ILPA comments on the proposed Asylum Instruction on Handling Claims Involving Allegations of Torture

Introduction

ILPA is a professional association with some 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups including the National Asylum Stakeholder Forum.

We have not had sufficient time fully to consider and respond to the proposed Asylum Instruction on Handling Claims Involving Allegations of Torture. We have previously written expressing serious concern at the four working days made available for comments on this policy document.

One consequence of this timeframe is that we have not been able to give careful consideration to the proposed removal of the current Asylum Instructions on Medical Foundation Cases and The Medical Foundation for the Care of Victims of Torture. We note the response to our letter:

> "…*The issues are contentious but not complex (particularly as we now are acting on ILPA's proposal to build on the existing systems rather than inventing something completely new)*…"

The proposed instruction contains proposals for a long-stop by which the UK Border Agency can manage its concern that asylum decisions are not indefinitely delayed pending medical reports. It also contains proposals for circumstances in which acceptance of a referral by either the Medical Foundation or Helen Bamber Foundation will be effectively ignored in favour of asylum and detention processes proceeding as if no referral had been made or accepted. The former can fairly be described as building on existing systems and "*acting on ILPA's proposal*", whereas the latter cannot. The proposed process for the latter does include steps that have never been discussed with us, and as we shall explain elsewhere in this response is far from straightforward in its implications. We also do not consider that a 45 minutes or so discussion at the National Asylum Stakeholder Forum provides an adequate substitution for a proper consultation as had originally been envisaged and do not accept that four days is a proper opportunity for that.

In the circumstances, this response will focus on the proposals contained in paragraphs 18 to 22 of the proposed instruction. These are of most immediate concern. In relation to those paragraphs and the proposals there set out, we make the following observations under discrete headings.

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Relevance of a history of torture

In the following paragraphs we describe how a history of torture may be relevant in the context of an asylum claim. It follows that a medical report, which may provide corroborative evidence of torture[1], will be relevant in the same ways. However, in some of the circumstances described, it is possible that a medical report may be relevant, even where there is no claim of torture.

A history of torture may be relevant to an asylum claim in several different ways. In some cases, it may be relevant in all of these ways and in others only in some or one or another. In many cases, that a claimant has been tortured previously will give strong indication that he or she is at risk of serious harm in the future[2]. A history of torture may also give rise to a factual inference as to a Convention reason bringing the case within Article 1(A)(2) of the 1951 Refugee Convention[3]. However, even where there is reason to consider that those responsible for a claimant's torture are no longer a specific threat to him or her, that past experience will be relevant in assessing any future risks since any mistreatment by anyone may be very much more harmful to a claimant who has previously been tortured[4]. Such a history may be similarly relevant to any consideration of the claimant's capacity safely to relocate to another part of his or her home country[5]. Even where harms within the ambit of Article 1(A)(2) of the 1951 Refugee Convention can be discounted, a claimant's history of torture may be a factor in considering the humanitarian consequences of requiring that he or she return to the country of origin[6].

The preceding factors are all matters that go directly to the substance of the decision to be made on the asylum claim. However, there are other factors, which relate not directly to the decision but rather to the way in which that decision can safely be reached. A claimant who has been tortured is likely to suffer a degree of trauma which may have consequences for his or her ability to relate what has happened (whether directly in relation to the experience of torture or more generally). A history of torture usually will, therefore, be relevant to how the claimant is interviewed[7]. It will equally be relevant to how the claimant's evidence is

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[1] An example is provided by *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367, where (in the context of an appeal) Wilson LJ made the following observation in his leading judgment: '*It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto.*'

[2] This is now explicitly recognised in Article 4.4 of the Qualification Directive, 2004/83/EC

[3] See *Sivakumar v Secretary of State for the Home Department* [2001] EWCA Civ 1196 (*per* Dyson LJ); [2003] UKHL 14 (*per* Lord Hutton and Lord Steyn, with whom Lord Bingham of Cornhill agreed)

[4] See *B v Secretary of State for the Home Department* [2005] UKHL 19 (*per* Baroness Hale of Richmond at paragraph 36). Another example of how past mistreatment is relevant to the severity of future mistreatment is given by *Katrinak v Secretary of State for the Home Department* [2001] EWCA Civ 832 (*per* Schiemann LJ at paragraph 21)

[5] See *AH & Ors v Secretary of State for the Home Department* [2007] UKHL 49 (*per* Baroness Hale of Richmond at paragraphs 27-28)

[6] See *B v Secretary of State for the Home Department* (*op cit*)

[7] This is expressly accepted in the proposed Asylum Instruction, which records (as previous instructions have recorded) at paragraph 39 that '*The traumatic nature of torture means that particular care and sensitivity is required when interviewing applicants who claim to be victims of torture…*'

weighed[8]. Should the matter proceed to appeal, it will be relevant to how any cross-examination of the claimant ought to be conducted[9].

