ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

2 March 2012

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By email to chiefinspectorukba@icinspector.gsi.gov.uk

Dear John

Re: Report on Asylum: A Thematic Inspection of the Detained Fast Track

I write following the Detention Forum meeting on 23 February 2011, at which you and Mark Voce spoke and responded to questions and observations on the report. We hope that the report will contribute to the ongoing discussion about the asylum process and the use of both detention and accelerated procedures.

At that meeting, Steve Symonds, representing ILPA, raised two points of concern about the report and I write to elaborate on these.

Quality of decision-making in the Detained Fast-Track

The report says at paragraph 6.10:

> "*Both senior managers reiterated that the number of appeals dismissed by the independent Tribunal was indicative of high quality decision making by the Agency. The dismissed appeal rate in our file sample (93%) also supported the view that decisions were of high quality.*"

The executive summary states:

> "*...the quality of decisions was high with the independent Tribunal upholding 93% of the Agency's decisions to refuse.*"

The report does not provide any sound basis for its assertion that the quality of decision-making is high. The terms of reference, set out at paragraph 3.3, do not include any inspection as to the quality of decision-making; and the

only basis for the assertion given in the report is the very low success rate for appellants before the First-tier Tribunal (Immigration and Asylum Chamber).

The quality of decision-making is a function not only of the quality of the decision-maker, but of the quality of the material with which the decision-maker has to work. That is as true of the immigration judge as of the decision-maker at first instance.

At the meeting, two asylum-seekers, Milton and George, who had been through the Detained Fast- Track at Harmondsworth, spoke. They explained that in the extremely short time they, and others they were detained with, had with their legal representatives prior to interview and refusal of asylum, they had no opportunity to develop a relationship of trust with those representatives. As Milton, in particular, explained, having been detained at the point of first contact with the UK Border Agency, he was in distress at his detention and fearful as to his immediate prospects, and his capacity to place his trust in anyone was accordingly even lower than it might otherwise have been. In all too short a time, he, like many others, was refused asylum and without legal representation. As he put it: "*What do you expect from the judge?*" He did not know what he was doing, what was needed and how he could or should go about preparing and presenting his case. Even if he had, given the timescales and his detention, the prospects that he could have prepared and then presented his asylum appeal properly were poor. As he said, "*You have nothing, no evidence.*" Had he had a legal representative for his appeal, however, the prospects of that representation being effective would still have been reduced by inadequacy of time to prepare and lack of the client's trust to which he and George referred.

As the report highlights (and see below), the information available to the UK Border Agency at the time the decision is taken to put a person into the Detained Fast-Track is not adequate for any meaningful evaluation of the person's "suitability" under the Agency's policy on detention or the nature, legal or evidential complexity, of the person's asylum claim. In the circumstances, there is no basis for concluding that the means by which individuals are selected for the Detained Fast-Track should result in the selection of those with asylum claims that are hopeless, yet the statistics consistently and throughout the operation of the Detained Fast-Track at Yarl's Wood and Harmondsworth show that, whatever the true strength or weakness of the individual cases, those who do not escape that process have extremely poor prospects of success at initial decision and on appeal.

Just as the two senior managers told your inspection team that the extremely low success rate on appeal indicated the quality of decision-making in the Detained Fast-Track, so senior managers have consistently told ILPA and others, for example repeatedly at meetings of the National Asylum Stakeholder Forum, that the quality and reliability of the Detained Fast-Track is attested to by the decisions of the immigration judiciary in dismissing appeals. The statement in the report, in contradiction of the findings by the UNHCR in its reports on decision-making in the Detained Fast-Track (where the remit had included to evaluate quality of decision-making) appears to endorse the position that the UK Border Agency has adopted throughout. You

expressed your aspiration that the report should lead to the Agency conducting an evaluation of the Detained Fast-Track; and you indicated some disappointment that no meaningful evaluation had been conducted by the Agency to date. It appears to ILPA less likely that the Agency will be moved to do this if its statements as to the quality of decision-making are not being challenged, and are being endorsed. The very first paragraph of the Agency's response to the report's recommendations repeats the assertion as to the quality of decision-making and highlights the report's endorsement of it.

Senior managers in the UK Border Agency have repeatedly said, for example at meetings of the National Asylum Stakeholder Forum, that the Detained Fast-Track is there to deal with manifestly unfounded cases. That view has been expressed by staff at all levels of the agency; and at the meeting it was suggested by one of the contributors that it had been suggested to her by an immigration judge. The published policy position is different. As set out in your report, the published policy position is that the Detained Fast-Track is for cases that can be decided quickly. The belief, firmly embedded within the Agency, that these are manifestly unfounded cases, despite that neither being the published policy position nor bearing any relation to the means and information by which cases are selected for the Detained Fast-Track, is a further factor in the disastrous prospects for asylum-seekers whose claims are determined in that process.

