Fresh claims for asylum since *Rahimi*[1] - legal consequences and procedural barriers

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Abstract

An asylum claim in UK law, and the right to have that claim determined inside the UK, both rest straightforwardly on the UN Convention on Refugees and the prohibition of refoulement to the country of persecution. More problematic, and more contested, are the procedures applied to asylum-seekers, and the conditions under which they are forced to live. Driven by the significant increase in asylum-seeker numbers in the late 90's, major new legislation dealt with the asylum process, with legal aid for asylum appeals, and with housing and social assistance for asylum-seekers. Lengthy delays in processing claims, along with rapid changes in country conditions, new wars, internal strife and genocides, led to the phenomenon of the 'fresh claim for asylum'.

In 2005 Kent Law Clinic's case of *Rahimi*[2], confirmed on appeal in *WM(DRC)*[3], determined that the threshold of 'realistic prospect of success' for a fresh claim was low, and that that 'prospect' referred to success before an adjudicator in an appeal.

The legal and practical importance of that judgment cannot be understated. The 'recording' of a claim as a fresh claim attracted a fresh in-country right of appeal, provided a passport to asylum support and, for some, the right to work. For many asylum-seeking communities and many representatives, a 'fresh claim' came to be seen as simply the next stage in their 'case'. Government responses include controlling the instigation of a fresh claim and its consequent entitlement to housing and social assistance, the decision to hive off 'fresh claim' judicial reviews to the Upper Tribunal, and, from 26/1/2015, to require all 'further submissions' to be lodged in person in Liverpool.

This paper examines developments in the law on fresh claims, the impact of Home Office defensive measures, and legal challenges in response.

1. The law

Until the case of *Onibiyo*[4] in 1996, it was not clearly accepted that a second or subsequent claim for asylum could be made. In *Onibiyo* the Master of the Rolls determined that the UK's

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[1] *R (Rahimi) v SSHD [2005] EWHC 2838*

[2] Abrahim Rahimi arrived in the UK as a young unaccompanied asylum seeker from Afghanistan, and was supported by Kent Social Services. His asylum claim was refused and his appeals dismissed. When he received his new evidence, Kent Law Clinic prepared Rahimi's fresh claim, including obtaining an expert report on his new evidence. The fresh claim was rejected and he was detained with removal directions. Kent Law Clinic issued a judicial review, assisted pro bono by Shivani Jegarajah then of Renaissance Chambers, and obtained permission from the court. The Clinic referred the case to the author, then employed at Hammersmith & Fulham Community Law Centre, so the case could proceed under legal aid, and Ms Jegarajah was instructed in both the High Court and the Court of Appeal.

[3] *WM (DRC) & AR (Afghanistan) [2006] EWCA Civ 1495*

[4] *Onibiyo [1996] 2 All ER 901, [1996] 2 WLR 490, [1996] Imm AR 370*

obligation not to *refoule* an applicant back to the country of persecution remained binding until the moment of return (implying that any number of fresh claims could be made).

The Court referred to rules 346 of the then Immigration Rules:[5]

> 346. When an asylum applicant has previously been refused asylum in the United Kingdom and can demonstrate no relevant and substantial change in his circumstances since that date, his application will be refused.

On what was needed for a 'fresh claim' Sir Thomas Bingham MR proposed the 'acid test':

> The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim.

The decision was to be determined by the Secretary of State in the first instance.[6] On what remedy was open to an applicant whose fresh claim the Secretary of State had refused to accept as such, the Court decided that since it was the task of the Secretary of State and the appellate authorities to determine whether an asylum-seeker is a refugee, such a decision should be open to a *Wednesbury* challenge only.[7]

When Rahimi made his fresh claim in 2005 the issue was covered in the Immigration Rules by para 353:[8]

> "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and if rejected will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material which has been previously been considered. The submissions will only be significantly different if the content;
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> 1) Had not already been considered;
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> 2) Taken together with the previously considered material created a realistic prospect of success, notwithstanding its rejection."

On 6 June 2005 the Home Office formally refused to accept Rahimi's new evidence, or that it amounted to a fresh claim. Permission was granted in a judicial review application, and following a full hearing Collins J held:[9]

> (para 12) ...The realistic prospect of success test is a low one. It really amounts to little more than there is a reasonable chance that the claim might succeed

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[5] HC 395 23/5/1994
[6] Rule 328 of the 1994 rules
[7] *Bugdaycay v SSHD [1987] 1 All ER 940 [1987] AC 514*
[8] Introduced in HC 1112 on 18/10/2004
[9] *Rahimi* [redacted] paras 12, 18

> (para 18) … I think it would be difficult to justify an approach which enabled the *Secretary of State* to find a matter of fact against a new claim which otherwise would succeed because the material had not already been considered; and there was good reason, as it happens in this case, for that, because it did not exist until after the relevant decision of the adjudicator. *(author's emphasis)*

Arguably this changed forever the legal landscape for fresh claims for asylum. Failed asylum-seekers with cogent new evidence had a chance of getting their cases back before a fact-finding tribunal.

The courts were quick to adopt the new approach. In *Palash & anor,*[10] heard in May 2006, James Goudie QC relied on *Onibiyo, Boybeyi*[11] and *Rahimi* to state without preamble that the 'realistic prospect of success' test for whether a claim was a fresh claim was *'a low one - in Nourse LJ's words "not a very high test". It really amounts to little more than that there is a reasonable chance that the claim might succeed and that the new evidence might produce a different outcome'.*[12] His view was straightforwardly that for Palash there was no such reasonable prospect, since the new material did not begin to address specifically the poor credibility findings of the adjudicator dismissing the first asylum claim.

In contrast, in *Khail,*[13] heard in August 2006, Bean J spent time carefully considering the nature of the fresh claim test. He noted Lord Bingham's 'tentative' view in *Onibiyo* that a Home Office decision on whether a claim is a fresh claim could only be challenged on *Wednesbury* grounds. He considered whether *Onibiyo* was binding since the new Rule 353 was not the same as the old Rule 346, and the Human Rights Act 1998 had come into force since *Onibiyo*. He noted Collins J's judgment in *Rahimi* deciding that the 'arguability' of the fresh claim was a low test. Bean J also referred to another judgment by Collins J (*Naseer)*[14] which suggested that that test was 'too strict' for the Secretary of State and said that if the matter were free from authority it would be for the court itself to consider whether there was a reasonable prospect of success. But, reluctantly, Bean J decided he had to follow *Onibiyo*, and dismiss Khail's application, since the refusal of his fresh claim was not *Wednesbury* unreasonable. Looking at the cases in detail, the difference in treatment between this and the cases of *Palash* and *Naseer* could be explained by noting that Khail was a claimant who had previously been found credible but not at risk on the basis of the then country evidence, but who wished the Home Office to take into account an arguably worsening risk on return. Bean J clearly felt the issue was finely balanced and that the nature of the test was crucial. Mr Khail appealed. His case was heard by the Court of Appeal shortly after *WM (DRC)* and allowed.[15]

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[10] *Palash & anor,[2006] EWHC 2702 Admin*
[11] *Boybeyi [1997] Imm AR 491*
[12] *Palash* [redacted]8 para 9
[13] *R (Abdul Wali Mohamed Khail) [2006] EWHC 2139 (Admin),*
[14] *R(Naseer) v SSHD [2006] EWHC 1671 (Admin)*
[15] *AK (Afghanistan) v SSHD [2007] EWCA Civ 535*

The Secretary of State's appeal in *Rahimi* was heard as *WM (DRC) and AR (Afghanistan).*[16] The 2 claimants had each relied on new documentary evidence which had become available since they had exhausted their appeal rights, evidence which in both cases had arrived via third parties and not at the instigation of the claimant.

