

## Fast-track

- 2.7.18 - That relevant Detained Fast Track procedures should be strengthened and rigorously implemented in order to ensure that in cases where there is evidence of torture, sexual violence or other forms of trauma which make it difficult for an individual to present their case coherently, that that person's vulnerability is quickly identified and they are removed from the Detained Fast Track process.
- 2.7.19 - That there should be a review of Harmondsworth and Yarl's Wood detained fast-track initial decisions and appeals to make sure that claims of torture or other traumatic ill-treatment are always put before the decision-maker and that gender guidelines have been rigorously followed in interviewing.

## Refusal

- 2.7.20 - That random examples of the Reasons for Refusal should continue to be periodically reviewed by an independent body to ensure that they are consistent with reliable Country of Origin Information.
- 2.7.21 - That UKBA should be careful not to present asylum-seekers whose appeals are refused as necessarily 'bogus', given that there are different reasons for refusal and that a decision in law that a person does not qualify for sanctuary does not necessarily signify that they are of bad intent.

**Interim Finding 3. The Commissioners expressed concern that the adversarial asylum system is heavily weighted against the asylum seeker**

**Finding 3.1: That some asylum seekers who have their initial decisions 'fast-tracked' have less chance of receiving a fair hearing**

***UKBA response:** Our Detained Fast Track has been tested at the highest level through the courts and found to be lawful. In *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131 the House of Lords considered the lawfulness of detaining asylum claimants pursuant to the fast-track process at Oakington, for the sole purpose of deciding their claims quickly. Their Lordships concluded that detention for the purpose of claims being decided quickly was lawful both within the Immigration Act 1971 and under Article 5 of the European Convention on Human Rights. This has now been confirmed by the Grand Chamber of the European Court of Human Rights.*

**Commissioners' assessment:** We recognise that some asylum seekers do have a weak case which can be dealt with relatively speedily. However, there is a difference between a process being lawful and it being appropriate. The Court of Appeal noted in *R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCH 684 (Admin)* that the fast track process had to operate flexibly in accordance with a written published policy in order for it not to be *inherently* unfair and unlawful. At present, the basis of the policy used to decide whether an asylum seeker should be subjected to the detained fast track process is not whether the case is weak, but whether it is capable of being decided speedily, with some nationalities deemed particularly suitable and some exceptions set out. We conclude that many claims are capable of being decided speedily without the asylum seeker being detained. We also conclude that the combination of the fact of detention and the speed of the fast track process imperils the high standards of fairness that should be used in deciding issues, where, if the decision is incorrect, the applicant's life may be at risk. If the fast track process is to be maintained, it is essential that the screening of applicants being assigned to the fast track process is effective and thorough.

**Finding 3.2: That segmentation of fast-track appeals and the tight time-frame for preparing a case for detained fast-track leads to too many people appearing without proper legal or other representation**

*UKBA response: To ensure that clients in the fast track process have early access to quality legal advice and representation, the LSC runs duty representative schemes at Harmondsworth, Oakington and Yarl's Wood removal centres. Fast track advice is provided through 'Exclusive Contract Schedules'. We recognise that it is important that prompt legal advice is available to assist appellants with their case and the LSC has sponsored the Immigration Law Practitioners Association (ILPA) to develop a best practice guide for fast track cases. The guide is now in its final draft and being progressed for publication.*

**Commissioners' assessment:** We commend the efforts to improve access to legal advice in detention. We also commend the publication of the Immigration Law Practitioners' Association's Best Practice Guide on the Detained Fast Track in January 2008. We are concerned that, though positive, these steps do not ensure that the necessary legal advice and representation will be available to all who need it, particularly in the case of legal representation at appeals that are heard within the detained fast track process.

