ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

29 February 2008

Mr Matthew Kirk
Asylum Operational Policy Unit (Team 2)
Border and Immigration Agency
14th Floor, Lunar House,
Croydon CR9 2BY

Dear Mr Kirk

Consultation on draft DFT & DNSA – Intake Selection (AIU instruction)

Thanks to you and your colleagues for the opportunity to participate in the workshop on 12 February 2008, and your email of 18 February 2008 including the draft AIU instruction ("the instruction"). We would like to take this opportunity to both comment upon the instruction and to provide some general observations upon the detained fast track, several of which were discussed among the various small groups at the workshop.

Comments upon the instruction:

Those to whom the instruction is addressed:
We understand that the instruction is addressed to staff at the Asylum Intake Unit (AIU). However, whereas the decision to take an asylum claimant into the detained fast track rests with AIU, the process of intake selection is a joint activity between AIU and those conducting screening – whether at port or at an Asylum Screening Unit (ASU) or elsewhere. The information gathered for deciding upon intake is gathered by the person conducting screening. It follows that an instruction on intake selection ought to provide guidance to both AIU and ASU/screeners at port so as to ensure that the information gathered is best suited and presented for informing the decision to be taken at AIU.

Further, given the acceptance by the Border and Immigration Agency (BIA) at the workshop that screening prior to intake is not well designed so as to identify many of those unsuitable for the detained fast track, the instruction ought to be designed to provide guidance to all at BIA who will have responsibility for an asylum claimant in those processes. The inadequacy of the selection process pre-intake is plainly relevant to later considerations of whether an individual should be released from the detained fast track, since the less reliable the original decision to take that person into that process the greater the responsibility upon the eventual caseowner to be aware and sensitive to reasons indicating that person's lack of suitability.

Need to distinguish DNSA and DFT:
As was touched upon at the workshop, the instruction needs to distinguish the detained fast track processes at Harmondsworth and Yarl's Wood ("DFT") from those at Oakington ("DNSA"). These differ fundamentally. The former are not concerned

with non-suspensive appeal cases (a distinction of rationale); and work to much faster timescales (a distinction of process). It follows that the guidance upon deciding whom to take into these differing processes ought to be different.

This inadequacy of the instruction is most marked in that part addressing Inclusion Criteria. The sole focus of that part is upon "*quick decisions*". However, the guidance given as to what constitutes a quick decision has no relevance to DFT. The 10-14 days period relates to DNSA, whereas decisions in DFT are made within 3-4 days. A decision to take a person into DFT based upon the guidance currently given in the instruction would not be safe since the sole criterion given for suitability is capacity to make a quick decision, yet the explanation of what constitutes a quick decision radically misstates the true speed of the relevant process.

Assessing whether a case may be decided quickly:
No guidance is given in the instruction as to what might make a case 'complex' and not capable of decision within either timescale. Cases are to be assessed on a case-by-case basis, but by what criteria? At the very least, the guidance ought to indicate those factors that are considered to militate in favour and those against speed – though necessarily distinguishing between the different processes so that a factor that may not be thought to militate against speed for the purposes of DNSA may nevertheless militate against speed in relation to DFT.

We note the Asylum Policy Instruction on Interviewing, which at Annex A indicates several types of case where flexibility may be required in the Solihull pilot. This is precisely the sort of guidance that ought to be included in the instruction giving indication of the sorts of circumstances that militate against speed.

Communication between ASU and AIU:
The instruction emphasises communication between the ASU and AIU, but in the absence of further guidance, it is difficult to see what the content of this communication is envisaged to be. The description of the current position given at the workshop on 12 February 2008 was vague as to the actual substance of the communication and decision-making. Yet, it is essential for the legitimacy of the decision-making process that there be evidence, upon which to decide whether a case can be decided quickly. It would encourage good decision-making if the draft instruction required the communication between ASU and AIU to be minuted in reasonable detail.

To allay concerns regarding the accuracy of screening notes, and the fairness of using the notes later in the asylum process, given the absence of legal representation at screening (and for most claimants absence of legal advice prior to screening), the BIA should routinely tape-record the interviews and acknowledge that screening interviews should not be relied on in making asylum decisions. It would be useful for the instruction to specifically address this.

