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Dear Ms Hutchison Hudson

Response to DFT & DNSA – Intake Selection (AIU Instruction), 21 July 2008

Thank you for your letter of 21 July 2008, and the “DFT & DNSA – Intake Selection (AIU Instruction)” of the same date (“the instruction”). This letter is a response to the instruction from ILPA and Bail for Immigration Detainees (BID). Given the contents of the instruction, we shall reiterate some of the points made in response to the consultation.

ILPA and BID remain opposed to accelerated procedures in principle, especially in detention. **We find there to be no justification in detaining people pending a decision on their claim.**

We are particularly concerned, on grounds of fairness, at accelerated procedures that induct applicants into detention at the initial point of claim, as is the case here, where applicants are inducted at the Asylum Screening Unit (“ASU”). There is insufficient information available at the ASU to enable a reasoned decision to be made on whether the case fits any real criteria (as opposed to vague criteria, or criteria so wide as not to be meaningful).

It is therefore appropriate to consider the stage at which, if detained accelerated procedures are to be retained, people enter the process, and to consider the stage at which meaningful information is available, as discussed in our response to the consultation.

We note that in your letter of 21 July 2008, induction at a later stage is now a part of policy. We reiterate concerns expressed at the July 2008 National Asylum Stakeholders Forum, and to Mr Hugh Ind after that meeting. Changes to the

Detained Fast-Track process may have significant effects upon the provision of legal services under legal aid arrangements. Further changes need to be carefully considered for their legal aid impact prior to implementation

The current criteria for suitability into the DFT amount to: any application is suitable, provided that there is no “evidence” to suggest that a decision cannot be made within the indicative timescales, and that none of the exclusion criteria apply.

As is now stated in the instruction, it is a requirement that all the information available, such as statements and documentary evidence, must be considered. However, for this to contribute to an effective decision-making exercise at the Asylum Intake Unit (AIU), this presumes

- (1) that the applicant with a complex or unsuitable case knows that this presentation of information at this point will be necessary, and
- (2) that there will be a real opportunity for the applicant to prepare the necessary information.

These presumptions seem unrealistic in most cases, given the emphasis on claiming asylum at the earliest opportunity, and the practical difficulty in accessing effective legal advice prior to claiming asylum.

The instruction still leaves the screening process with no systematic effort being made actively to gather facts to enable a case to be assessed as being suitable or not. The instruction does not indicate how it is expected that the required facts are to be gathered. Indeed the instruction states that the “referring officer” must make “no assessment” of whether a quick decision is possible.

It is worth setting out what the UNHCR Quality Initiative Fifth Report said of this—

‘UNHCR’s audit also examined the application of procedural safeguards in the DFT which aim to ensure that the speed of the DFT process does not affect the quality of decisions produced. UNHCR considers that the screening of asylum applicants and procedures for the application of flexibility and the removal of unsuitable cases from the DFT are often not operating effectively to identify complex claims and vulnerable applicants. As a result, UNHCR is concerned that inappropriate cases are being routed to and remaining within the DFT.’

This will continue so long as induction decisions are made at the screening stage as it is currently formulated.

Exclusion criteria in the draft instruction

General use of detention

Chapter 55 of the Enforcement Instructions and Guidance states—

‘[T]he White Paper confirmed that there was a presumption in favour of temporary admission or release and that, wherever possible, we would use alternatives to detention

...In all cases detention must be used sparingly, and for the shortest period necessary.’

As policy on the Detained Fast-Track is developed, these general principles appear to be receding into the distance. How are these principles being translated into practice? Why are `referring officers' not being asked to demonstrate that alternatives have been explored and that detention is being used as an exception?

Persons unsuitable for detention

Section 55.10 of the Enforcement Instructions and Guidance lists “persons...normally considered suitable for detention in only very exceptional circumstances”, including

- those suffering from serious medical conditions or the mentally ill;
- those where there is independent evidence that they have been tortured;
- people with serious disabilities;

The instruction (and Section 55.4 of the Enforcement Instructions and Guidance) are manifestly inconsistent with Section 55.10. The instruction acknowledges the criteria in Section 55.10, but then imposes additional requirements of degree, undermining the intention of the policy set out in 55.10.

For instance, 55.10’s “serious medical condition” is transformed in the instruction into “any medical condition which requires 24 hour nursing or medical intervention”; 55.10’s “the mentally ill” is metamorphosed to “Presenting with acute psychosis, e.g. schizophrenia and requiring hospitalisation” in the instruction. This further narrows the exception to the exclusion criteria as it relates to cases that raise medical questions. It is also unclear how UK Border Agency staff can make judgements on mental health screening when they are not qualified to do so.

We are gravely concerned by the new addition, “Those presenting with...learning disabilities requiring 24 hour nursing care”. The vast majority of applications by persons with any real degree of learning disability would be rendered incapable of being decided fairly within the indicative timescales, simply by the presence of the learning disability.

There is no obvious rationale for the difference in criteria between the instruction and 55.10. Although the period of detention under the Detained Fast-Track is (in theory) limited, in that respect it is no different from periods of detention in non-Fast-Track cases.

