

Internal review of response to request under the Freedom of Information (Fol) Act 2000 by Vincent Aleck (reference 12555)

Responding Unit: UK Border Agency International Group

Chronology

Original Fol request:	04 August 2009
Acknowledgement:	05 August 2009
First Request for an internal Review	06 September 2009
UKBA response:	15 October 2009
Second request for an internal review:	29 October 2009
Acknowledgement of request for internal Review	02 December 2009

Subject of request

1. Mr Aleck asked for information about the UK Border Agency (UKBA)'s Entry Clearance Guidance section EUN2.15, which can be found at the following web page:

<http://www.ukvisas.gov.uk/en/ecg/eunationalsschemes/eeafamilypermit#20844623>

2. The section states 'This guidance is currently under review'. Mr Aleck's request was in the form of six questions, which are set out in the attached **Annex A**.

The response by UKBA

3. UKBA responded to Mr Aleck, by e-mail, on 15 October 2009, this e-mail is attached at **Annex B**. UKBA provided responses to all six of Mr Aleck's questions.

Mr Aleck's request for an internal review

4. Mr Aleck asked for an internal review on 06 September, before any response had been sent out. The request for an internal review was made on the grounds that the response was overdue and no reason for the delay had been provided by UKBA.
5. On 29 October UKBA e-mailed Mr Aleck in order to ascertain why he was not satisfied with the response he had received on 15 October. The requester replied asking for an explanation of:

- The time it took to respond to e-mails
- Why the e-mails went unanswered?
- Why certain information requested was not answered, without a specific exclusion given?

Procedural issues

6. The request for information was received by UKBA Freedom of Information Team on 04 August and a formal acknowledgement was sent, by e-mail, on 05 August.
7. The delay in response was due to two factors; firstly, there was a delay in the internal allocation of the request; and secondly, the person to whom the case was allocated was on annual leave for a period of three weeks during the time in which the case should have been handled. The case was not reallocated to another member of staff. UKBA have now put in place measures to ensure that this is not repeated.
8. The UKBA response of 15 October was sent 52 days after the receipt of the request. This was substantially in excess of the 20 working day limit imposed by section 10(1) of the FoI Act.

Consideration of the response

9. I have considered the UKBA response to Mr Aleck's request.

Question a

10. Mr Aleck requested a copy of the most recent guidance that was available before being placed under review. The UKBA response provided Mr Aleck with the guidance that had been archived in December 2008. I am satisfied that the UKBA response provided the information requested and that there is no further guidance on this issue.

Question b

11. The UKBA response of 15 October explained that the guidance has been placed under review because the issue of dual nationality and its meaning under EU law is not clear. This follows the Court of Appeal case *McCarthy (Eire) v Secretary of State for the Home Department (SSHD)*, which can be found at the following link:

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/641.html>

12. This case has now progressed to the House of Lords who have referred a number of questions to the European Court of Justice, where determination is still pending. The referred questions can be found at the following link:

13. The UKBA response should have clearly stated that the reason for the review of paragraph EUN2.15 is the referral from the House of Lords to the European Court of Justice.

Question c

14. Mr Aleck asked for the possible outcomes of the review. The response from UKBA stated that the review of the guidance is pending until the outcome of the case of *McCarthy v SSHD*.
15. In his request for an internal review on 29 October Mr Aleck asks why no specific exclusion is given, when the information requested in the response is not answered (sic). In the review, I have assumed that in the use of the word exclusion the requester is referring to the exemptions set out in the FoI Act. A review of the guidance could take a number of different directions based on the outcome of *McCarthy v SSHD* case and until the case is concluded UKBA are unable to provide information on the direction of the review. It is not for the SSHD to prejudge the handling of the case before the ECJ.
16. There appears to have been no need to cite an exemption in this case, as no information was available for release due to the fact that it did not, as yet, exist. The response failed to explicitly say whether or not the information was held. In this respect the response of 15 October was in breach of section 1(1)(a) of the FoI Act.
17. I am satisfied that the response was reasonable, if brief, on the basis that the possible or likely outcomes of the review cannot be accurately speculated upon until the judgment is made.

Question d

18. The requester asked for the likely outcome of the review. The UKBA response simply referred Mr Aleck back to the response to question c. For the reasons given in paragraphs 15 and 16 above it would not have been possible for UKBA to provide the information requested as it did not, as yet, exist.
19. The response failed to explicitly say whether or not the information was held. In this respect the response of 15 October was in breach of section 1(1)(a) of the FoI Act.

Question e

20. Mr Aleck requested information about the timelines for the review. Again, the reply from UKBA referred him back to the response to

question c, which states that a review of the guidance is pending until the outcome of *McCarthy v SSHD*.

21. I have been informed that any review of section EUN2.15 will only take place once the ECJ rules in the case of *McCarthy v SSHD*. There is no set timeframe for the ECJ to consider this case. Consequently, at the time of the response UKBA would not have been in a position to state any likely timeframe of the review. The response failed to explicitly say whether or not the information was held. In this respect the response of 15 October was in breach of section 1(1)(a) of the Fol Act.

Question f

22. Mr Aleck asked for the current guidance provided by UKBA to ECO's, pending the outcome of the review. UKBA's response disclosed the information requested. I can confirm that there is no further guidance on this issue and all of the information was disclosed to Mr Aleck in the UKBA response.

Advice and assistance

23. The requester sent a number of e-mails, starting on 06 September, to UKBA asking about his internal review. The responder failed to acknowledge these e-mails until 02 December 2009. I have been informed that the Freedom of Information Team did not respond to Mr Aleck's e-mails earlier because of a lack of resource at the time.
24. The responder failed to inform Mr Aleck of any reason why the request took longer than 20 working days to be completed.
25. On 29 October UKBA e-mailed the requester to ask why he was not satisfied with the response that he had received.

Conclusion

26. The UKBA response of 15 October was provided to Mr Aleck outside the 20 working day limit and so was in breach of section 10(1) of the Fol Act.
27. UKBA failed to provide any explanation as to why their response would take longer than 20 working days to complete or reply to any of Mr Aleck's e-mails requesting an update the current position.
28. The UKBA response of 15 October provided proper responses to all six of Mr Aleck's questions.
29. The response should have made it clear that there was no information available to be disclosed, in relation to questions c, d and e. In this respect the response of 15 October was in breach of section 1(1)(a) of the Fol Act.

Information Access Team
Home Office
23-Mar-10