The court confirmed that the Secretary of State's task was to assess whether the new evidence, taken with what had gone before, etc, provided a realistic prospect of success before an adjudicator: and that the Secretary of State, the adjudicator and the court, must apply 'anxious scrutiny' (*Bugdaycay).*[17] At para 10 Buxton LJ said this:

> First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return…

The issues raised in these cases were relatively simple, and the solution arrived at by the Court of Appeal was straightforward. This is demonstrated by the fact that *WM (DRC)* is still the binding authority on the issue of fresh claims for asylum. However, behind that simplicity already lay several interlocking legal and practical issues.

First, *Cakabay* [18] had decided that a determination of whether a fresh claim amounted to a fresh claim in law was not 'a precedent fact' in the way that whether a person was an illegal entrant was a question of fact. Whether a claim amounted to a fresh claim was an issue of judgement and was the province of the Secretary of State. Despite that, a study of 'fresh claim' legal challenges since *Rahimi* often show the court itself considering and evaluating claimants' new evidence in detail, if only to assure itself that the Secretary of State's decision is not *Wednesbury* unreasonable. There are in fact 2 clear types of fresh claim challenge. In some, the court is prepared to look in detail at the facts, generally through the prism of how the applicants' tribunal determinations dealt with their facts, and consider in detail the quality of the fresh evidence and to what extent it rebuts earlier poor credibility findings. In others, principally where the fresh claim is not based on new factual evidence from the applicant, but, for example, on a change in the legal landscape following the determination of a new country guidance case, the courts adopt a more algebraic examination of the Secretary of State's decision-making process.

For example, in *Ahmed,*[19] the judge noted that permission had been granted 'with some reluctance' and had included the advice to the applicant to produce 'full facts… and full supporting documentation'. The full hearing examined the new documents and decided that they were merely 'evidence of a complaint and not actually of conduct that would be sufficient to ground an asylum claim'.

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[16] *WM (DRC) & AR (Afghanistan)* fn 3 above

[17] *Bugdaycay* fn 7 above part 12

[18] *Cakabay v Secretary Of State For Home Department [1998] EWCA Civ 1116* 'The precedent fact question' referring to *Khawaja [1984] AC 74* as an example

[19] *Ahmed [2007] EWHC 3102 Admin* paras 10,11

In *Baydak*[20] the court undertook detailed consideration of the dismissed appeal, and considered whether the findings should be reconsidered on the basis of new information on airport security identifying failed asylum-seekers at risk on return, supported by the findings in a new country guidance case. However the court's decision was an 'algebraic' one, noting that the new country guidance case had decided that those found to be at risk in their home area may also have difficulties at the airport. This claimant had been found by the tribunal not to be at risk in his home area, therefore none of the new evidence was relevant to him.

In *Etame* [21] the High Court heard 2 applications where the claimants faced deportation, and in which the claimant Etame had made a fresh claim for asylum after having lost an appeal against revocation of his deportation order. It is the first 'fresh claim' case to refer to the EU Procedures Directive[22], which had only recently been transposed into UK law. Article 32 of that Directive deals with 'subsequent applications' for asylum, and broadly provides for a procedure like that set out in para 353. For both applicants the court decided that no further right of appeal should be available simply on the grounds that a further claim had been made. However, for Etame, who feared persecution because of his homosexuality, the court considered in detail the fresh evidence (of rape and sexual violence inflicted in prison), noted that the Secretary of State had misdirected herself in suggesting that he could be discreet (dealt with in *J v SSHD [2006] EWCA Civ*), and decided that the claim should be remitted for a new decision.

The second legal issue to emerge was what should be the relationship between the 'low' fresh claim test of 'reasonable prospect of success before an adjudicator', applying 'anxious scrutiny' and another Home Office attempt to stamp out repeat claims and unmeritorious prolongations of asylum applications - the certification of claims as or 'clearly unfounded'.

This was touched on in submissions by Andrew Nichol QC (as he then was) in *WM (DRC)* but fully explored in the case of *ZT (Kosovo).*[23] ZT's original application for asylum had been rejected and certified as 'clearly unfounded', since his country of origin (Serbia and Montenegro at that time) was 'white-listed' under s94(4) Nationality Immigration and Asylum Act (NIAA) 2002, and so his claim had never been before a tribunal. Collins J had refused permission only 2 days before judgment was handed down in *WM(DRC)* and permission to appeal was granted just in case Collins J had not applied the correct test. In argument before the Court of Appeal the Secretary of State proposed that where a case had been so certified, a 'fresh claim' did not fall to be determined by reference to para 353 of the Immigration Rules and the test set out in *WM (DRC),* but with reference to the criterion laid down in s94(4), viz, that the claim 'shall' be certified unless [the Secretary of State is] satisfied that it is not clearly unfounded'. That view was straightforwardly rejected by the Court. How, if that were right, could an asylum-seeker put forward entirely new grounds for claiming asylum? In any event, the issue of certification is a red herring. Its effect is to deny an applicant an in-country right of appeal. But faced with a 'fresh' claim, if the Secretary of

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[20] *Baydak [2008] EWHC 244 Admin*
[21] *Etame [2008]EWHC 1140 Admin*
[22] COUNCIL DIRECTIVE 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
[23] *ZT (Kosovo) [2008] EWCA Civ 14*

State does not accept it as such, there is no need to certify it. 'The rejection is not appealable at all, whether in-country or out'.[24]

The Secretary of State appealed, and in the House of Lords 3 issues were canvassed. First, could para 353 be applied at all in these circumstances? Did the possibility of making an out-of-country appeal mean that an appeal was 'pending'? This was rejected, as the definition of a 'pending' appeal does not include one that could be lodged but has not been.[25] Secondly, their Lordships compared the potential outcomes of a consideration under the s94(4) procedure and under para 353, and Lord Phillips decided at para 20 that:

> the Secretary of State should apply the rule 353 procedure in respect of cases that have been certified under s94 and should, in all cases, treat a claim as having a realistic prospect of success unless it is clearly unfounded.

This is an interesting conclusion, since only in para 18 Lord Phillips had considered that a claim which has 'no realistic prospect of success' may not be so hopeless as to be deemed 'clearly unfounded'. But he evidently concluded that the conceptual space between these formulations was too small to be of importance to a decision-maker. He explores this issue further, stating that the test of whether a claim is 'clearly unfounded' is a black and white test. 'A claim is either clearly unfounded or it is not'.[26] Since if any reasonable doubt exists as to whether a claim may succeed then it is not clearly unfounded, any challenge to that decision must be a rationality challenge. However, not all the judges agreed on this. In fact different judges dissented over different issues,[27] but the important outcome was that all fresh claims were to be considered under para 353.

