Interim Finding 5. The Commissioners expressed concern at policies and practices that appear not to have been clearly thought through

Finding 5.1 – That families with children are detained prior to return of refused asylum seekers

UKBA response:

Children are only ever detained in one of two limited circumstances: (a) as part of family groups whose detention is considered necessary, most often to effect removal and usually just for a few days and (b) where, very exceptionally, it is necessary to detain an unaccompanied minor whilst alternative care arrangements are made and normally then just overnight.

Although families with children may be detained under the same criteria as individuals – i.e. whilst their identity and basis of claim are established, because of the risk of absconding, as part of a fast-track asylum process or to effect removal – in practice most are detained for just a few days prior to their removal. In those circumstances where detention of families with children is prolonged it is usually as a consequence of the parents seeking to frustrate the removal process.

We recognise that detention of families with children is an emotive issue and there are mechanisms in place to ensure rigorous review of such detention, including Ministerial authorisation for those exceptional cases where detention lasts for 28 days or more.

We are currently piloting, until October 2008, an alternative to detention for families with children who have reached the removal stage, based at an accommodation centre in Ashford, Kent.

Commissioners' assessment:

We remain concerned that decisions are not always taken with the best interests of the child in mind, and note the prominence given to this criterion in the EU directives, the force of which is accepted by UKBA. We believe that detention, other than for the briefest of periods to avoid absolute destitution, can never be in the best interests of the child.

We are pleased to learn of the pilot scheme exploring an alternative to detention for families with children who have reached the return stage. We hope it has been sensitively handled. In evaluating the pilot, we suggest it will be very important to demonstrate that the families did not enter the scheme with a sense of grievance that their claim had not been explored fully and fairly, and that the obvious incentives to return to the UK communities from which they had come were addressed.

Finding 5.2 – That refused asylum seekers are detained with foreign national prisoners awaiting return

UKBA response:

Foreign National Prisoners (FNPs) are only eligible for detention in the immigration detention estate following completion of their criminal sentence. Ex-FNPs are risk-assessed at the end of their sentence and only those assessed as suitable for the immigration detention estate are transferred from prisons.

Commissioners' assessment:

The presence of foreign national ex-prisoners in IRCs has, we have frequently been informed, made IRCs more difficult to manage and still more difficult for asylum seekers. The mixing of these two groups has increased the sense of criminalisation amongst asylum seekers. We have had no opportunity to explore what kind of risk assessment is made before FNPs are sent to IRCs, but wish to stress that such a risk assessment should not concentrate merely on the risk of physical harm to other detainees. It is not satisfactory regularly to detain in the same facilities two groups of people whose needs are likely to be so different. Having said that, we believe that amongst those listed as convicted FNPs are some who should not have been criminalised as their actions (eg. passport fraud) may have been a legitimate response to their need to seek sanctuary in the UK. Measures that keep refused asylum seekers and convicted FNPs separate and that speed up the return of convicted FNPs who have served their sentence – where such return is appropriate – are vital for the wellbeing of detained asylum seekers.

Finding 5.3 – That children with stable backgrounds and who have lived as part of local communities for many years are being returned suddenly and without consideration for the emotional and psychological impact

UKBA response:

The immigration rules require a number of factors to be considered before a person is removed from the United Kingdom, including length of residence and compassionate circumstances. Any enforced return is, of course, likely to be distressing to the individuals concerned, especially if there are children involved, but we believe that the best place for a child will usually be with their parents. This will sometimes necessitate the removal of a child as part of a family group.

Commissioners' assessment:

Our concern here is not only for the children who are faced with return but for other children (especially those with similar immigration status) who are disturbed by the loss of their friends. The fundamental problem is the amount of time that has elapsed since refusal of asylum: children have become part of communities who mourn their loss. Undoubtedly, the best place for a child is likely to be with their parents, but the best interests of a child faced with return will be served by careful preparation for voluntary return, by the avoidance of detention for families, and, where detention is absolutely unavoidable, detention is for the minimum period possible.