Exclusion criteria:
Firstly, the instruction repeats an inconsistency within chapter 38 of the Operational Enforcement Manual ("OEM") as between those "*persons… normally considered suitable for detention in only very exceptional circumstances*" (section 38.10) and those who "*will usually be unsuitable for the detained fast track*" (section 38.4). The

former, which is in keeping with the general policy that "*in all cases detention must be used sparingly*" (section 38.1), includes:

- those suffering from serious medical conditions or the mentally ill

However, "*serious medical condition*" is transformed in section 38.4 and the instruction into "*any medical condition which requires 24 hour nursing or medical intervention*". Similarly "*the mentally ill*" are confined in section 38.4 and the instruction to those "*presenting with acute psychosis, e.g. schizophrenia and requiring hospitalisation*".

Although those listed in the instruction and in section 38.4 are merely examples, why are the examples drawn more restrictively than those listed at section 38.10 as normally unsuitable for detention? Given the instruction lists the examples in isolation from, and without reference to, the policy given at section 38.10, it can only encourage a far more restrictive approach to considerations of unsuitability for detention by the decision-maker at AIU than is compatible with the policy elucidated at section 38.10.

It may be that this is a further example of failure to distinguish the rationale and process in DNSA and DFT; and provide different guidance in respect of each. Whereas we would question the propriety of the guidance given in the instruction for DNSA purposes, it should be recalled that detention in DFT is not for a period limited to 10-14 days, but may last several weeks; and indeed the period of detention may and in many cases does ultimately extend to several months.

Secondly, the instruction repeats an inadequacy of the policy at chapter 38 of the OEM. The reference to "*independent evidence*" of torture is overly rigid. In practice, this is interpreted as meaning a medical report, or an assessment letter from the Medical Foundation. However, 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 BIA as a point against a claimant, it is imperative that claims are not 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 available when the asylum claim is made at ASU.

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

Thirdly, there is a similar inadequacy in the instruction regarding trafficking victims where again the reference is made to "*independent evidence*", and the criterion is further confined by requiring that this come from "*a reputable organisation*". Although the Trafficking Convention is not yet in force, we would hope that the BIA would now seek to act in compliance with it. On that premise, given that there is a duty to identify trafficked persons, this should be done at the earliest opportunity, which in this context is at screening. One consequence of the identification of potential trafficking victims at screening should be to avoid their detention in the fast track processes. The UN Recommended Principles and Guidelines on Human Rights

and Human Trafficking[1] recommend ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody. Detention can be distressing and even 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 most 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 the requirements for "*independent evidence*" and that such evidence should come from particular sources leaves open the risk that victims of trafficking are detained for no better reason than specific evidence is unavailable to the individual victim. This is not consistent with Article 13 of the Convention, which speaks of "*reasonable grounds to believe*". Consider the following scenario. A duty-officer at the ASU is confronted with an claimant. 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 any, still less an organisation (or one considered to be reputable). Even if the duty officer passes on the information to AIU, the instruction appears to encourage AIU to disregard this information for the purposes of assessing suitability for the detained fast track.

The instruction and section 38.4 of the OEM may be improved by adding to their respective exclusion lists:

- Where any officer involved in screening, suspects that the claimant may be a trafficked person.

A similar approach might be taken in respect of torture survivors.

Suspected victims of gender-related persecution:
As noted in a report by the NAM Quality Team of 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*". A further report by the NAM Quality Team *Yarlswood Detained Fast-Track Compliance with the Gender API* of August 2006 found that women who had experienced gender-related persecution had been admitted to the DFT. The report recommended a more robust referral mechanism. BIA has itself identified needs in the treatment of these claimants, and we would ask that the instruction expressly provides for circumstances in which claims founded upon gender-related persecution may fall within the exclusion criteria.

[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"*.

Onward Consideration of Suitability:
Firstly, the instruction confirms that: "*assessment* [of suitability]… *must be carried out throughout the life of the claim*". However, the value of this statement in an instruction solely addressed to AIU is questionable. It appears to do no more than encourage AIU to take comfort in making intake decisions on the basis that someone else will continue to have an eye on the individual's suitability for the detained fast track. As indicated above, we would encourage the adoption of guidance that is provided for all active BIA participants in the process (including those conducting screening, AIU and caseowners) so that there is a shared understanding of the reasonable expectations and responsibilities of each.