The small space between 'clearly unfounded' and 'reasonable prospect of success' was explored again in *TK.*[28]This case concerned a Sri Lankan Tamil who was refused in 2003, and who made a fresh claim based on deteriorating conditions in Sri Lanka. No decision was made until 2007. A further decision letter was written in 2008 following a new tribunal determination on Sri Lanka, again refusing to accept a fresh claim. In the judicial review of that refusal, the claimant relied on some of the dicta in *ZT Kosovo* to suggest that whether there is 'no realistic prospect of success' must admit of only one answer. The Master of the Rolls decided that there is a difference between the 'clearly unfounded' test and the para 353 test:

> 'so narrow that its practical significance is invisible. A case which is clearly unfounded is one with *no* prospect of success. A case which has no realistic prospect of success is not quite in that category; it is a case with *no more than a fanciful* prospect of

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[24] *ZT (Kosovo)* fn 21 above para 17

[25] *ZT (Kosovo) [2009]UKHL 6* para 14, s104 NIAA 2002.

[26] *ZT Kosovo* fn 21 para 22, referring to the judgment in *R(L) v SSHD [2003] EWCA Civ 25*

[27] *Free Movement 25/2/2009 notes*: The majority hold that the fresh claim rule, rule 353, does apply where a person in receipt of a s.94 certificate but who has not yet left the UK and therefore still has a right of appeal (albeit one that can only be exercised after departure) makes new representations to the Home Office. Lord Hope dissents on this point. The majority then hold that there is a potential difference between the outcomes of considering a case under s.94 and rule 353. Lords Phillips and Brown dissent and hold that there is no difference, but Lords Hope, Carswell and Neuberger form the majority on this issue.

[28] *R(TK) v SSHD [2009] EWCA Civ 1550*

> success. "Realistic prospect of success" means only more than a fanciful such prospect'.[29]

The Master of the Rolls 'firmly' held that the correct approach is the *Wednesbury* approach, with anxious scrutiny, as in *WM(DRC)*.

Thirdly, the Secretary of State was exercised by the succession of appeals available to an individual asylum-seeker, and of the need for a '1-stop notice' procedure, requiring an asylum-seeker to advance all their arguments and present all their evidence as soon as practicable. That was demonstrated in earlier wordings of the 'fresh claim' rule, and by Home Office refusal letters' emphasis on 'whether the person could have advanced those arguments at an earlier stage'. This issue was discussed in the *BA (Nigeria)*[30] litigation, which considered the issue of whether an appeal against a refusal to revoke a deportation order was exercisable from inside the UK. The claimant BA had made a human rights claim but had not claimed that it was 'fresh', while PE had made a fresh claim which had been rejected as such under para 353.

In the Court of Appeal, it was decided that where a person had an outstanding asylum or human rights claim which was not purely historical, and which had the required nexus between it and the basis of the application to revoke, a refusal to revoke a deportation order would attract an in-country right of appeal. Potential abuse was catered for, in that where the outstanding claim rests on material or arguments which could have been put forward earlier, the Secretary of State has power to certify (subject to judicial review) that the claim is 'clearly unfounded'.

The Supreme Court, by a majority, Baroness Hale dissenting, dismissed the Secretary of State's appeals. Lord Hope considered whether the expression 'an asylum claim, or a human rights claim' in s92(4)(a) Nationality, Immigration and Asylum Act 2002 includes any subsequent claim, or only one which has been accepted as a 'fresh claim' under para 353 of the Immigration Rules. He decided[31] that 'claims which are not certified under section 94 or excluded under section 96, if rejected, should be allowed to proceed to appeal in-country under sections 82 and 92, whether or not they are accepted by the Secretary of State as fresh claims. Lord Brown notes that 'possible abuse' is dealt with in 2 separate ways: repeat claims may be certified under section 94 and claims relying on material which 'could reasonably have been expected... earlier' certified under section 96.[32]

2. Making a fresh claim - defensive responses from the Home Office

For many years there was no clear procedure on how to bring a fresh claim. Of the leading cases discussed above, *Onibiyo, Rahimi, Etame, BA (Nigeria)* and *PE (Cameroon)* all faced deportation or removal, and their judicial reviews were needed to prevent removal until their claim was properly considered. At that time relatively few reported cases arose from a simple refusal. Of the increasing numbers who were refused asylum during this period, nothing happened to them, and as time passed, some individuals received or obtained new

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[29] *R(TK)* fn 28 above para 9, quoting from *AK (Sri Lanka) [2009] EWCA Civ 447* para 34
[30] *R (BA and PE) v SSHD [2009] EWCA Civ 119; [2009] UKSC 7*
[31] *BA (Nigeria) [2009] UKSC 7* para 32
[32] *BA (Nigeria) [2009] UKSC 7* para 46

evidence while others fell to benefit from new country guidance decisions. For example, many Eritreans were able to make meritorious fresh claims following the series of country guidance determinations in the early 2000's covering persecution of Jehovah's Witnesses and Pentecostal Christians and, most importantly, draft evaders, a category eventually applying to nearly every Eritrean asylum-seeker, as that country's forced military service was understood to apply to wider and wider age groups. Because there was no published formal procedure for making a fresh claim, some representatives sent their clients to an asylum screening unit, while others made postal representations. Either way, because of the growing backlogs of unprocessed cases, no reply or even acknowledgment was received, and so the first response of the Secretary of State to a fresh claim was often via a NASS[33] refusal to provide accommodation and financial support.

It is clear from the Secretary of State's witness evidence in the later major case on delays in providing support, *MK & AH,*[34] discussed more fully below, that what drove the Home Office eventually to formalise a 'further submissions' procedure was the significant increase in numbers of fresh claims made by destitute failed asylum-seekers in order to qualify for 'hard cases' support under s4 Immigration and Asylum Act 1999.[35] For many applicants, the merits of their fresh claim would be considered not in the High Court but in the Asylum Support Tribunal, to which destitute asylum-seekers could appeal a refusal to grant support: and the legal issue was that NASS officials were not charged with the task of carrying out the para 353 analysis, and should not refuse support on the basis of their allegedly superficial view of someone's fresh claim.[36] In the asylum support appeal case of *Wamba,*[37] discussed in *AW v Croydon,*[38] the adjudicator decided that it was ultra vires for the NASS official to purport to determine an applicant's fresh claim. The judge in *AW v Croydon* thought that had been wrongly decided, as the NASS official 'was making an assessment, for the purposes of section 4 support only, of whether the claim could be regarded as a fresh claim or whether, manifestly, it could not. To my mind, it is not necessarily ultra vires for a NASS caseworker to make any sort of evaluation of a purported fresh claim'.[39]

Brief glimpses of the problems encountered by those making fresh claims at that time can be seen in the minutes of the National Asylum Support Forum, a large stakeholder group composed of Home Office officials, refugee NGOs, representatives from the Medical Foundation for the Victims of Torture (as was) and the Helen Bamber Foundation, and national representatives from advice agencies and immigration lawyers.[40] An entry in the 'issues log' from the 26/2/2004 meeting[41] states:

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[33] National Asylum Support Service, the maintenance and accommodation scheme set up under the Immigration and Asylum Act 1999. For some years it was administered by a separate bureaucracy in the Home Office Immigration and Nationality Department.

[34] *MK & AH [2012] EWHC 1896 (Admin)*

[35] Under s4 IAA 1999, support for 'failed asylum-seekers' is provided if the applicant is destitute and meets one of 5 requirements: the relevant one for a person making a fresh claim is that 'the provision of accommodation is necessary to avoid breaching a person's human rights', and the relevant human right for a fresh asylum claim is art 3 ECHR.