Finding 5.4 – That Section 4 hard case support is only available to a small proportion of refused asylum seekers, there is sometimes a delay before support starts, and the quality of some accommodation is extremely poor

UKBA response:

Support under section 4 is available to those failed asylum seekers who are destitute and unable to leave the UK for one of 5 specified criteria. One criterion is that the failed asylum seeker is taking reasonable steps to leave the UK or to place himself in a position in which he is able to do so, for example by registering for an Assisted Voluntary Return. Thus section 4 support is available to all failed asylum seekers who would otherwise be destitute whilst they are taking positive steps to leave the UK. If a voluntary return were not possible for reasons beyond the applicant's control, then it is likely that the failed asylum seeker would meet the criterion that the provision of accommodation would be necessary for the purpose of avoiding a breach of his Convention rights (within the meaning of the Human Rights Act 1998).

Once an individual has been accepted as eligible for section 4 support, he will be accommodated as quickly as possible. The Agency works with its grant funded voluntary agencies to understand any problems which might cause delays in the application process – a dedicated workshop was held in April 2008 addressing such issues.

We accept that some of the accommodation previously supplied by a number of accommodation providers did not always meet the necessary standards. To counteract this we have over the past year or so transferred more than 7000 persons supported under section 4 to 'Target Contract' providers who offer improved standards of accommodation and are well regulated with a better responsiveness to local issues.

Commissioners' assessment:

We welcome the assurance that delays in the application process for Section 4 are being addressed. We repeat our concern that there is often a significant gap between application for support and provision of accommodation and vouchers. Also that only 9,365 refused asylum seekers are on Section 4 support, when there are an estimated 283,500 refused asylum seekers remaining in the UK. We are pleased to hear that the quality of accommodation is being improved. We are also pleased to note that in a letter of December 2007 sent to Restore of Birmingham, circulated nationally, BIA acknowledged the importance of local networks of friends and local access to services. It is to be hoped that in the future access to Section 4 accommodation will not entail relocation to another region.

Finding 5.5 – That vouchers provided for hard case support are ineffective, costly and stigmatising

UKBA response:

The Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 allow for the Government to provide accommodation to failed asylum seekers. There is no provision in law for UKBA to provide cash to failed asylum seekers. The vouchers issued are primarily luncheon vouchers, supermarket payment cards or supermarket vouchers which are widely used by non-asylum seekers. The vouchers used are those that would be used by any member of the public and because of this they do not identify persons using them as refused asylum seekers.

Commissioners' assessment:

We acknowledge that UKBA is following current provisions in law by providing vouchers rather than cash to refused asylum seekers. However, members of the public make relatively infrequent use of vouchers. Although in theory anyone can present a voucher, this does not in practice mean that stigmatization of asylum seekers is avoided.

Such is the need that asylum seekers have for cash, sometimes to get to reporting centres, that vouchers are often sold for less than face value. All asylum seekers need a certain amount of cash. The expense of running a demeaning, inflexible and inefficient system could be entirely avoided by providing support in cash.

Finding 5.6 – That hard case support provided for short-term use is being used to support people for long periods

UKBA response:

Support under section 4 of the Immigration and Asylum Act 1999 is available to those failed asylum seekers who are destitute for the period of time in which they are unable to leave the UK. Government policy is clear that once a failed asylum seeker is no longer prevented from leaving the UK, they should no longer be provided with support under section 4 unless failing to provide such support would breach the European Convention on Human Rights.

Commissioners' assessment:

Our concern here is for those on Section 4 support who cannot be returned to their country of origin and who are supported for long periods at a level that is designed for the short term. We have called this 'asylum on the cheap' and have recommended that Section 4 (hard case) support should be provided for six months after which refused asylum seekers who cannot be returned through no fault of their own should revert to mainstream asylum support and be eligible for a temporary work permit, under the conditions laid out in recommendation 3.5.1.