A further factor relates to both the way in which a decision can safely be reached and to the treatment of the claimant more generally. It is UK Border Agency policy that a claimant who has been tortured should not normally be detained. This is because the detention of the claimant is likely to be particular damaging to him or her because of the trauma he or she has suffered[10]. This policy reflects human rights obligations toward a survivor of torture and a humane approach. Moreover, the harm that detention may cause to the claimant is likely to further inhibit or damage his or her ability to engage with the asylum decision-making process – whether in giving instructions to a legal representative or relating what has happened to the UK Border Agency caseowner or an immigration judge.

Detention and survivors of torture

It has long been the policy of the UK Border Agency and its predecessors that survivors of torture should not normally be detained. This is reflected, for instance, in Chapter 55 of the current Enforcement Instructions and Guidance and rule 35 of the Detention Centre Rules 2001. Together these make express that a history of torture must be considered in relation to any decision to detain, that healthcare staff must report (via the Centre Manager) any concerns that a person may be a survivor of torture to the person responsible for authorising detention and that where there is any independent evidence of torture a person should normally not be detained.

As we have consistently maintained the Detained Fast Track undermines the general and longstanding policy intention that survivors of torture should not be detained. This is because the screening process, on which a decision is taken whether to subject a person to that process, does not provide a suitable opportunity to elicit information that illustrate that a person was not suitable for the process (by reason of his or her being a survivor of torture or another reason). UNHCR has expressly questioned the role of screening in this regard[11]. It does so because, as the UK Border Agency has acknowledged[12], screening does not provide a suitable or appropriate opportunity for a person to disclose a history of torture. Effectively, the Detained Fast Track introduces a 'detain first, ask questions later' approach. We remain opposed to the Detained Fast Track for reasons, which are not repeated here but which include this way in which the Detained Fast Track undermines the

[8] See *Mibanga v Secretary of State* (*op cit*)

[9] This follows from the same consideration identified at fn. 8

[10] Presentations, including a literature review, at the 9 December 2009 launch of a joint statement and briefing paper by the Royal College of Paediatrics and Child Health, Royal College of General Practitioners, Royal College of Psychiatry and UK Faculty of Public Health highlighted such concerns in relation to all immigration detainees, albeit with a particular focus on the harm to children and parents. See also the Memoranda of the Royal College of Psychiatrists and the Forensic Faculty of the Royal College of Psychiatrists to the Joint Committee on Human Rights inquiry into The Treatment of Asylum Seekers, published as Ev 37 & 38 to the Committee's Tenth Report for Session 2006-07, HL 81-II, HC 60-II, March 2007

[11] UNHCR Quality Initiative 5th report, paragraph 2.3.85

[12] Such concerns were discussed and acknowledged at the 12 February 2008 National Asylum Stakeholder Forum workshop; and as recently as July 2009, at that month's National Asylum Stakeholder Forum meeting, the UK Border Agency has confirmed the role of the capacity to take someone out of the Detained Fast Track as a safeguard intended to ameliorate these concerns.

wider and more general policy position, which we support, that survivors of torture should not be detained.

In the circumstances, the current policy position provides a vital (if inadequate) amelioration of this fundamental failing of the Detained Fast Track. Acceptance of a referral by the Medical Foundation or Helen Bamber Foundation is sufficient for a person to be taken out of the Detained Fast Track. It offers the limited protection to a survivor of torture that, although he or she will have suffered a period of detention, this may last no longer than a number of days if either of the Foundations decide, on considering his or her referral, that there is sufficient merit to accept the referral. If it were necessary to await the report before releasing the person, his or her detention would be likely to last for several weeks or longer. In responses to questions raised in Parliament regarding detention and torture survivors, Ministers have expressly relied upon this practice of release from the Detained Fast Track process on confirmation of the acceptance of a referral by the Medical Foundation, and have confirmed the inadequacy of current practice for the purpose of identifying survivors of torture[13].