In responding to concerns raised at the meeting by ILPA, you emphasised that it is no part of your remit to undertake any evaluation of the quality of judicial decision-making. We accept that. But, as Milton put it so eloquently and simply ("*What do you expect from the judge?*"), there is no need to question the quality of judicial decision-making to recognise the prejudice to appellants in the Detained Fast-Track in seeking to pursue their appeals. This is sufficient to identify that poor success rate in so doing is not a reliable indicator of the quality of the initial decisions reached.

Screening

Your report states:

> **Recommendation 1: "*Reduces the number of people allocated incorrectly to the Detained Fast Track by enabling and encouraging applicants to disclose personal information at screening interviews affecting their suitability for the Detained Fast Track.*"**

Paragraph 5.14 states:

> "*Any assessment of the suitability of people for detention and the likelihood that a claim could be decided quickly must be done on a case by case basis and screening is utilised to gather information in order for the assessment to take place... Screening was not designed to elicit the most relevant information for DFT assessments to be made.*"

Having identified that screening is not an appropriate means of evaluating a person's suitability for detention or whether his or her case can properly be decided more quickly than others (let alone at the extreme pace of the Detained Fast-Track), the report reaches the conclusion that screening must be adapted to undertake and enable more detailed enquiry relating to the asylum-seeker's "suitability" for detention and the nature, legal and evidential complexity, of his or her asylum claim.

This conclusion and the recommendation which follows it, are grounded in an incomplete understanding of the context of screening and limitations on enquiry into the substance of the asylum claim. If this recommendation is acted upon, without modification so as to address that context, the result will be the removal of a vital safeguard for all those seeking asylum. This is a matter that ILPA has raised with the UK Border Agency many times. For example, on 13 June 2011, we wrote to the Head of the Asylum Screening Unit following a meeting with her and said:

> "*We raised at the meeting the seeking of information at screening, and the extent to which this trespasses on the substantive enquiry into the asylum claim. For many years, the position has been advanced and maintained between the UK Border Agency and the Legal Services Commission that screening does not form part of the substantive asylum process. That has been the basis for not funding Legal Aid representation at screening. However, at times that position has appeared more imagined than real. Currently, many asylum-seekers are effectively excluded from the procedural safeguard of legal advice and representation before and during screening, yet the procedural requirements as regards screening are less stringent (e.g. there is no general requirement to offer or permit tape recording).*"

At the Detention Forum meeting, you indicated concern that enquiry at screening was inconsistent. Sometimes enquiry was made into the substance of the asylum claim and sometimes it was not. You also indicated a concern that the environment at screening was not conducive to an enquiry into that substance, or into characteristics of the asylum-seeker such as whether his or her sexuality and/or history (e.g. of torture or trafficking), which characteristics would almost inevitably be features of substance in the asylum claim; and suggested that private rooms could be used to conduct such enquiries.

The recommendation in the report, and these observations made at the meeting, would, if acted upon, reverse the position that there is to be no substantive enquiry. Unless there is to be provision made for legal advice and representation before and at screening, the abandonment of this safeguard is not acceptable and would constitute a serious prejudice to all asylum-seekers at screening.

Roland Schilling, UNHCR Representative to the UK observed at the meeting and by reference to the example of the Netherlands, that asylum-seekers ought not to face enquiry into the substance of their asylum claims for at least several days, which period would provide opportunity for legal advice and representation to be secured. In this regard, we recall the observations of

Milton and George concerning trust, and the need for time to allow for trust to be established. As was also raised at the meeting, those likely to need more time to develop trust are those who have experienced traumatic and potentially shaming experiences such as rape and torture, though these are very far from the only reasons why many asylum-seekers feel inhibited from placing their trust in legal representatives (let alone officials) from the outset.

Conclusion

If we can assist with further elaboration of these matters, we should be very pleased to do so. We have copied this letter to Roland Schilling, to Mr Whiteman, to the three Members of Parliament who attended the meeting and to Maurice Wren who chaired the meeting.

Thank you again for attending the Detention Forum meeting and responding to the various matters raised from the panel and the floor.

Yours sincerely

Sophie Barrett-Brown
Chair
ILPA

cc: Roland Schilling, UNHCR Representative to the UK
Mr Rob Whiteman, Chief Executive, UK Border Agency
Richard Fuller MP
John McDonell MP
Keith Vaz MP
Maurice Wren, Director, Asylum Aid