[36] A similar issue was raised in *Birmingham City Council v Clue [2010] EWCA Civ 460,* which decided that a local authority had to provide accommodation and support to a family with a child who had an outstanding human rights application, unless that application was "obviously hopeless or abusive".

[37] *Wamba v Secretary of State for the Home Department* ASA/05/04/9178

[38] *AW, R (on the application of) v London Borough of Croydon [2005] EWHC 2950*

[39] *AW v Croydon* fn 38 above paras 71-72

[40] The author attended as a representative of the Immigration Law Practitioners Association (ILPA)

[41] Minutes of meetings 2004-6 available in the ILPA archives

3. It is still not clear under what circumstances NASS will accept claims as recorded fresh claims when they are made to IND. Do they expect such people to attend [asylum] screening interviews and if so, how does this happen? They need better liaison with IND.

Home Office reply:
NASS will consider requests for support when there is clear evidence that a claim under article 3 has been recorded on the ACID database as a fresh claim for asylum. If a postal application has been submitted and accepted as a fresh claim the applicant will be invited to attend an ASU [asylum screening unit] to register the claim. It will also be necessary for the applicant to be interviewed in order that eligibility for support can be determined under s55.[42]

From our current standpoint, after the Home Office has been twice declared as 'not fit for purpose' on the basis of failing to deal with Biblical queues of unresolved applicants, it can be easily imagined that a destitute fresh claim applicant might wait several months between the submission of a postal application and its 'acceptance as a fresh claim'.[43] (Even 'acceptance as a fresh claim' was not always sufficient. Rahimi himself, whose fresh claim was emphatically declared to be such by the judgment in *WM(DRC),* was refused support on the basis that the Home Office had not 'recorded' his fresh claim. The author had to make an application in the Court of Appeal to enforce the judgment before NASS would process his claim).[44] More importantly, that 'issues log' reply entirely sloughed over the fact that once a fresh claim has been 'accepted' an applicant reverted to the status of 'asylum-seeker' and was entitled to support under s95 IAA 1999, while what was necessary was immediate provision of 'hard cases' s4 support to avert destitution, until the para 353 decision was eventually made. This remained a serious problem for several years, and even after the case of *MK & AH* in 2012 destitute failed asylum-seekers applying for s4 support on the basis of having made a fresh claim still wait significant, unlawful, periods during which Home Office officials take time to locate the applicant's old asylum file and carry out a quasi- or pre-consideration of the merits of the fresh claim before granting support.

Following the 2006 discovery of around 450,000 unsolved asylum applications, and the then new Home Secretary John Reid's declaration to Parliament that the Home Office was 'not fit for purpose', a number of major procedural changes were introduced in asylum determination, including the New Asylum Model (NAM) consisting of an 'end-to-end' caseworking procedure, with individual caseowners assigned to each case for its whole life, and new targets of 6 months for the entire asylum process from arrival to grant of status or removal from the UK.

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[42] The acronyms are: IND was the Home Office's Immigration and Nationality Department, the forerunner of the UK Border Agency. ACID is the Home Office asylum database; ASU is an asylum screening unit. Section 55 Nationality, Immigration and Asylum Act 2002 is the infamous section denying any support or accommodation whatever to someone who does not make their asylum application 'as soon as reasonably practicable', in relation to which a great wave of injunctions eventually led to the case of *Limbuela.*

[43] Evidence given in the Legacy cases [fn 46 below] and in the permission to work cases [fns 60,64-66 below] shows the scale of the delays.

[44] This was a bizarre postscript to *WM(DRC)* – neither the Administrative Court office nor the Civil Appeals office knew what to do, and in the end the author persuaded the Civil Appeals office to issue an application, just to provide something to show the Home Office. It did the trick.

All the unresolved claims were hived off into the Case Resolution Directorate (CRD), or 'legacy'. For those wishing to make a fresh claim, this system was no improvement. The CRD's operational methodology required cases to be selected at random from the archives, and worked on 'to a conclusion'. The CRD set 4 priorities – those who may pose a risk to the public, those who can more easily be removed, those receiving support, and those who may be granted leave – but such cases were to be identified 'without the need to consider the files'[45] and in fact there was no capability for doing so. At an all-day National Asylum Support Forum conference the author suggested that after a new country guidance case was promulgated, the CRD could pick out cases of that nationality and quickly identify and process those whose claims were affected by the new legal decision. The answer was that the structure of the database did not allow them to make that kind of selection. We know now that some applicants who in the mid-2000's would have been granted refugee status on the basis of a contemporary country guidance decision, by bad luck alone languished in the 'legacy' until after its conclusion in 2011 and then were refused leave on the basis of a changed legal position. This may be the law,[46] but it shows the Home Office unable, and so clearly unwilling, to proceed in a legally conscientious[47] way towards those with fresh claims with a reasonable prospect of success.

Even after the introduction of the New Asylum Model no formal procedures were introduced for fresh claims, until 2009. By then, 2 years after the introduction of the NAM, it had become clear that the 6 months end-to-end target was not being met, neither in making first decisions and dealing with resultant appeals, nor in 'concluding' cases by removing failed applicants. Another feature of attempting to deal so rapidly with asylum claims was that many asylum-seekers simply could not obtain and present all their evidence in the required time.[48] So, gradually, even applicants processed in the NAM were beginning to submit fresh claims for asylum.

From 14 October 2009, any 'failed asylum-seeker' who wished to make any 'further submissions' had to make them in person at their local immigration office, and it would be their NAM caseowner who would deal with those submissions. For a while that system functioned better, so long as the caseowner teams were retained, and the caseowners themselves remained in post. But after subsequent Home Office reorganisations, funding cuts, downgradings of the caseowner role, etc, the caseworking teams eventually disintegrated, and it became extremely difficult for those wishing to make fresh claims to know where to make them, or get any acknowledgement of having made them: and so, again, the 'front line' issue for applicants was obtaining section 4 support.

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[45] *FH & ors [2007] EWHC 1571 (Admin)* para 17

[46] There have been many challenges to different aspects of the 'legacy' programme, from *R(FH) v SSHD* [2007] EWHC 1571 (Admin) up to *SH (Iran) & Anor v Secretary of State for the Home Department* [2014] EWCA Civ 1469 stating *'There is no separate legacy "policy". There is no basis for relying on delay as, in itself, a ground for obtaining leave to remain. There is in the ordinary case no relevant legitimate expectation...'* and warning lawyers of dire consequences of attempting to re-litigate these issues. However, just as with our failed Afghan asylum-seeker clients, one cannot relinquish a view that if an applicant, on the facts and law obtaining at a particular time, was a refugee, but because of administrative inefficiency or actual mistakes not declared to be such, there should be a corrective remedy.

