

**TSAI Project: Proposal to use Video Conferencing for  
substantive Asylum Interviews of Prisoners**

**Immigration Law Practitioners' Association  
Response to Proposal**

**Introduction:**

1. The proposal is identified in the short note provided by Mr Sims, which has been circulated to the Asylum Policy Stakeholder Group (APSG):

*“IND proposes to undertake a short initial trial to develop procedures and ensure that the equipment is compatible, before using VC to conduct a live interview. However, we appreciate that there may be circumstances in which video conferencing might not be [an] appropriate medium to conduct such interviews and we would welcome stakeholder comment in developing a protocol for its use.”*

2. As is made clear in the first bullet point in the note, the interviews to which this proposal relates are substantive asylum interviews.
3. In this response, and under separate heading, we:
  - highlight some established principles concerning asylum interviews; identify general factors inhibiting full disclosure at interview;
  - consider the reasons TSAI advance for introducing video conferencing;
  - provide some general observations upon the proposal; and
  - give an analysis of the viability of the proposal.

**Established principles concerning substantive asylum interviews:**

4. As a matter of principle, it is essential to recognise that these interviews concern matters of the most vital importance. Asylum is granted to persons, who are at risk of execution, torture and other serious ill-treatment. As Lord Bingham, then Lord Chief Justice, said in *Thirukumar* [1989] Imm AR 402, at 414:

*“It is... plain that asylum decisions are of such moment that only the highest standards of fairness will suffice.”*

5. So far as how the asylum interview relates to this, the Court of Appeal has said more recently in *Dirshe* [2005] EWCA Civ 421, at para. 14 (having adopted Lord Bingham's imperative as to the highest standards of fairness):

*"The interview is a critical part of the procedure for determining asylum decisions. It provides the applicant with an opportunity to expand on or explain his written account and for the [Home Office], through the interviewing officer, to test that account and explore any apparent inconsistencies in that account. The interview could well be critical to any determination by either the interviewing officer or appellate authorities as to the credibility of the applicant..."*

6. Moreover, the Court of Appeal has made clear that the prospect of an appeal is not of itself an answer to systemic inadequacy in asylum interviews. In *RLC* [2004] EWCA Civ 1481, the court held at para. 15:

*"First of all, an applicant is entitled not only to a fair appeal but to a fair initial hearing and a fair-minded decision. Secondly, ... if the record of interview which goes before the [immigration judge] has been obtained in unacceptably stressful or distressing circumstances, so that it contains omissions and inconsistencies when compared with what the applicant later tells the [immigration judge], the damage may not be curable."*

**General factors inhibiting full disclosure at interview:**

7. The purpose of the asylum interview is, or ought to be, to best ensure that the reasons for the claim and the relevant history of the asylum-seeker are fully disclosed. It is well recognised that asylum-seekers often have significant hurdles to overcome in order to provide full disclosure.
8. Many will not speak English. The need to use an interpreter itself introduces a barrier to disclosure. Firstly, the asylum-seeker is precluded from the natural means of communicating with another person directly. Secondly, the interviewer's capacity to communicate to the asylum-seeker and understand the asylum-seeker is inevitably reduced. The extent to which this may happen will depend upon the quality of the interpreter and also upon the qualities of interviewer and asylum-seeker.

9. Many will have social, cultural or religious backgrounds, which themselves create a barrier to full disclosure. It may be that social, cultural or religious norms familiar to the asylum-seeker promote silence or reservation in response to questioning upon sensitive matters related to the asylum claim. It may also be that different normative experiences or values inhibit effective communication because verbal or physical expressions carry varying meanings or nuances.
10. Many will have had experiences of authority which have led them to distrust persons in authority. Such distrust may be blatant in the sense that the asylum-seeker's experience is that figures of authority have consistently abused him or her and his or her family or others sharing certain characteristics (e.g. race or religion); and hence the individual instinctively distrusts any authority figure. Such distrust may also be more subtle in that experience has led the asylum-seeker to react distrustfully in the face of verbal or physical expressions, which trigger particular interpretations.