Finding 5.7 – That there is inadequate legal representation for those at the end of the process who may still have protection needs

UKBA response:

There are no barriers to individuals accessing Legal Aid funding for those who are at the end of the asylum process and continue to require legal advice – providing that the relevant means and merits tests are met and specialist legal advice is required.

If individuals require help in locating an adviser they can contact Community Legal Advice (CLA). This is a free and confidential service paid for by legal aid. CLA can refer individuals to a local solicitor or organisation who may advise them further.

Special arrangements to access advice are in place for those who are detained in Immigration Removal Centres (IRCs). Many of those in detention will have exhausted their appeal rights and may be facing removal. Legal Advice Surgeries are organised by the Legal Services Commission in each IRC on a twice-weekly basis to allow the opportunity for detainees to seek legal advice on any outstanding or possible immigration issues they may have.

Commissioners' assessment:

In practice, such legal advice and representation is extremely likely to be unavailable, as means will be exhausted and merits tests will be failed. There is an urgent need, as we have frequently stated, to enlarge the provision of legal aid. Our concern here is for those who have been ill-served by the system, and who need legal help to ensure that aspects of their case which have not hitherto been addressed are addressed before a final decision to effect return.

Finding 5.8 – That charter flights are used to return refused asylum seekers to countries or areas that may be unsafe such as Iraq, the Democratic Republic of Congo and Afghanistan

UKBA response:

We recognise that the conditions in certain countries are such that some individuals are able to demonstrate a need for international protection. We do not, however, accept that we should make the presumption that each and every asylum seeker who presents themselves as being of a particular nationality regardless of their particular circumstances, should automatically be afforded the protection of being allowed to remain in the UK. We believe the right approach is to consider the protection needs of individuals on an individual basis.

Each and every asylum (and human rights) claim is considered carefully on its individual merits. Those that are found to be in need of protection are granted it. Those found not to be in need of protection have a right of appeal to the independent appellate authorities. In this way we ensure that we provide protection to those asylum seekers who need it.

We do not return anyone back to countries where they will be at risk of persecution, torture or death. We only enforce the return of individuals if satisfied that they are not in need of protection and we do not seek to enforce returns to any country unless we and the independent courts are satisfied that it is safe to do so.

Commissioners' assessment:

We welcome UKBA's assertion that each and every asylum and human rights claim is considered on its merits and that it does not return anyone back to countries where they will be at risk of persecution, torture or death. As the Government prepares to publish its consultation on a British Bill of Rights, we will be looking for a cast-iron guarantee that the right to be protected from torture or inhuman or degrading treatment or punishment (Article 3 of the European Convention on Human Rights, incorporated into British law by the Human Rights Act) and an essential protection for many asylum-seekers, will remain an absolute right on which no limitation or restriction is permissible.

Recommendations 5.8:
The Commissioners therefore recommend:

5.8.1 – That asylum seekers – particularly women and children – should never be detained alongside foreign national prisoners.

5.8.2 – That all Immigration Removal Centres should have welfare officers to assist individuals to sort out their affairs in the process of return.

5.8.3 – That prior to the return of any child – forced or voluntary – a full independent assessment should take place to ensure the child will be adequately protected upon return.

5.8.4 – That more care should be taken to ensure that families are not divided and parents are not separated from children at the time of return, and that staff should be aware and follow professional guidelines on the effects of return on children.

5.8.5 – That all UK agreements with other governments on the readmission of their nationals should be transparent and open to scrutiny.

5.8.6 – That the UK government should never return refused asylum seekers if they believe torture will be used against the individuals concerned.

5.8.7 – That Section 4 accommodation should be provided within the region, and wherever possible in the locality, in which a refused asylum seeker resides.

5.8.8 – That the use of vouchers for Section 4 (hard case) support should be discontinued.