[47] See part 8 and fn 90 below

[48] And this was more true, and remains true, for those placed in the Detained Fast Track

For those 'failed asylum-seekers' whose claims had originally been lodged before March 2007 the position was far worse. They were obliged to travel to Liverpool, with any family members, with no funding for the fares or for any accommodation, to lodge their further submissions in person, having first of all telephoned to make an appointment. Every aspect of this arrangement caused great hardship and confusion. Steve Symonds of ILPA reported at a 2010 public meeting:

> Many people believed that by making appointments and travelling to Liverpool – even though they have no further submissions to make – it may get them to the front of the 'legacy' queue, and get them indefinite leave to remain[49]. Whereas the only people whose claims may be prioritised by this process are those who have made or are making a claim for section 4 support on the strength of their further submissions. These cases are prioritised so that the UK Border Agency can aim to make a decision on the case before considering the section 4 claim – thus avoiding providing support. However, if someone does not submit his or her fresh claim, he or she may be at greater risk of detention or removal.[50]

The procedure covered every single new piece of information or changed circumstance apart from a change of address, which could be reported to a specific office. This meant that an applicant who had given birth to a baby could not simply send the birth certificate to the Home Office, but had to travel to Liverpool, with the baby, to provide that information. Unsurprisingly, many applicants did not do this, and so when leave was granted their children received no leave.

The Home Office were criticised for introducing this scheme without notice to refugee organisations and lawyers advising such applicants. This was deliberate, they said, precisely to prevent a rush of new fresh claims being lodged before the policy was introduced.[51]

The scale of the problem: *MK & AH [2012] EWHC 1896 (admin)*

Formal published statistics do not separate fresh claims from first claims for asylum. But witness statements from the Secretary of State in *MK & AH,* heard in 2012, gave a figure of 64,916 further submissions made from 14/10/2009 and 20/4/2012, of which nearly 10,000 remained to be decided at the date of that hearing. Of the nearly 55,000 decided claims, only 7705 (14%) were said to have met the test for a fresh claim or were granted leave to remain in the UK. It was accepted by the court that the remainder were 'not necessarily abusive, manifestly ill-founded or simply repetitious', and it should be noted that the mere 250 or so reported fresh claim judicial reviews shown on BAILII from *Onibiyo* onwards are no indication of the true number of challenged rejections, since it is well-known that in cases which do have a prospect of success the Secretary of State's practice is generally to concede before permission is considered.[52] It was further accepted by the court that not every fresh

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[49] The author among other legal representatives would receive calls from the Home Office in Liverpool about clients who had turned up for their appointment with no further submissions, and in fact not really knowing why they were there.

[50] Steve Symonds, ILPA Legal Officer, Churches' Refugee Network annual conference 5 June 2010

[51] Referred to in the SSHD witness statement to *MK & AH,* para 124

[52] In an earlier case on delay in provision of s4 support, *LG [2010] EWCA Civ 977,* Counsel had told the court that there were at least 36 cases open on the issue, to the knowledge of his instructing solicitor alone. This practice of settling cases

claim applicant would be in need of asylum support – but the difference between the nearly 65,000 fresh claim applicants and the only 4,512 granted s4 support on the basis of their fresh claim cannot but suggest that many fresh claim applicants were deprived of support during that period.[53]

The SSHD witness statements noted that from 2002-2005 there were very few applications for s4 support, increasing rapidly in late 2004 when it was accepted that there was no viable route of return to Iraq. However, as is noted later in *MK & AH,*[54] the existence of s4 support had been a well-kept secret until the case of *Salih & Rahmani*[55] determined that it was unlawful for the Secretary of State not to publicise the existence of the scheme. As the numbers of s4 applications increased rapidly, in the words of the SSHD witness, 'a way to handle the section 4 applications based on further submissions had to be developed. It was absolutely clear that many of the further submissions lacked any merit... for these reasons caseworkers ... were encouraged to liaise with colleagues in other parts of UKBA, in order to see if the submissions could be answered quickly, thus obviating the need to place the person on section 4 support. In most instances this proved very difficult to achieve ... it was often very difficult to track down the further submissions...'[56]

In cases from *Salih & Rahmani* onwards the courts faced the difficult issue of determining whether delay in providing support in a particular case was unlawful, without making any general prescriptive declaration on the delays, or commenting on how the Secretary of State should allocate resources to the issue. In *R(Nigatu) v SSHD [2004] EWHC 1806 Admin,* Collins J decided that, although the Secretary of State was entitled to consider whether [further] representations can properly be said to amount to a fresh claim, delay in considering the merits of a fresh claim before providing s95 support 'may put an altogether illegitimate pressure on the individual, who may have a genuine fresh claim to give up if the alternative is destitution' (para 19). Collins J decided that s4 provided 'a safeguard' for such individuals (para 20). In *AW v Croydon*[57] it was held to be wrong for NASS to deny s4 support on the basis that the applicant could simply apply to a local authority for support under s21 National Assistance Act 1948. That court referred to *Nigatu* and decided that it would be open to the Secretary of State not to provide support if the further submissions were 'manifestly unfounded, or merely repeat the previous grounds, or do not disclose any claim for asylum at all'. The Secretary of State's position was that this was impossible to

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before permission, applying to immigration and asylum JRs generally, is most recently discussed in the Public Law Project Appendices to PLP's response to 'Judicial Review: Proposals for further reform' consultation Nov 2013. A different Public Law Project report fn 80 below notes that before transfer of fresh claim judicial reviews to the Upper Tribunal in 2011 the number of fresh claim JRs was around 1000 per year.

[53] *MK & AH* fn 34 above paras 58-59

[54] *MK & AH* fn 34 above para 82

[55] *R(Salih & Rahmani) v SSHD [2003] EWHC 2273 Admin*

[56] *MK & AH* fn 34 above para 80

[57] Fn 38 above. This case continued in the Court of Appeal solely on the issue of responsibility for providing support to 'destitution-plus' failed asylum-seekers: *AW & Ors, R (on the application of) v London Borough of Croydon & Ors [2007] EWCA Civ 266*

determine this without calling for the whole file, and the problem was that often they could not find it.

Most applications for section 4 support were made with the support of NGOs such as Refugee Action, Refugee Council and similar. At that time the application was made on a short form and faxed to the NASS office, marked priority A for those applicants who were currently or imminently street homeless, and Priority B for others. Guidance to caseowners issued in 2008 stated that applications for s4 support should be considered 'and if possible determined within **two working days** of receipt...' and it was understood that this referred to Priority A cases. Where an application for support was based on a fresh claim, the guidance advises caseowners to 'endeavour to assess the further representations' before considering the application for s4... if ... there will be a delay... case owners must consider whether or not granting section 4 would breach the applicants ECHR rights...'[58]

However, after the 14 October 2009 changes, new guidance omitted the requirement to consider s4 applications within 2 working days, and, where the application was based on a fresh claim, 'the Case Owner **must** assess the further submissions', and consideration of granting s4 support before looking at the further submissions required the consent of a Grade 7 senior manager. The requirements to submit further submissions in person, and for them to be assessed before an application for s4 support is considered at all, were introduced explicitly 'to break the automatic link between receipt of a further submission and granting support... [and] discourage abuse of the system'.[59] The court in *MK & AH* continues its relation of the evidence by describing the evolving of a '15-day rule' before any application for s4 support would even be considered, during which time the further submissions were expected to be dealt with, and summarising the evidence from the claimants and the intervener showing that the delay was almost always much longer than that. Home Office internal guidance produced to the court revealed a '15 *working* day' rule, (author's emphasis) which led to far greater delays before applicants were placed in accommodation. And for 'legacy' applicants, who had to make an appointment in Liverpool to lodge their fresh claim, the delay was even longer. The court noted that there did not appear to be a system for quickly identifying 'vulnerable' applicants.