**Finding 3.3: That the right to appeal is curtailed if an asylum seeker comes from a supposedly safe third country**

***UKBA response:** Asylum decisions attract a right of appeal. However a person being returned to a safe third country (usually one of our EU partners) is not being removed to the country in which they fear persecution. We consider in those circumstances that an out of country right of appeal is justified as it does not place the applicant at risk and discourages abusive asylum shopping. We may also certify some applications from a limited list of countries as clearly unfounded and these also do not attract a right of appeal in the UK. We do not assert that these countries are entirely safe for everyone. What we say is that in general there is no serious risk of persecution and that removal would not breach our obligations under the European Convention on Human Rights (ECHR). The protection needs of individual claimants continue to be assessed on a case-by-case basis regardless of the designation and we do not certify all claims from those designated countries. We are not aware of any successful appeal since 2005 against a clearly unfounded claim.*

**Commissioners' assessment:** We recognise that appeals with little merit may on occasion be used as a means of prolonging an applicant's stay in Britain. However, given that unmeritorious asylum claims can be decided quickly, even allowing for an in-country appeal right, the policy objective of discouraging 'abusive asylum shopping' can be met without maintaining a non-suspensive appeals regime. Furthermore, in respect of removals to third countries, significant concerns have been expressed about the quality of refugee status determination processes operated by some EU member states. For example, UNHCR has recently called for all EU member states to suspend third country returns to Greece for that reason. Additionally, the Administrative Court has found in *Nasseri v Secretary of State for the Home Department [2007] EWHC 1548 (Admin)* that the provisions around third country returns to EU member states are incompatible with the European Convention on Human Rights (although, we recognise that this decision has been appealed by the Secretary of State to the Court of Appeal).

**Finding 3.4:** That there is a lack of legal advice for asylum seekers during their initial interview leading to unjust decisions

**Finding 3.5:** That there is a shortage of solicitors to represent appellants and that asylum seekers are denied justice if their solicitors do not appeal in time or do not have the relevant information

**Finding 3.6:** That cuts in the legal aid budget have led to an increase in appellants appearing unrepresented

**Finding 3.7:** That there is insufficient opportunity for redress if an asylum seeker's appeal is not heard, if they are not properly represented, or if they are failed through maladministration or other human error

*UKBA response: Unlike many EU Member States the UK provides free legal advice and representation out of public funds at both initial and appeal stages. Funding for legal aid in England and Wales is available for anyone who passes the statutory means and merits tests that are set out in the Commission's Funding Code and approved by Parliament in 2000, when legal aid was expanded to cover representations at immigration and asylum appeals. Legal advice and representation is provided by a range of quality assured providers including private solicitors and NGOs. In addition to legal aid funding provided to private solicitors the LSC provides the vast majority of income for both the Refugee Legal Centre and Immigration Advisory Service. LSC funding accounted for £12.3M of the Refugee Legal Centre's total income of £12.7M (RLC annual report 2006, and £13M of the Immigration Advisory Service's 2006/07 funding (Report of Trustees and financial statements year ended 31st March 2007). An Early Access to Legal Advice Pilot began in Solihull in November 2006 and is currently at the evaluation stage. The pilot tests the idea of involving legal representatives in the pre-decision stage of an asylum case to make the process one of increased interaction between case owner, legal representative and applicant, to ensure all facts are raised and considered as part of the decision-making process.*

**Commissioners' assessment:** We recognise that there must be a limit to the legal aid budget and that the constraints on the legal aid budget, which concern the Commissioners greatly, are a matter for the Ministry of Justice. It is of great concern when an asylum seeker is not able to consult a legal representative before their substantive interview. It is equally a matter of concern that asylum seekers are not guaranteed a legal representative at their substantive interview as a matter of course. Taking into account the limit to the legal aid budget, quality legal representation can facilitate quicker, more accurate and more efficient status determination. These are the reasons why the work being done as part of the Solihull Early Legal Advice Pilot project, where all asylum claimants have the benefit of legal support from the pre-decision stage, is of such great importance and we commend UKBA for an initiative that addresses our concerns about adequate, timely legal support.

**Finding 3.8:** That good medical expert reports to support an appellant's case are hard to obtain, expensive and are not always given due consideration

*UKBA response: Those requiring a medical report to support their claim can apply to the Medical Foundation or the Helen Bamber Foundation. Both these organisations are registered charities. Around 2,400 cases were referred to the Medical Foundation in 2006 (10% of our asylum intake) and they produced around 750 reports (3% of our intake or 30% of those referred). Although the Medical Foundation can charge between £450 and £700 for such reports this cost can be met by legal aid.*

**Commissioners' assessment:** We acknowledge that due to the burden of work and shortage of resources, obtaining a medical report can sometimes slow down the asylum procedure considerably. However, such reports can be crucial to ensuring that the claims of asylum seekers are appropriately considered.