Secondly, it would increase confidence in the process if this produced a written decision at key points. The monthly detention reviews could be adapted to reflect this. We suggest that a decision letter as to suitability should be produced as soon as practical after the asylum interview. In practice, as was accepted by the BIA at the workshop, it is at the point of the asylum interview that the decision-maker first has sufficient information to make a reasoned decision as to whether the claimant is or is not suitable for the detained fast track.

Thirdly, it is the experience of our members that a torture survivor referred to the Medical Foundation pre-interview is much more likely to be taken out of DFT than a case referred after the decision. This indicates that onward consideration is not being conducted consistently according to the exclusion criteria.

General observations upon the detained fast track:

We remain opposed to accelerated procedures in principle, particularly in detention. We would particularly refer to –

1. *Impact of sexual violence on disclosure during Home Office interviews*, The British Journal of Psychiatry (2007) 191: 75-81, Diana Bögner, Jane Herlihy, Chris R. Brewin.
2. UNHCR observations and recommendations in respect to the fast track system in the Netherlands, July 2003.
3. *Accelerated Asylum Procedures in Council of Europe Member States*, Doc.10655, 2nd August 2005, Pedro Agramunt, Rapporteur for the Committee on Migration Refugees and Population.
4. *Seeking Asylum Is Not A Crime - Detention of people who have sought asylum*, Amnesty International, 2005.

Rationale for the detained fast track process
As indicated at the workshop, there is a pressing need to reconsider the rationale for the detained fast track in the light of the New Asylum Model ("NAM"), which post-dates the introduction of both DNSA and DFT. NAM is designed to speed up the asylum process across the board. As such its introduction ought to have a bearing on whether there is a continued need for a detained fast track – whether in its current guise or at all.

As was accepted by BIA at the workshop, there simply is insufficient information available at screening to enable a reasoned decision to be made on whether the case fits any real criteria of either suitability for inclusion or exclusion (as opposed to

vague criteria, or criteria so wide as not to be meaningful). We note that section 38.4 of the OEM lists criteria that are meant to indicate a case is unsuitable for "*referral*" to the detained fast track. This particularly highlights that if there is to continue to be a detained fast track, the earliest point that claimants should be taken into such a process is post-substantive interview by when there is a real prospect that information relevant to assessing suitability will, in most cases, have been disclosed.

The current criteria for induction are that a decision can be taken quickly and none of the exclusion criteria apply. It is plain that there is no systematic effort being made to gather facts to enable a case to be assessed against these criteria, such as they are. Moreover, even if there was an adequate fact-gathering process, how is it to be decided that a case can be decided quickly? Currently, no guidance is given as to what might make a case 'complex' or what factors militate in favour or against the capacity to make a quick decision. Currently, it appears that individual decision-makers are left to fill in the policy gaps without any or any published guidance; and this causes similar cases to be treated differently, with no good reason. Indeed the only tangible consideration that has been articulated by BIA, and which appears to encapsulate the reality of the situation, suggests that intake decisions are dominated by the operational consideration of availability of bed spaces. (If that is the reality, then the instruction ought to say so.)

We note that the judgment of the Grand Chamber in *Saadi v UK*[2] is expressly founded on the basis that the intake decision to a fast track process is not arbitrary[3]. Of course, that judgment relates to the DNSA, which must be distinguished from the DFT in which decisions are taken at far greater speed and individuals are detained for significantly longer periods of time. Moreover, the majority judgment in *Saadi* also made plain that their decision was founded upon the particular situation – in particular the very much larger and growing number of asylum claims – facing what was then the Immigration and Nationality Directorate at the time (2000)[4]. That situation now is very much changed[5].

On-site legal advice at the ASU:
The Legal Services Commission have indicated they have a budget to provide on-site advice at the ASU with a duty advisor scheme, and this should be taken forward. Factors such as torture or gender-based persecution, which should render the person unsuitable for detention, should be presented to the AIU in a context where the person has received legal advice and representation at ASU.

Health screening at the ASU:
In the event that a decision is made to induct someone into DFT, the person should be medically screened at ASU.

The current position is this. A decision is made while the person is at ASU to detain the person and take the person into DFT. The person is sent to the detention centre,

---

[2] Application (no. 13229/03), European Court of Human Rights judgment given on 29 January 2008
[3] paras. 73-74 *op cit*
[4] para. 80 *op cit*
[5] The number of claims for asylum has been falling year on year, and stood at 23,430 for 2007; whereas in 2000 the number had been rising year or year, and stood at 80,315.

and seen very shortly after arrival by a nurse. When the person has their DFT induction interview in the detention centre, which will likely happen some days later, they will sign an authority allowing the BIA to get their medical records.