The court then referred to *ZO (Somalia)*[60] (concerning permission to work for those who have made a fresh claim, discussed below) in which the Respondent's concern about the high numbers of abusive fresh claims is dealt with by the Supreme Court's suggestion of a screening process to identify briskly those claims devoid of merit, and refers sarcastically to the Secretary of State's characterisation of this suggestion, made unanimously by five

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[58] *MK and AH* fn 34 paras 107 and 119

[59] SSHD witness statement from *MK & AH* fn 34 above para 123

[60] *ZO (Somalia) [2010] UKSC 6*

members of the House of Lords, as 'unworkable'.[61] The court noted that the 14% of applicants deemed to have a meritorious fresh claim represents a significant number of 'deserving' applicants deprived of s4 support, who are also deprived of any independent review of the merits of the claim for support while the substantive 'fresh claim' application is being considered. The court concluded that 'the policy or practice reflected in the instruction is unlawful'.[62]

The Asylum Support Appeals Project (ASAP) in their 2013 report *One year on – still 'no credibility'*[63] considered the experience of s4 applicants following *MK & AH* and notes that the [then] UK Border Agency did introduce a 5-day time limit for some applicants, including those who had made fresh claims. However, they say:

> The speed with which applications are processed by the UKBA should depend on an applicant's vulnerability. Given what is at stake they should all be processed within a matter of days. In many instances, however, there were long delays in processing applications, from the date on the application to the date on the decision letter. Seventy per cent of applicants had to wait more than two weeks for a decision; this is an increase of 14% since the previous report. Of these, 55% waited between two and eight weeks and there were 15% who had to wait between nine and 21 weeks.

These delays concern people who are destitute and street homeless.

3. Fresh claim applicants and permission to work: *Min Min and Omar,*[64] *Tekle*[65] and *ZO (Somalia)*[66]

As the 'legacy' period wore on, applicants and their representatives found that making an application for permission to work did, on occasions, result in an examination of the substantive application, and, for some, a grant of leave. The claimants in these particular cases were some of the many fresh claim applicants stuck in the 'legacy' and who had already waited several years with no response. They each applied for permission to work, relying on para 360 of the Immigration Rules, which provided:

> 360. An asylum applicant may apply to the Secretary of State for permission to take up employment which shall not include permission to become self employed or to engage in a business or professional activity if a decision at first instance has not been taken on the applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if, in his opinion, any delay in reaching a decision at first instance cannot be attributed to the applicant.

This rule was introduced after the transposition of the EU Reception Directive[67], whose aim was to ensure 'a dignified standard of living and comparable living conditions in all Member

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[61] There does not appear to have been any mention of Lord Phillips' dictum at para 20 of *ZT (Kosovo)* (fn 25 above) that the Secretary of State 'should, in all cases, treat a claim as having a realistic prospect of success unless it is clearly unfounded', a relatively easy test to apply.

[62] *MK & AH* fn 34 above para 186

[63] *UKBA decision-making audit: one year on- still 'no credibility'* http://www.asaproject.org/wp-content/uploads/2013/05/ASAP-Audit-on-decision-making-2013.pdf

[64] *R(Min Min and Omar) v SSHD [2008] EWHC 1604 (Admin)*

[65] *Dawit Tekle v SSHD [2008] EWHC 3064 (Admin)*

[66] *ZO (Somalia) [2009] EWCA Civ 442* and *[2010] UKSC 36*

States'.[68] The issue in this case was whether a fresh claim was included in the Reception Directive's definition of 'an application for asylum'. In *Min Min and Omar* the court decided that the EU Reception Directive applied only to the 'reception' of asylum-seekers making their first claim, while the issue of second or subsequent claims was dealt with in the Procedures Directive. Mackie QC was unwilling to accord any status to a fresh claim, or to the person making it, until a determination is made that the claim amounted to a fresh claim under para 353.

Mr Tekle was one of hundreds of applicants of mixed Eritrean and Ethiopian origin who submitted fresh claims following a UNHCR report of 2004 on the risks to young men of mixed origin of military service age in Eritrea. No response was received and an application for judicial review on the grounds of delay was made in 2007. That application was stayed pending the 'legacy test cases' eventually determined as *FH & others,*[69]in which Collins J decided that the delays in the legacy process, though arising from the 'past incompetence and failures by the Home Office', did not give rise to any cause of action for individuals:

> 30. It follows from this judgment that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the court.

Following that judgment the claimant made a formal request for permission to work. The Home Office refused, stating that his situation was not 'exceptional'. After further correspondence a judicial review was issued, and permission was granted on the issue of permission to work only. Reliance was placed on the breach of the claimant's art 8 right to private life in not being granted permission to work, since the claimant had by that time been in the UK for 7 years without any chance of leading a normal life, with a credible fresh asylum claim, in circumstances which it is recognised that it is 'impracticable, if not impossible to someone in his circumstances with no travel documents' to return to his country of origin[70]. The court cited *(R (S)*[71] and *EB (Kosovo),*[72] the major judgments concerning delay and art 8 rights, noting that in each of those cases the court said 'people cannot be expected to put their lives on hold, particularly if they are young'. The court also noted that lengthy delays in processing applications drive away any sense of precariousness for the applicants, which increases the right to respect for private life that is carried on 'of necessity during the period of delay, and can be said to diminish the strength of immigration control factors that would otherwise support refusal of permission to work'.[73] Blake J

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[67] Council Directive 2003/9/EC laying down minimum standards for the protection of asylum-seekers
[68] Reception Directive fn 67 above recital (7)
[69] Fn 45 above
[70] Mr Tekle was granted indefinite leave to remain
[71] *R (S) v SSHD [2007] EWCA Civ 546*
[72] *EB (Kosovo) [2008] UKHL 41*
[73] *Tekle* fn 65 above para 34

canvassed various possible solutions while insisting that the precise policy must be for the Secretary of State to decide, and demanded a response within 3 months of his judgment.

The 2 claimants Min Min and Zahra Omar appealed their refusal, and the Secretary of State appealed in *Tekle*. The cases were joined in the Court of Appeal case of *ZO (Somalia).*[74] The court announced at the end of the hearing that a subsequent application for asylum does fall within the Reception Directive, and the applicants therefore should be granted the right to work after 12 months if no decision has been made on the claim. The court also briskly decided not to hear argument about art 8. The conclusion was blunt. The Secretary of State appealed in all three cases, and the Supreme Court[75] decided just as briskly that the Court of Appeal was right, that there was no need to consider art 8 ECHR, and certainly no need to refer any questions to the Court of Justice of the European Union.

Judgment was handed down on 28 July 2010. The very next day the immigration minister Damian Green announced that the Home Office were seeking ways of limiting the impact of the judgment, under which some 45,000 fresh claim applicants stood to benefit. The proposal which was eventually implemented[76] was to restrict fresh claim applicants to 'shortage occupations' which are determined from time to time by the Home Office in consultation with the Migration Advisory Committee[77] and are listed on the Home Office website. A Guardian report of 29/7/2010[78] lists 'qualified maths teachers, chemical engineers, high-integrity pipe-welders or even experienced orchestral musicians or ballet dancers'. The author, having obtained permission to work for an Eritrean woman in her 50's who was looking for part-time cleaning work in west London, checked the list and found that she could apply to work as a manager in the nuclear waste disposal facility at Sellafield.

