



Legacy Cases - The Court of Appeal Pronounces

1. A recent Court of Appeal decision, *SH (Iran) and another v Secretary of State for the Home Department* [2014] EWCA Civil 1469 has sought to put an end to a series of cases on Legacy decisions in asylum applications. A summary of what is meant by Legacy cases is given in paragraph 5 of the judgment of the court delivered by Davis LJ as follows:

“The Legacy programmewas set up [by the Home Office] to deal with a vast backlog of cases that had by 2006 been identified. In respect of applications made prior to 5 March 2007 which had not been disposed of – several hundreds of thousands – responsibility for dealing with such cases was transferred to the Casework Resolution Directive (CRD). Many of those potentially within the programme were liable to removal, having previously exhausted their appeal rights. Many (although by no means all) sought thereafter to lodge fresh submissions and representations. By mid 2011 there were still over 100,000 cases remaining to be disposed of: albeit a very significant proportion of those related to cases here contact had been lost with the applicant or where there were other difficulties, causing such cases to be transferred into what was called the controlled archive were transferred for resolution to a new unit called the Case Assurance and Audit Unit (CAAU).”

2. Five applicants from Iran whose applications had been pending for some years and fell within the Legacy operation brought individual applications for judicial review in the High Court and their appeals against refusal of their applications were considered together by the Court of Appeal. The basis of their appeals is summarised as follows in paragraph 3 of the judgment of Davis LJ:

“The common issue...arising on these ...applications can be formulated in this way: was there an obligation, in the form of a commitment, on the part of the Secretary of State to “conclude” cases falling within the legacy programme relating to asylum cases either by the grant of leave to remain or by effecting the removal of the applicant from the United Kingdom? The Secretary of State says there was and is no such commitment. The applicants...say there was and is: accordingly, they say, because none of [them] has been removed, each is entitled to, or at least to be considered for, a grant of leave.”

The Court of Appeal decisively rejected these arguments and made the following points:

1. The Legacy programme was never intended to be an amnesty and statements to that effect were made by the then Secretary of State at the time when it was announced.
2. Mere delay in dealing with particular applications cannot of itself give rise to any expectation or entitlement that relief should be granted. “Delay and maladministration...are...not to be equated with unlawfulness.”
3. Public law in the context of immigration and asylum recognises a doctrine of legitimate expectation, which may create an enforceable right which would not in the normal course arise. Thus for example, an undertaking by an entry clearance officer in a British embassy abroad concerning rights of entry to the United Kingdom in response to a particular application made locally, based on a misunderstanding of the relevant Immigration Rules, might be held to create an enforceable right. But in a Legacy case, the only legitimate expectation of an applicant is

that he will have his case considered in accordance with the law and policy in force at the time of the relevant decision.

4. To quote paragraph 38 of the judgment:

"...[T]here is no room for argument that these applicants...are to be treated as entitled to a grant of leave to remain simply because they otherwise (so it is said) will be left in a state of indefinite limbo. True it may be that there have been times when (for example) it has not proved possible for undocumented Iranians to be removed to Iran. But it does not follow that that will always be the case, and.....there at no stage has been in existence a policy that those whose removal from the United Kingdom cannot be enforced should for that reason be granted leave."

3. The conclusion of the court was that there had not been on the part of the Secretary of State any promise, policy, commitment or unlawful act in relation to the long pending applications for asylum made by the applicants and their appeals against dismissal of their applications for judicial review were dismissed.

4. Numerous judicial review applications have been brought in recent years advancing similar arguments in relation to Legacy cases. All have been rejected and the judgment of the Court of Appeal in this latest case makes it clear that any further attempts will be similarly unsuccessful. The judgment ends with a clear warning:

"Attempts to advance such claims are a waste of public money and scarce judicial resources. All those advising clients have a duty to examine any further potential legacy claim with the closest scrutiny."

5. In the passage from the judgment of Davis L.J. quoted in paragraph 1 above, the learned judge gives the figure of 100,000 outstanding applications in 2011. We have not been able to identify any strictly comparable figure for 2014, but there is good reason for assuming that it remains substantial. Clearing this huge backlog remains an intractable problem and a huge embarrassment for the government, but at least this decision and other decisions on the same subject which preceded it show that the judiciary is sympathetic and supportive. The situation of having many thousands of asylum applications left pending for years is a serious blot on the Home Office's record, but there is no provision in statute law or any other legal source for dealing with it. I understand that the lawyers concerned are considering an appeal to the Supreme Court, though having regard to the warning just quoted they may well decide that that would not be a good idea.

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