

ILPA comments on the draft Asylum Pre Briefing

General

The internal evidence suggests that the asylum pre-briefing is a script, designed to be read/adapted by a UK Border Agency staff member or another person. It is not at all clear who it is intended will conduct the pre-brief (hereafter “the person briefing”). The use of “them” in the section on the Asylum Process and “they” in the section “What UKBA must do” suggests that the person briefing is not an official from the Agency, or an agent acting on the Agency’s behalf. But in such a case there would be no reason for an asylum seeker to consent to see them. Questions of confidentiality and informed consent may arise and, if the person did not attend a briefing, of how the information would be conveyed. Further, the draft includes information that is “immigration advice” within the meaning of the OISC regulatory scheme, and the person briefing would have to comply with the requirements of the scheme or be at risk of prosecution for a criminal offence.

It is unclear whether the material in the script would form the basis of a leaflet to take away as well.

The pre briefing focuses on the applicant disclosing their claim in full. It reads as though the Agency’s focus is to catch out a person who does not disclose everything at an early stage. The result may be, if a third party is delivering the briefing, that third party being called as a witness at appeal. There is likely to be argument over what was said and not said, understood or not understood. Calling it a “pre-briefing” does not alter that it is a substantive encounter, of which a full record needs to be kept.

Legal representatives are familiar with trying to explain to persons seeking asylum

- The purpose of the interview;
- The criteria against which the UK Border Agency will determine whether or not a person is a refugee
- What to expect and what an applicant must do in the asylum process.

A relationship of trust, timing of the giving of information, dealing with extraneous concerns before asking a person to retain the information and repetition, including by those supporting the applicant and, in appropriate cases, in writing, are all elements in doing this. Our comments below are based on experience of carrying out these tasks.

Purpose

The script is, based on our understanding of its purpose, trying to use a single encounter to do (too) many different things.

- Convey information on which the applicant needs to act now (e.g. request tape recording of interview ; ask for interpreter of same sex);

- Explain which interview questions the Agency considers important (we anticipate with a view to relying on the explanation in the briefing when castigating the applicant for not having mentioned certain matters at interview later on);
- Persuade the applicant to give up and make a voluntary return;
- Explain who is a refugee according to the 1951 UN Convention Relating to the Status of Refugees
- Set out (for whom? why?) a schema of the “Asylum Process”

Approach

The first question must be whether it is desirable to produce a script in this form. It creates the risk that the person reading it ploughs on through and takes no notice of what is said in response (anyone familiar with telephone helplines will have experience of this). In general the script seems designed to be delivered to a passive recipient. It does not encourage the person delivering it to take heed of the personal characteristics of the applicant and to respond to the applicant’s questions. In essence, the first instruction to an applicant is to shut up: “You are not here to talk about...” That it needs to be included in the script at all is an acknowledgment that the pre-brief is likely to feel like a distraction to an applicant waiting to get on with asserting their substantive claim. In such a state, people are unlikely to be receptive to explanations of process.

It is unclear whether an applicant would receive a one to one briefing or whether the script is designed to be delivered to groups, and, if so, of what size. The ambition that the briefing will “...ensure applicants are fully aware of the purpose, process and what is required of them at the interview” cannot, in ILPA’s view, be achieved by a one-off briefing. An applicant does not need or want to know “how claims for asylum are managed in the UK.” They do not necessarily want to know how their “claim” will be “managed”. They want to know what will happen to them. They do not need to know, now or at any stage, that “The Asylum Process is the name given to the way your claim for asylum will be dealt with in the United Kingdom.”

Alternatives

A checklist of points to consider covering might be of more assistance than a script to UK Border Agency staff or whoever is supposed (and see the concerns expressed above) to be giving the briefing. The list would need to be adapted according to the understanding of the applicant(/s), who might already have had some explanation about parts of the procedure but be more confused and worried about others, or about extraneous matters such as housing and support. Particular characteristics of the applicant(/s) would also need to be taken into account.

If the UK Border Agency is putting money into ensuring that a person who is unrepresented or poorly represented can understand the asylum interview we suggest that it might do better to produce and disseminate information, in a range of languages and in different formats, designed both for persons seeking asylum and those endeavouring to support them and disseminated so that people get a chance to see it at a much earlier stage.

In what follows we have sought to illustrate the difficulties outlined above. Our comments are thus not “left a bit, right a bit” suggestions on amending the text, but designed to illustrate why it is necessary to go back to the drawing board. They are also comments on the way in which the UK Border Agency views the asylum process as evidenced by the script. Because we think it is necessary to go back to the drawing board our comments are illustrative only. Silence should not be treated as our considering that a part of the script is satisfactory.