Many will simply be inexperienced at being interviewed, and find the process unnatural, inhibiting and even threatening.

12. The foregoing may be significantly exacerbated depending upon the subject matter which the asylum-seeker needs to disclose. Experiences of abuse often lead to mixed feelings, including shame, guilt and trauma. Gender may play a significant part in how any such feelings are experienced and may interfere with disclosure in any particular case. An asylum-seeker may have been raped or otherwise tortured or abused, or been compelled to do something of which they are ashamed (e.g. abandon a child or someone else for whom they feel responsible; implicate another under interrogation). These, and many other experiences, may be ones that the asylum-seeker instinctively wishes to conceal, for reasons that are wholly natural and not intrinsically dishonest.
13. As indicated, some asylum-seekers will be traumatised. This may be by their experiences of past abuse, or by experiences in getting to the UK or experiences while in the UK (including while in prison). It should be noted

that asylum-seekers in prison will likely be particularly isolated – confined in establishments where very few or nobody speaks their language, and without ready or effective access to lawyers or social contact. These difficulties may also seriously undermine any access that might otherwise be available to medical support or religious or spiritual guidance. HM Chief Inspector of Prisons published her thematic report on the situation of foreign prisoners in November 2006 and identified the foregoing as significant problems for foreign prisoners<sup>1</sup>

14. Those who have been traumatised may suffer from significant mental illnesses. Some may not have been formally identified as ill or the subject of any care or treatment. Some may simply not be easily identifiable – particularly where the individual’s social contact is very limited and the signs of trauma or illness may be misunderstood as the effects of linguistic or cultural difference.
15. Mental illness or trauma may itself constitute a substantial hurdle to full disclosure, whether because the asylum-seeker’s capacity to understand the interviewer or concentrate upon the interview is reduced, or because the effect of trauma has been to repress certain experiences, or the illness simply inhibits the building of any effective relationship between the asylum-seeker and interviewer in which disclosure can be made.
16. In our view, it is plain that asylum interviews are among the most sensitive and demanding formal interviews that an authority may be required to conduct. The proposal to conduct such interviews via video-link requires careful assessment of how effective an interview conducted in that way can be, having regard to the various matters we have highlighted.

**Reasons advanced for use of video-conferencing:**

17. The reasons advanced in the note reflect the brief analysis given at the recent APSG meeting. In essence, video conferencing is identified as a cost saving

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<sup>1</sup> HM Chief Inspector of Prisons’ thematic report on foreign prisoners was published on 3 November 2006; and a follow-up report was published on 23 March 2007.

to the Home Office. Savings would be made on accommodation and travel for Home Office staff and interpreters (and also on waiting times). The problem of having insufficient time to complete an interview, and the need for a pre-visit risk assessment, is also highlighted. We note, however, there is no detailed cost assessment indicating how much is the annual cost to the Home Office of these interviews, nor any projected annual saving if the proposal is taken up.

18. The note gives examples of when video conferencing is currently used – for remand hearings, and consultations between clients and lawyers. These facilities are used generally for prisoners. We are not aware of any assessment of their use for asylum-seeking prisoners. In particular, we are not aware of any assessment of their use in the course of preparation for or pursuit of an asylum claim or appeal.

**General observations upon the proposal:**

19. The proposal invites stakeholder input for the purpose of developing a protocol for the use of video conferencing for asylum interviews. However, that assumes video conferencing will be adopted. We had understood from the recent APSG meeting that this had not been decided. If it is already decided that video conferencing will be introduced for asylum interviews of prisoners, we would be grateful to receive confirmation of that. We would object to that, since such a decision would be premature. The presentation on the proposal at the meeting indicated that no consideration had been given to whether video conferencing would have any impact upon an asylum-seeker's ability to disclose information. Even when the matter was raised, in language that was readily understood by other stakeholders who were present, the response given clearly misunderstood the issue in thinking that the concern was one of confidentiality. (Nevertheless, it may be that misunderstanding reflects another reason why an asylum-seeker asked to disclose information via video-link might be suspicious of this method of interview and inhibited from making full disclosure.)