What will the effect of such examples be on the decision-maker? If the decision-maker at the ASU is confronted with a claimant suffering from physical or mental ill-health, then s/he will remind him/herself of the guidance given in this document; s/he will look at the examples given. Any claimant capable of attending the ASU will presumably not be receiving 24-hour care, and so there will be a large difference of degree between the severity of the ill-health suffered by the claimant, and the severity of the ill-health set out in the examples in the instruction/55.4.

Suspected survivors of torture

As regards “independent evidence of torture, this appears in the instruction and 55.10. It appears that this is interpreted as meaning a medical report, or an assessment letter from the Medical Foundation. This is too rigid. The rationale for this particular policy is that torture-survivors should not be detained. Given that a delay in claiming asylum will be taken by the UK Border Agency as a point against a claimant,

the UK Border Agency wishes people to claim asylum as soon as possible, and for this not to be delayed, for example, by seeking to obtain a medical report documenting torture. Thus in the typical case of a torture-survivor claiming asylum, there will be no medical report at the point the claimant claims at the ASU.

To make a reasonable decision, the decision-maker must be prepared to have regard to other evidence of torture. This could include visible scars, providing photographs of scars, or providing a statement detailing an account of torture.

We suggest adding to the instruction–

- Where there are reasonable grounds to believe that the claimant may be a survivor of torture.
- Where any officer involved in screening, thinks that the claimant may be a survivor of torture.

Suspected trafficked persons

The Council of Europe Convention on Action against Trafficking in Human Beings is not yet ratified by the UK but, given imminent ratification, we hope that the UK Border Agency would now seek to act in compliance with it. There is a duty to identify trafficked persons at the earliest opportunity, which, in this context, is the ASU or port if the person has not been identified before. One consequence of the identification of potential trafficking victims at the ASU or port should be to avoid their detention in the Fast-Track. The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking¹ recommend ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody. Detention is distressing and can be traumatic, and is inconsistent with the aims of the Convention.

Generally, it is recognised that identification of trafficked persons is difficult. As noted in the UN International Labour Office’s “Human Trafficking and Forced Labour Exploitation Guidance for Legislation and Law Enforcement”, a major challenge is that many victims do not perceive themselves as “victims” but rather as migrants who happen to be in a “difficult” situation.

Our concern with the current wording of the instruction is that “independent evidence...that the claimant has been a victim of trafficking” sits uneasily with the language of Art 13 of the Convention, which speaks of “reasonable grounds to believe”. The statements of the person may be such grounds. What would happen in the following scenario? A duty-officer at the ASU is confronted with an applicant. The duty-officer suspects that the claimant may have been trafficked; however, the duty-officer has no opportunity to investigate this within the constraints of the screening process. The duty-officer then has no “independent evidence” from another organisation. The duty-officer looks at the instruction and sees no guidance as to what to do.

¹ The official Explanatory Report to the Convention states that this chapter of the Convention “is centred on protecting the rights of trafficking victims, taking the same stance as set out in the United Nations *Recommended Principles and Guidelines on Human Rights and Trafficking in human beings*”.

We suggest adding to the instruction—

- Where there are reasonable grounds to believe that the claimant may be a trafficked person.
- Where any officer involved in screening, thinks that the claimant may be a trafficked person.

Suspected victims of gender-related persecution

As noted in a report by the New Asylum Model Quality Team in February 2006:

“The referral mechanism to the detained fast track is not sufficiently robust to identify potential gender-related claims which are not suitable for fast track”.

Unsurprisingly, a report by the New Asylum Model Quality Team, “Yarlswood Detained Fast-Track Compliance with the Gender API”, in August 2006, found that women who had experienced gender-related persecution had been admitted to the Detained Fast-Track. The report recommended a more robust referral mechanism. This is particularly important given the comments on the caseowners at Yarls Wood, made in the UNHCR Quality Initiative Fifth Report. We ask for provision to be made in the instruction to meet these needs.

Difficulties with removal

It is clear from the sections in the instruction “Travel Documentation for Removal” and “Legal Bars to Removal”, that it is envisaged that applicants for whom it is clear at the outset cannot be removed until long after the expiry of the indicative timetables, will still sometimes be put in the Detained Fast-Track. If a case is to be considered resolved only at the point of removal or grant of status, then for these applicants the Detained Fast-Track does not operate as a “fast track” at all. We can see no justification for putting these categories of applicant through an accelerated procedure.

Furthermore, this is inconsistent with Chapter 55 of the Enforcement Instructions and Guidance, when it states—

It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted.

Allocation of duty lawyers

A matter of continuing concern is the unpredictability for lawyers on the rota for a particular day, of whether they will receive a call from the UK Border Agency local office, allocating them a client. ILPA members often find that they are not called when they are on the rota; if they telephone the UK Border Agency local office on the morning to ask if there is a client for them, they are usually told that information is not available. A call may be received in the mid-afternoon, the day before the interview the following afternoon. This uncertainty increases the organisational difficulties faced by solicitors’ firms, thus further decreasing the viability of legal aid work.

We accept that there will be fluctuations in demand for duty lawyers. What is of concern is that the allocation of cases between lawyers on the day's rota is not transparent. It is unclear to us how allocation is made, if there are, for example, ten lawyers on the list for a particular day, but only six detainees requiring a lawyer and we should be grateful for details of the system of distributing work under the scheme.

Yours sincerely

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Chair
ILPA

Celia Clarke,
Director
Bail for Immigration Detainees