Paragraph 18 of the proposed Asylum Instruction:

This paragraph would establish two circumstances in which a caseowner may decide not to give any time to obtain a medical report before he or she proceeds to decide an asylum claim. This would apply to asylum claims dealt with in the ordinary New Asylum Model process and in the Detained Fast Track process. The two circumstances are set out as:

> "*a) there are significant factual reasons for concluding that torture cannot have been inflicted in the circumstances described; or*
>
> "*b) a medico legal report would not be relevant to an assessment of a current claim for international protection;*"

The letter of 24 March, by which this consultation was invited, makes reference to a case (which we shall call *N*) in relation to this part of the proposed instruction:

> "*Our view has been strengthened by the recent High Court judgement in the case of* [*N*]*, in which the Court upheld the UKBA decision when the UKBA departed from the policy on the grounds that the medico legal report would have had no bearing on the asylum decision. But you will be reassured that, in light of the concerns raised about our original proposals in respect of the criteria caseowners would use to make these decisions, we have refined these criteria; nonetheless, it is important that caseowners are able to proceed quickly in cases where, for example, as in the case of* [*N*]*, it is clear that a medico legal report would have no bearing on the asylum claim.*"

We are not reassured. We addressed this matter in detail when we met with UK Border Agency representatives in January. At that time, we pointed out (as is explained above) that the relevance of a medical report may be felt in several ways.

[13] *Hansard* HL, 2 November 2006 : Column WA60 *per* Baroness Scotland of Asthal; and Joint Committee on Human Rights Tenth Report for Session 2006-07 (*op cit*), paragraph 234

We indicated that we found it difficult to conceive of circumstances, save one, in which it could be concluded, without sight of the report, that the report could have no relevance for deciding the claim. That exception, which we continue to accept, was that a decision to grant asylum may safely be made without obtaining a report. While Mr Brandon, for the UK Border Agency, indicated that it was thought that the criteria would affect only a few cases, and laid stress on a need for flexibility, he did not at the meeting give example of other circumstances where a report would not be relevant. Two months on, the case of *N* is the only real or hypothetical example that has been identified to us.

We have read the judgment of the deputy High Court judge in refusing permission to apply for judicial review on the papers. It appears to us that this application was brought by *N* in person. The judgment does not (and this is no criticism of it) make clear what grounds *N* had advanced in his application. What is revealed, however, is that while *N* sought to claim asylum in June 2009, it was decided in October 2009 that this fell to be treated as further representations by *N*, which did not establish a fresh claim for asylum. Accordingly, no decision on what *N* advanced as an asylum claim has or is to be taken. We do not know when *N* obtained an appointment with the Medical Foundation for him to be examined in relation to his claim to have been tortured, but the judgment reveals that this has not as yet taken place. On the face of the matter, three matters are striking. Firstly, *N* is not an example of a case in the asylum process. Secondly, in his case nearly four months have gone by between his seeking to make an asylum claim and the relevant decision of the Secretary of State. Finally, the history of *N*'s case (including that he had made three different asylum claims in three different names and claiming to be of three different nationalities with three different dates of birth) are to say the least exceptional. If *N*'s case sets the threshold by which the Agency intends to apply the proposals, we see few difficulties save that the terms of the policy, as currently drafted, provide no guidance whatsoever to assist a caseowner to understand that this is where the threshold has been set. In any event, it appears to us that there is no need to revise the Agency's policy to deal with a case such as that of *N*.

However, whatever the Agency's intention may be, caseowners in the Detained Fast Track are already refusing to wait for a report from the Medical Foundation or Helen Bamber Foundation before proceeding to make decisions on asylum claims. In other words, the current policy is not being applied and what has been presented to us as the proposed policy is, it would appear, effectively not a proposed policy but current policy. We have been informed of four such cases, which are current. We cannot know whether, had we been given more time for this consultation, we should have been made aware of others, but it is relevant that these four are each current cases. This belies the suggestion made to us that the criteria would only affect a few cases. Whether consistently with the policy intention or not, the facts appear to be that several cases are already affected and the only reasonable assumption is that many more will be if this policy is to continue. That is all the more likely to be the result given the absence of any guidance on how to apply the criteria, and in view of the fact that the UK Border Agency, and hence its caseowners, experience pressure and have targets for the process and resolution of asylum claims.