20. The proposal set out in the note indicates it is now accepted that “*there may be circumstances in which video conferencing might not be [an] appropriate medium to conduct such interviews*”. With respect, this was not appreciated at the meeting; and the note now circulated still gives no indication of any real understanding of such concerns. There is no particular recognition of what those concerns may be; still less any attempt to address such concerns in the note.
21. In such circumstances, it is plain that the starting point ought not to be the development of a protocol for use of video conferencing, but careful consideration of whether it is viable to use video conferencing for these interviews at all.

**Analysis of the viability of the proposal:**

22. Having regard to the foregoing, we consider the following analysis to clearly indicate that video conferencing is not a viable option for asylum interviews.
23. As has been indicated, and is well established in UK jurisprudence, asylum interviews require the highest standards of fairness and concern matters of the utmost importance.
24. As is equally well established, key to any adequate asylum interview is that it provides the best opportunity for the asylum-seeker to make full disclosure of his or her fears and relevant past experiences. There are several features of asylum interviews, which have been analysed above, inhibiting disclosure. Some of these features form part of the background, indicating a starting point that is difficult and therefore requires careful attention to the method of interview. Other features may be significantly exacerbated by the interview method.
25. The use of video conferencing for remand hearings is plainly not capable of providing comparison with the proposal of using such facilities for asylum interviews. Neither the length, complexity nor substance of a remand hearing indicates any basis for comparison.

26. We are not aware of the extent to which it is said that lawyers dealing with asylum claims and appeals use video conferencing; or for what purpose. We are not aware that such facilities are used by lawyers for the purpose of conducting detailed interviews with a view to taking instructions on asylum-seekers' fears and histories. We can imagine that in certain circumstances, video conferencing facilities might be used by lawyers to impart discrete information to an asylum-seeker without the need for a prison visit; or to check a discrete issue in relation to information previously disclosed face-to-face. Our experience suggests that such discrete matters may sometimes be addressed by telephone if a personal visit cannot be undertaken. Of course, asylum-seekers will be far more likely to be familiar with use of a telephone than a video-link.
27. We have profound reservations about the suitability of video conferencing as a means to taking an asylum-seeker's history. However, we note a critical factor that might allay such reservations in exceptional circumstances where a legal representative might choose to use video-link facilities. We would expect that an asylum-seeker would, prior to any communication via video-link (and, depending on the subject matter, telephone), have met his or her lawyer. Ordinarily, we would think the lawyer may have met the asylum-seeker more than once, and in any event would have taken instructions face-to-face concerning the asylum-seeker's fears and history. It may be, depending on the particular circumstances, that the lawyer would be able to undertake some follow-up work via video-link because a relationship of trust and confidence had already been established.
28. The reason for our general reservations is that video conferencing is a highly unnatural form of communication, with which very nearly (if not all) asylum-seekers will have no experience. It is highly unsuited, therefore, for the purpose of disclosing sensitive information – even to someone with whom the asylum-seeker has established some relationship of trust and confidence and is recognised by the asylum-seeker as acting in their interests.

29. An asylum-seeker will not, however, be able to establish such a relationship with a Home Office interviewer. Firstly, the interviewer represents the Home Office and not the asylum-seeker, and cannot expect to be perceived by the asylum-seeker as acting in his or her interests. Secondly, the asylum-seeker will have had no opportunity to establish any relationship prior to the interview.
30. The use of video-link would greatly accentuate the hurdles to disclosure we have previously identified by inhibiting the asylum-seeker's capacity to build or feel any relationship with the interviewer and by impairing the interviewer's capacity to notice or pick up on signs that the asylum-seeker was so inhibited. (It may even be the case that an asylum-seeker interprets the decision not to come and interview him or her in person as indicating that the interviewer is fundamentally uninterested in the asylum claim.) Similar difficulties of establishing any relationship of trust and confidence would apply in respect of the interpreter.
31. We recall the observations of the Court of Appeal, highlighted above, to the effect that the possibility of remedy by way of appeal cannot provide justification for failing to ensure the highest standards of fairness and opportunity for full disclosure at the interview. Moreover, we note those observations did not have regard to either: (i) an inadequate interview might lead to a wrong certification of an asylum claim such that any appeal was precluded before the asylum-seeker was removed to the country where he or she feared persecution; or (ii) under section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, an inadequate interview might lead to allegations of failure to cooperate with the interviewer, which themselves might be relied upon as requiring an adverse assessment of credibility.
32. Whereas we recognise that there may be cost savings to the Home Office if video conferencing were adopted, we would expect that there would be increased costs elsewhere. We have indicated why this method of interview would be likely to greatly exacerbate current difficulties in ensuring full disclosure on the part of an asylum-seeker. The chances that a wrong or