**Recommendations 3.9:** The Commissioners therefore recommend:

### Early access to legal representation

- 3.9.1 - That no asylum claimant should ever, for want of affordable representation, appear before a tribunal unrepresented.
- 3.9.2 - That research should be undertaken to understand why asylum seekers are unable to secure legal representation, particularly before the initial interview. This research should consider level of supply and legal aid funding, the effect of asylum seekers' dispersal, the speed of the decision making process and other relevant factors.
- 3.9.3 - That, whilst that research is undertaken, the current restrictions on legal aid funding should be relaxed to encourage an increase in the number of quality legal representatives serving the needs of asylum seekers.
- 3.9.4 - That if an asylum seeker has, through no fault of their own, been unable to secure legal advice before their asylum interview, then the interview should be postponed to facilitate access.
- 3.9.5 - That the disincentive under the new legal aid regime for legal representatives to represent asylum seekers whose claims are difficult, complex and time-consuming should be removed.

- 3.9.6 - That the principle of 'front loading' legal advice should be actively pursued, and that the Solihull Pilot, suitably modified after careful audit and following the training of case owners and legal representatives, should be implemented nationwide as the standard way in which initial decisions on asylum claims are made.
- 3.9.7 - That careful consideration should be made of measures which can be introduced to ensure that legal aid funded lawyers are not discouraged from representing appellants at hearings in the detained fast track process.

### Engagement with applicants

- 3.9.8 - That there should be further consideration of issues of credibility. The current guidelines on credibility place the burden of proof on the applicant, but recognise that the applicant may not be able to produce evidence to substantiate the claim. In cases where evidence provides grounds for prima facie disbelief, the officer or tribunal concerned should take steps to ensure that such grounds have been explained to and understood by the applicant, and that the applicant has been allowed sufficient opportunity to offer an explanation, including the opportunity to submit further evidence.
- 3.9.9 - That there should be a means of recognition and redress within the asylum system in instances where the system itself has failed the asylum seeker, such as when a notice of appeal hearing has not been received due to human error, a solicitor has not completed papers within due time, or a representative has, without reasonable explanation, at the last minute withdrawn from a case.

### Appeal rights

- 3.9.10 - That careful consideration should be made in respect of the UK law relating to third country removals to EU member states. In particular, consideration should be given to additional remedies, such as an in-country appeal right, and applicants should be able to challenge the assertion that they do not face being returned to their country of origin from a third country in breach of the Refugee Convention or European Convention on Human Rights.
- 3.9.11 - That UKBA reviews non-suspensive appeals provisions having regard to whether they are still necessary to meet the purpose for which they were introduced.

### Fast-track process

- 3.9.12** - That the impact of fast-track procedures on the quality of decision making should be examined and the results of this research used to inform future policy around fast-track procedures.

### Conduct of appeals

- 3.9.13** - That there should be a preliminary exploration of tribunal practice - especially where appellants are unrepresented – which is less adversarial and more investigative.
- 3.9.14** - That a panel of user representatives should be established for the Asylum and Immigration Tribunal and the Asylum Support Tribunal respectively, to complement existing stakeholder arrangements by auditing and advising upon the development of the service. These panels should include asylum seekers whose appeals have been heard by either Tribunal.
- 3.9.15** - That, if qualified legal representation is not available to an asylum seeker who has to appear before a Tribunal, appropriate lay support should be encouraged through the involvement of CITIZENS, the voluntary sector, and a wider recognition of the role of ‘McKenzie Friends’.

### Expert reports

- 3.9.16** - That legal representatives and decision makers should be trained in the commissioning and use of medical expert reports and witnesses.
- 3.9.17** - That criteria should be developed specifying when expert opinion should be obtained, for example, in the cases of psychologically vulnerable persons where credibility issues or issues of the timing of disclosure are deemed relevant.

### Public understanding of decision making

- 3.9.18** - That there should be a pilot initiative to improve public understanding of the way initial decision making in asylum applications works and, the challenges and the criteria that asylum seekers have to meet to have their claims accepted.
- 3.9.19** - That UKBA should host an experimental day conference at which UKBA practitioners engage with members of the public, including those in the voluntary sector, about the ways in which they work.