Bringing the screening process forward to ASU has the advantage that some people may be identified as unsuitable for detention while still in ASU, thus avoiding re-traumatising some vulnerable people. We accept that operational circumstances are different where claims are not made at ASU, but this does not provide reason not to improve the process of intake to DFT where there is opportunity to do so.

Comments were made at the 12 February 2008 workshop that notes by health centre staff documenting claims of torture could not currently be treated as "*independent evidence*" by BIA caseworkers because the health centre staff are simply reiterating what the claimant tells them. That is a good example of an overly rigid approach; and one which would be vulnerable to judicial review. Indeed this is not the approach given in the Asylum Instruction of 7 February 2008, *Rule 35 - Reports of Special Illnesses and Conditions (Including Claims of Torture) Received from Immigration Removal Centres, Regarding Detainees*, in the section, *Receipts of Reports of Special Illnesses and Conditions (Including Torture Claims): Detention Review*, *Action to be Taken by the Officer Conducting the Detention Review*. Even if it is the case that there is nothing found on examination by the healthcare staff that corroborates the assertion of torture, that merely goes to weight; it is not appropriate to discount the assertion or take no action.

Allocation of duty lawyers:
Currently practitioners report to us that the usual practice in Harmondsworth and Yarl's Wood appears to be that the BIA local offices allocate cases to duty lawyers the day before the asylum interview. By then the detainee could have been in the detention centre for a few days. We are concerned that this means time, which is particularly valuable in the context of the DFT/DNSA and could have been used by the duty lawyer to assess and prepare the asylum application, is wasted – to no-one's advantage.

BIA ought to ensure that allocation is made to a duty lawyer (where the claimant wishes to instruct a duty lawyer) at the earliest possible time. We note that the interview date must be allocated at the same time, as the interview date is a fixed event that the lawyer must plan his or her diary around. If the interview date was not allocated at the same time as the lawyer, the result would often be that the lawyer would see the client to start preparing the case, only to find him- or herself unable to attend the asylum interview due to diary commitments elsewhere.

Accordingly, we look forward to hearing from BIA further to the discussion at the workshop regarding the possibility of moving the timing of referral to a duty lawyer to the time of the intake decision rather than post-induction to the detention centre. In any event, there ought not to be any delay after induction at the centre.

Another matter of concern is the unpredictability for lawyers, on the rota for a particular day, of whether they will actually receive a call from the BIA local office allocating them a client. Our members often find that they are not called when they are on the rota. If they telephone the BIA local office on the morning to ask if there is

a client for them, they are usually told that information is not available. The actual call may be received in the mid-afternoon, the day before the interview the following afternoon. The effect of this uncertainty is to increase the organisational difficulties faced by solicitors' firms, thus further decreasing the viability of legal aid work. We accept there will be fluctuations in demand for duty lawyers. What is concerning is that there is no transparency in the process of how the cases are allocated to lawyers on the rota for calls on a particular day. If there are, say, ten lawyers on the list for a particular day but there are only six detainees requiring a lawyer to be allocated, how is it decided which lawyers are allocated the detainees? There should be a transparent and fair system of distributing the work under the scheme.

Disclosure to legal representative:
At the time of the allocation of the duty lawyer, full disclosure of all relevant documents should be made. Currently, the BIA will typically only release the screening interview. This limited disclosure further burdens the legal representative with having to request disclosure on each case.

Quality of decision-making:
As was indicated at the workshop, the quality of decision-making and the very wide disparity of success rates for those within the DFT as compared to those not in that process remain matters of serious concern. We have noted the short feedback given at the workshop regarding the discussion in one of the small groups (in which we were unable to participate) of the BIA Quality Team. Particularly in the context of DFT, there appear to be strong reasons for giving further consideration to the time lag between audit and report back (we understand usually four weeks) and the current lack of power for the Quality Team to intervene directly when their audit indicates poor or bad practice, including the power to remit cases that have been previously decided. Generally, where casework practice has been found to be inadequate, there should be a systematic response to help the caseworker, with training, mentoring and so on.

Yours sincerely

Sophie Barrett-Brown
Chair, ILPA