We are aware that judicial review applications are being or have been lodged. Far from being "*contentious but not complex*", this suggests to us that the policy's implications are contentious and complex. As we have set out in our general

observations, a medical report that provides corroboration of a torture claim is likely to be relevant to an asylum claim in several ways. In the circumstances, a decision by a caseowner not to allow time for a medical report to be obtained may do harm to the claimant and his or her claim. Accordingly, it is a decision that may be subject to judicial review on a variety of grounds; and if a legal representative took the view that the caseowner's decision that a report must be irrelevant was wrong, it would be likely that an application for judicial review ought to be made on the grounds that the decision taken was irrational. Such applications would need to be made each and every time a caseowner took a decision that was considered to be wrong.

Paragraph 20 of the proposed Asylum Instruction:

This contains a new proposal, and spells out formalities that we had not previously discussed as to what a caseowner should do in considering whether to apply the criteria in paragraph 18. It includes that:

> "*A decision not to await a medico legal report on the basis of these criteria must be made with caution, taking into consideration the unique circumstances of the applicant…*"

This does not provide any useful measure against which the need to take caution can be assessed. In the absence of guidance on the criteria, and express acceptance of each and all of the ways a medical report may prove relevant, we do not consider this statement to have any practical value.

The paragraph ends with:

> "*The rationale for such a decision must be clearly articulated, in writing, to the applicant's legal representative using template letter A. The legal representative should be given five working days (24 hours in DFT) in which to challenge the decision in writing.*"

We understand that this is intended to ensure that the legal representative has an opportunity to make representations before a decision is taken on the asylum claim. It may be that this could be made clearer. Were the general policy being proposed in paragraph 18 to have merit, we should accept that this provided an important safeguard. Clearly, where the consequences of a caseowner's decision may be that an asylum claim is refused for reasons that would have been addressed by a medical report and that a claimant, who should not be in detention due to his or her history of torture, continues to be detained it is vital that there is a full and proper opportunity for the legal representative to make representations on the matter. These concerns are compounded by the fact that a consequence of the caseowner's decision could be that an appeal may be heard and determined before the medical report is available. Of course, an immigration judge in the First-tier Tribunal would have an opportunity to prevent that by way of adjournment. However, that does not provide reason for the UK Border Agency to be any less responsible in ensuring that it is properly in a position to make a safe decision on the claim before it. In the Detained Fast Track, the relevant timescales are such that the risk that the case passes through the appeal process is particularly great.

Nonetheless, the proposal is not without difficulty. The proposal creates circumstances in which a legal representative may be required to do additional work. In cases not in the Detained Fast Track, assuming the representative is working under Legal Aid, that additional work will generally not be remunerated. This is because, as we have highlighted previously, the current Legal Aid arrangements provide the representative with a fixed fee regardless of the volume of work the particular case requires. (This is subject to a threshold, which is set at a level sufficiently high as to render it irrelevant to the concern expressed here.)

In the Detained Fast Track, the legal representative is paid an hourly rate. There is thus no fixed fee difficulty. However, there is a different difficulty. The proposal concerns the pre-decision stage of the process. Thus it is within a two or three days period in which the legal representative may be acting. As the Agency is aware, there is a duty rota of Legal Aid representatives undertaking Detained Fast Track work. This is to ensure that anybody subjected to that process is offered a Legal Aid representative – at least to advise and represent up to the point at which the asylum claim is decided. Representatives must ensure that they manage their diaries such that, when they are on the rota, they are sure to be available to undertake this work if a case is referred to them. This has an impact on their other workload because they must keep the diary free of matters such as appointments with clients and court appearances. Given a representative could not know in advance whether any case that may be referred will be one where a referral to the Medical Foundation and Helen Bamber Foundation may be made, the representative must know that he or she will have sufficient time in order to do this if needed. Similarly, the representative could not know whether any case that may be referred will be one that is subject to the proposals here. He or she will have to ensure that there is time available to make representations as envisaged here.