These restrictions applied to all asylum-seekers applying for permission to work after that date, and to all fresh claim applicants regardless of when they had applied or how long they had been waiting. Then, largely because it proposed reducing to 6 months the period during which asylum-seekers (including fresh claim applicants) could be denied access to the labour market, the government decided not to opt in to the recast EU Reception Directive.

4. Section 4 support for fresh claims raising article 8 issues

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[74] *ZO (Somalia)* fn 66 above

[75] *ZO (Somalia)* fn 60 above

[76] Statement of Changes in Immigration Rules CM 7929 August 2010

[77] The Migration Advisory Committee (MAC), an independent, non-statutory, non-time limited, non-departmental public body that advises the government on migration issues. The MAC is made up of a chair and 5 other independent economists, who have been appointed under rules relating to public appointments laid down by the Office of the Commissioner for Public Appointments (OCPA). Additionally, the Commission for Employment and Skills and the Home Office are represented on the committee. It was set up in 2007 as an independent non-departmental public body to provide evidence-based advice to the government. For example, on where shortages of skilled labour can sensibly be filled by immigration from outside the European Economic Area.

[78] http://www.theguardian.com/uk/2010/jul/29/restrictions-sought-asylum-seekers-jobs

The Asylum Support Appeals Project(ASAP) recently intervened in *R(Mulumba),*[79] a judicial review from an appeal to the First tier tribunal (asylum support) against a refusal of section 4 support for further submissions raising art 8 right to family and private life. The ASAP briefing note[80] explains that, although the section 4 regulations[81] do not exclude further submissions not based on a protection claim (asylum or art 3 ECHR), the Home Office has not accepted that such applicants are entitled to section 4 support. The case of *Mulumba* was settled on the basis of a Home Office concession that s4 support could cover further submissions based on art 8 ECHR. As at the time of writing the Home Office has not changed its written policy. The terms of the consent order require such applications not to be routinely refused, but ASAP will not be the only organisation expecting this not to be widely observed, and for most applicants to have to litigate to obtain support.

5. Transfer of fresh claim judicial reviews to the Upper Tribunal

Since 17 November 2011 judicial reviews concerning fresh claims were to be issued in the Upper Tribunal. This has proved undramatic. An undated Public Law Project report[82] noted that the Upper Tribunal's task was simple 'because the legal test...has settled' by the *WM (DRC)* judgment. The report notes that for the 6 months from April to September 2012 the Upper Tribunal received 380 applications and disposed of 289, of which 11% were granted permission, and a further 3% were granted permission after renewal. At the time of writing the Upper Tribunal website shows all reported decisions in fresh claim judicial reviews, the latest one reported in September 2013. Of course we cannot know how many are favourably settled before a full hearing, or even before permission.

All the Upper Tribunal reported cases strictly apply the *WM(DRC)* test, considering whether SSHD has applied the correct rule para 353, and applying anxious scrutiny. A couple are interesting more for the other legal issues canvassed in the determinations.

The case of *Matthew*[83] crisply applied the *WM(DRC)* test and granted judicial review. The court took time to review the 'art 8-new Rules' litigation as at 2013, including a discussion on 'insurmountable obstacles'.

Mamour[84] is one of a series of cases concerning the application of the *Rashid- R(S)* 'corrective remedy' principle to young Afghan failed asylum-seekers. On refusal of his original claim, because of a mistake about an age assessment, he was wrongly not granted any leave to remain. He made a fresh claim but was removed to Afghanistan before it could

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[79] *R(Mulumba) and First-tier tribunal (Asylum Support) v SSHD*, unreported and settled on 2/2/2015 – see the briefing paper at next footnote

[80] http://www.asaproject.org/wp-content/uploads/2013/03/Feb-2015-ASAP-Briefing-Note-Article-8-application-and-eligibility-for-section-4-support.pdf

[81] Reg 3(2)e Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005

[82] http://www.publiclawproject.org.uk/data/resources/40/PLP-Talk-mp-amended.pdf

[83] R (on the application of Matthew) v Secretary of State for the Home Department FCJR [2013] UKUT 00466 (IAC)

[84] R (on the application of Mamour) v Secretary of State for the Home Department (FCJR) [2013] UKUT 00086(IAC)

be considered. The Upper Tribunal decided that the decision to reject the fresh claim was *Wednesbury* unreasonable. It was further decided that although the UT did have power to order the SSHD to make best endeavours to bring him back to the UK, they would not so order, principally because it did not go without saying that his fresh claim would be 'accepted as a fresh claim' and therefore there was no guarantee that he would obtain an in-country right of appeal.

Of course, not all fresh claim judicial reviews are issued in the Upper Tribunal. Claims concerning unlawful detention must still be issued in the Administrative Court. But these cases do not raise any new legal issues in relation to the fresh claim question.

6. Changes in legal aid for judicial review

The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 removed non-asylum immigration cases from the scope of legal aid. Although asylum claims remain within scope, the diminishing numbers of solicitors with legal aid contracts are generally reluctant to take on applicants wishing to make a fresh claim for asylum, since often the need to obtain and peruse the client's previous asylum files makes the work uneconomic under the fixed fee legal aid system: and for clients in detention, facing deportation or removal, the difficulties of finding legal representation for a fresh claim are even greater. Immigration issues remain in scope for judicial reviews, but new regulations[85] brought in in April 2014 ruled out payments except where permission is granted, except in exceptional circumstances. This despite representations from the Public Law Project (PLP)[86] and others that the majority of immigration judicial reviews settle before permission, on often on terms favourable to the applicant. In *Bell Hoare Bell Solicitors & ors*[87] the High Court decided that 'because the regulation extends to putting providers 'at risk' in situations which cannot be said to be linked to its stated purpose'[88], it cannot be lawful. A Ministry of Justice (MOJ) spokesperson said that the MOJ would now 'carefully consider' the technical aspects raised by the court before deciding whether to appeal.

7. Recent Home Office responses – all further submissions to Liverpool from 26/1/2015 – suspended pending a judicial review by Liverpool City Council

A letter 13/1/2015 by UK Visas and Immigration to National Asylum Stakeholder Forum (NASF) members announced that from 26 January 2015 all further submissions must be submitted in person at the Further Submission Unit (FSU) in Liverpool. Refugee support NGOs and representative bodies made urgent formal representations against this proposal, the introduction of which has been suspended following legal action by Liverpool City Council.

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[85] Civil Legal Aid (Remuneration) Amendment (no 3) Regulations 22/4/2014

[86] PLP report cited at fn 52 above

[87] *Bell Hoare Bell Solicitors, Deighton Pierce Glynn Solicitors, Mackintosh Law, Public Law Solicitors and Shelter v Lord Chancellor [2015] EWHC 523 Admin*

[88] *Bell Hoare Solicitors* fn 88 above, paras 6, 31-62

The proposals represent a significant barrier to those wishing to make further submissions. The system has been in place for several years for those who first claimed asylum before March 2007. The difference is they will now affect many more people. Issues include:

- Very difficult to get through on the telephone to make an appointment
- Those with children face problems of childcare, or alternatively the prohibitive cost and distress of taking their children to Liverpool with them
- No-choice appointments are provided, giving appointments in the morning even for people who live too far away to make them without travelling or staying overnight. The ILPA representations[89] note that from the North-East the earliest coaches arrive in Liverpool after 12 noon and the last coaches to return leave at 5pm, an 11 hour day with a small window in which to attend the further submission appointment. From the South West the situation is worse – a coach arriving after 1pm leaves Plymouth at 5.15am and the latest coach to leave Liverpool, in order to return the same day, is 3pm, arriving back at nearly midnight. The return train fare, for a not much quicker journey, costs £226.40.
- No funding is provided either for travel or for staying overnight.