inadequately reasoned initial decision was made, precipitating an appeal, would be increased; similarly the prospect of litigation challenging the interview, or the likelihood that the appeal was extended to deal with challenges to the interview (in addition to the substantive issue of whether the claim was made out). Just as such a method of interview might be the cause of increased time spent at a court or tribunal hearing, it may require those representing asylum-seekers interviewed by this method to spend more time with their clients taking instructions on the asylum-seekers' experiences of interview. We are not in a position to assess the relative cost balance. However, as plainly recognised by the Court of Appeal in the *RLC* case, referred to above, as a matter of principle it is wrong to systemically jeopardise fairness at the initial decision stage on the basis that the appeal stage will provide a remedy. In such circumstances, any cost balance assessment is simply irrelevant.

33. We note that the effectiveness and fairness of video conferencing in immigration hearings has been subject to an American study – see *Videoconferencing in Removal Proceedings: A case study of the Chicago Immigration Court*, 2 August 2005<sup>2</sup>. The resulting report noted:

*“Much of the literature on videoconferencing concerns its use in criminal courts. Commentators have focussed particularly on the risk that videoconferencing may skew a court's perception of defendants or other witnesses through its failure to convey subtle nonverbal cues, its interference with ordinary eye contact, and the possibility that camera angles or screen size will distort perceptions of a witness's affect. Criminal defendants, who lack make-up, coaching, and winning wardrobes, are unlike the photogenic persons we are accustomed to seeing on television, and this disconnect with one's expectations has the potential to impact decision-makers' perceptions negatively. A defendant appearing from a remote facility (often inside a prison) may not exhibit the demeanor one expects in a courtroom. Studies, moreover, confirm that people evaluate those with whom they work face-to-face more favourably than those with whom they work over a video connection. Studies indicate that fact-finders empathize more with live witnesses, and that decision makers are less likely to be sensitive to the impact of negative decisions on physically remote*

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<sup>2</sup> The report is available from [www.chicagoappleseed.org](http://www.chicagoappleseed.org) and was produced by The Legal Assistance Foundation and Chicago Appleseed Fund for Justice.

*persons. Finally, commentators have pointed to the possibility that videoconferencing may make it more difficult for criminal defendants to understand what is happening in a court...”*

34. The report found that these problems similarly affected those, who were subject to immigration hearings; and also found that these difficulties exacerbated problems with interpreting. So far as asylum cases are concerned, there is judicial authority in the United States finding that video conferencing may cause profound difficulties where a credibility assessment is required.<sup>3</sup> These profound, and potentially prejudicial, difficulties will be similarly applicable to an asylum interview. Indeed, they may be exacerbated because the worst extent of these difficulties will not be ameliorated by the presence of legal representation in view of current legal aid funding arrangements for interviews.
  
35. In conclusion, we do not consider the proposal to be viable at all. Substantive asylum interviews are simply too sensitive and complex to allow for video conferencing. We do not believe that protocols for their use provide any satisfactory answer to the concerns we have expressed here. If it is suggested otherwise, we would be grateful to receive any proposed protocols along with reasons advanced as to how such protocols provide answer to the concerns we have raised.

30 March 2007

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<sup>3</sup> Rusu v INS, 296 F.3d 316, 322 (4<sup>th</sup> Cir. 2002)