We have not had time fully to consider the implications of this. However, we note a funding concern in addition to the managerial concern we have outlined above. There is no guarantee that a case will be referred to a representative on the rota. Legal representatives are, therefore, paid an amount of money by the Legal Services Commission to compensate them for the Legal Aid work that they could have done (and been paid for) in the time that they set aside. If they must set aside more time this may mean that compensation requires to be uplifted.

Legality

We continue to have reservations as to the legality of the Detained Fast Track process. In *Case of Saadi v UK*[14], the Grand Chamber of the European Court of Human Rights ruled that the different fast track process operating at Oakington (now referred to as the Detained Non-Suspensive Appeals process) was lawful in part because it was a reasonable response to the very much larger numbers of asylum claims made in the UK around 1999 and 2000 than is the case now. In *RLC v Secretary of State for the Home Department*[15], the Court of Appeal ruled that the Detained Fast Track was lawful provided it was operated with a degree of flexibility to ameliorate any prejudice to the claimants subjected to that process. The premises to the Grand Chamber's judgment no longer apply, and there are

[14] Application No. 13229/03, judgment given on 13 January 2008
[15] *RLC v Secretary of State for the Home Department* [2004] EWCA Civ 1481

considerable differences in any event between the process that court considered and the one now operating. The premises to the Court of Appeal judgment are directly undermined by the proposed policy. It does not provide greater flexibility in favour of the claimant but rather reduces such flexibility by introducing circumstances where one vital aspect of the flexibility that has previously operated is removed. More generally, it is relevant that both judgments were given in the context of a policy position, under which survivors of torture were considered unsuitable for the Detained Fast Track. That position is also undermined by the proposed Asylum Instruction. This is significant, in relation to survivors of torture, given the Court of Appeal's acceptance that, as regards anyone (survivor of torture or not), it is "*inherent to so pressured a system*" as the Detained Fast Track that there is a risk a person with "*legally sound claim to asylum* [] *will fail to do himself justice and be refused*"[16]. We reiterate that, as the Court of Appeal emphasised, a right of appeal does not provide a proper response to that concern[17].

Impact Assessments

We are not aware that any Legal Aid Impact Assessment or Equality Impact Assessment has been undertaken. As we have indicated, we consider there to be a number of implications of the proposals at paragraphs 18-22 of the proposed Asylum Instruction, which ought to be the subject of an assessment prior to any implementation of this policy.

There are wider impacts that ought to be assessed. For example, and this would itself have a knock-on effect in relation to Legal Aid, channelling cases too quickly through the asylum system (particularly the Detained Fast Track) ultimately reduces rather than improves the capacity of that system to function safely or efficiently. If claimants cannot obtain their medical reports in time for these to be considered before claims may be refused and appeals dismissed, this will inevitably lead to fresh claims being made at the end of the process. This may prove costly, take away important resources (whether of the UK Border Agency, courts or legal representatives, and by extension the Legal Aid fund) and undermine confidence in the asylum system. These concerns are well rehearsed, and have been realised in the past.

Paragraphs 23 to 30 of the draft Asylum Instruction

If there were time we should have wished to consider and offer comments in relation to these paragraphs, which set out other proposed changes to the current policy.

Concluding remarks

Finally, we must draw to the Agency's attention the impropriety of having named the person whom we have referred to as *N* in the letter that was circulated to what is a very wide distribution list for the National Asylum Stakeholder Forum. It is useful to be alerted to matters, such as court judgments, upon which the UK Border Agency relies, or considers supportive, in relation to proposed policies; and we are grateful

[16] paragraph 11 *op cit*
[17] paragraph 15 *op cit*

for the prompt response to our request to be provided with a copy of the particular judgment in order to understand how it is considered supportive of the proposals here. We wish to draw to the Agency's attention that we have disclosed the judgment to a number of our members so that they may offer their thoughts on the judgment's relevance or consider its relevance in the context of any response they may be making. In doing so, we have redacted the judgment so as to avoid revealing the identity of the claimant in that case. That is something that should have been done before it was passed to us. We are particularly concerned at this because it is not the first time, even in recent weeks, where it appears to us that the UK Border Agency has disclosed the identity of a person who has sought asylum and to a relatively wide audience[18].

Sophie Barrett-Brown
Chair
ILPA
30 March 2010

[18] On 1 March 2010, a news item appeared on the UK Border Agency website headed '100 up for Leeds creche'. This carried a photograph of a child, gave the child's name and age and the name and age of a sibling. The item has since been removed from the website.