In a press release the Mayor of Liverpool stated:

> "The suspicion is that the Home Office is deliberately making it difficult for asylum seekers so they may not be able to travel from all parts of the country to Liverpool, but the reality is that because they have just slid this decision out through the back door, without proper consultation, nobody knows what the likely effects will be – how can we plan when we are completely in the dark?"

With around 1000 applicants making 'further submissions' each year, the Mayor's concern is that many of them, having travelled to Liverpool to make their further submissions, will not be able to afford to return, or will have no home to return to, and will therefore remain in Liverpool, adding to the burden on their social services budget.

The proposal includes failed asylum-seekers living in Scotland, and a legal challenge has been launched by a Scottish lawyer, arguing that the proposals would arguably breach applicants' rights under the Refugee Convention, the European Convention on Human Rights and the EU Qualification Directive. The application is supported by representations from the major Scottish refugee charities.

At the time of writing the outcome of these judicial reviews is awaited.

8. 'legal conscientiousness'

Simon Halliday[90] used this concept in 2004 to examine responses of local authority homelessness officials in the face of judicial review challenges to their decisions. It is offered

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[89] ILPA letter to UKVI 21/1/2015

[90] *Judicial review and administrative compliance*, Hart Publishing 2004

briefly as an academic and intellectual counterweight to the recurring themes evident in the Home Office responses (and some judicial responses) to nearly 20 years of fresh claims and fresh claims litigation.[91] These themes are that 'fresh claims' are generally neither fresh nor even claims, and that they are made simply to prolong the applicant's stay in the UK, and to obtain accommodation and support while they remain. In that view, applications consist of template letters, objective evidence not related to the individual case, or 'new evidence' of dubious origin or clearly fake. Any asylum practitioner will have seen all of these, and most 'legally conscientious' practitioners in practice during the 'legacy' years will have faced distress and even anger on advising such clients that he or she did not have a viable fresh claim. However, even the Secretary of State's own statistics, provided as evidence in cases like *MK & AH,* discussed above, show that at least 14% of fresh claims submitted during the 'legacy' period amounted to a fresh claim in law, meaning that several thousand people arguably merited international protection. And, as argued above, it is likely that others, in unreported cases settled before a full hearing, or even before permission is granted, will have succeeded following judicial review.

It is suggested that, as with other major litigated immigration issues,[92] the 'collateral damage' from the measures described above, inflicted on the 14% of fresh claim applicants whose claims are arguable, amounts to a disproportionate level of suffering. This must especially be so when it is clear that the circumstances leading to the high volume of fresh claims were either external to the UK (authoritarian regimes, civil wars and state collapse, genocides) or down to the 'past incompetence and failures by the Home Office' as Collins J put it in *FH.* The White Paper 'Fairer, Faster and Firmer'[93] said this in 1998:

> Delays and backlogs on this scale lie at the heart of the problem. They put unnecessary pressure on the staff who have to operate the system. They are not fair to genuine applicants who face long periods of uncertainty about the outcome of their application. They make it extremely difficult to deal firmly with those who have no right to be here. Tackling these delays and backlogs is a fundamental part of modernising our immigration control.

One could not agree more, and what is interesting about that White Paper is the practical proposals it made which did improve matters, such as granting indefinite leave straight away to refugees, and reducing other periods of qualifying time, in turn reducing the need for repeat applications, freeing up administrative resources for new applications. But, as the numbers of asylum-seekers continued to rise, the government resorted to the familiar 'collateral damage' rhetoric about 'bogus asylum-seekers', legislative strategies including effectively criminalising entry to the UK and excluding people from support if they did not claim asylum soon enough, and administrative strategies such as the Detained Fast Track

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[91] Another useful concept is 'organised hypocrisy', from *Sovereignty- organised hypocrisy* Stephen D Krasner 1999, referenced by Matthew J Gibney in the last chapter of his book *The ethics and politics of asylum* Cambridge 2004

[92] Notably sham marriages, attacked by the requirement to obtain a 'certificate of approval' (defeated in *Baiai [2008] UKHL 53)* and requiring both parties to be over 21 (defeated in *Quila [2011] UKSC 45)*

[93] CM 4018

and other unsustainable target- setting procedures for processing asylum cases and appeals. The concern with asylum rights and quality of decision-making expected of a 'legally-conscientious' government department makes an important but short-lived appearance with the 2007 introduction of the New Asylum Model and the Solihull Early Advice Pilot[94], but NAM was subsequently and quietly put to rest, and although the evaluation of the early pilot was positive,[95] the 2013 final report on the broader scheme revealed mixed conclusions and the scheme is not being continued.[96] Research reports from a wide range of institutions[97] and the regular Home Affairs Committee reports on the workings of the immigration and asylum system[98] show that despite detailed published guidance covering every aspect of an asylum claim, and despite relentless public oversight, 'incompetence and failures' continue.

Conclusion

The case of *Rahimi* in 2005, confirmed on appeal a year later in *WM(DRC),* set a clear comprehensible test for determining whether a subsequent claim for asylum amounted to a 'fresh claim' leading to a fresh right of appeal on refusal, and to support and accommodation as an 'asylum-seeker'. That test continues to provide a reliable remedy to applicants with meritorious claims who can get access to the courts, and provides some protection against unlawful removal. However, besides simply failing to apply the correct legal test in many thousands of cases over the years, the Home Office has sought to control and deter the making of fresh claims by an assortment of measures including giving fresh claim applications a lower administrative priority, delaying and refusing the provision of asylum support, rendering meaningless the Reception Directive's requirement to give permission to work in cases of delay, reducing access to legal aid for judicial reviews and most recently by making it difficult even to submit a fresh claim. These measures are a further demonstration of the Home Office's lack of legal conscientiousness.

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[94] A large-scale pilot project in which asylum applicants were ensured of a legal representative earlier in their claim, where Home Office caseowners worked with applicants' representatives to make sure a decision was not made until all the evidence was available, and legal representations were permitted after the asylum interview.

[95] The initial pilot of the ELAP in Solihull in 2007-08 generated significant evidence of improved decision-making, with a 73% higher initial grant rate of refugee status and a 50% lower successful appeal rate; fewer asylum-seekers absconded due to closer contact management. 58% of cases were concluded within six months. 'Applicants felt more engaged with their claim and that they seemed to have a better understanding of what was happening at each stage', which contributed to a significantly higher removal rate, as 'there was a greater understanding and acceptance by the applicant of the reasons for a negative decision [and] that they had been able to put their case fully'. (reported in *Fast track to despair* Detention Action 2011

[96] *Evaluation of the Early Legal Advice Project Final Report* Home Office research report 70, May 2013

[97] *Unsustainable* Asylum Aid January 2011; *Refused* Women for Refugee Women, May 2012; *I feel like as a woman I'm not welcome'* Asylum Aid January 2012; *What's going to happen tomorrow- unaccompanied children refused asylum* Office of the Children's Commissioner March 2014; *How children become failed asylum-seekers* Kent Law Clinic June 2014

[98] The most recent, covering January to June 2014, is here: http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhaff/712/71202.htm