Form

The language of a script can all too often determine the language of the person using the script. The jargon, focus on definition of terms and use of the passive voice in the script are all likely to find their way into the spoken presentation. The passive voice can create difficulties for the interpreter.

Content

The script does read as the Agency describing the process to itself, rather than to an applicant. It is a mixture of the administrative and substantive and of a description of the “asylum process” from a bird’s eye, rather than an applicant’s point of view.

The person delivering the script is not given the tools to respond effectively to the applicant’s reactions to the information they are conveying. Why not simply ask a person there and then whether they want the interview tape recorded or want an interpreter of a particular sex, explaining that if they want to think about it they can provide the information later? If the applicant says there and then that they cannot make arrangements for childcare, what is the person delivering the script going to say?

Introduction

It is likely to confuse an applicant preparing for an interview to find themselves in the midst of a discussion about deciding to leave their country of origin¹ let alone about assisted voluntary return.

There is no information about confidentiality.

The Asylum Process

See comments above.

Comments such as “If you arrived at an air or sea port and did not claim asylum there, you may be asked to explain...” are simply a dry run of the asylum interview, when the applicant may feel “I have been asked this before.” They are much more difficult to deal with in the abstract than in the course of the substantive interview where, for example, the person conducting the interview could say “Please explain why you did not claim asylum as soon as you arrived.” If one is to touch on

¹ We suggest, as the script contemplates, avoiding the use of “home” as not everyone who has been chased from a country by persecution feels comfortable about referring to it, or hearing others refer to it, as “home.”

the Agency's expectations in this context, the Agency should explain why it expects this, bearing in mind that it is very far from the case that all those recognised as refugees claim asylum as early as possible.

Why "check and record" that a Point of Claim leaflet has been received? Why not simply hand one out and say "you may have received this already"? What is the purpose of "and record"? If the leaflet has been received, it may not have been read. If it has been read, it may not have been understood. If it has been read and understood, it may have been, and may be, forgotten. Etc.

A person who has suffered ill-treatment may broach that here, or indicate that they anticipate difficulty in saying what has happened to them. They may say nothing at their substantive interview, at which point the record of this encounter could be important.

What you can ask for before your interview

Saying at this stage that it is up to an applicant to give a copy of the interview to a legal representative, rather than saying it at the end of the interview, is apt to confuse. An applicant risks spending the interview trying to remember these things rather than focusing on the interview. It will need to be repeated at the end of the interview in any event.

There is no explanation or guidance to those who may have medical conditions which affect their ability to participate in the interview, for example to submit a medical report in advance of the interview.

The law that applies

Reference to "persecution" and "social group" without more are not illuminating. The briefing makes reference to European Convention of Human Rights but does not explain what the European Convention on Human Rights is or what factors will be relevant to consideration under the Convention. It thus does not prepare a person for an interview in which they will be expected to state their case under the Convention, and risks misleading.

There is also no reference of explanation of the Article 15C aspect of humanitarian protection - that is, those who may be at risk of indiscriminate violence arising out of a situation of armed conflict.

Voluntary return comes up again – for the second time, when the leaflet has already been handed out.

Interview

This fails to set out the right to legal advice and own interpreter, which in some cases will be paid for by legal aid.

It may be helpful to flag up what to do if there are problems with the interpreter lest the interpreter fails to convey this, but to get into detail about the role of the interpreter is unlikely to be helpful.

Some of the points under this heading are essentially elements of the discussion of the applicable law. And they are confused. There need have been no past ill-treatment if there is future risk. If there is no future risk, a person is not a refugee despite past persecution.

It is confusing to say “the earlier you tell” in an encounter where you have just said “You are not here to talk about your reasons for claiming asylum.”

It is not the case that a person “must” inform the UK Border Agency if s/he is going to provide documents. No one is going to consider that they are involved in a process that is fair if it says that the UK Border Agency “may” not “will” “consider giving” not “give” time to provide the translations. A pre-briefing such as this is likely to give the impression of a process that is not fair.

It is unlikely to be the case that the UK Border Agency can advise a person whether documents are necessary. This is a matter for the person and for their legal representative.

What the UK Border Agency must do.

The briefing gives the applicant a view of how the asylum process should work. Statements such as “UKBA will give you an opportunity to explain” are, in our experience not always correct. That they should be correct does not alter that they are not. The briefing must reflect reality not aspiration, otherwise it will mislead. Just as with the interpreter, it would have to describe what the Agency should do, and explain what to do if they do not. There is no information for the applicant on where they can go when the process does not work as it should.

A statement of the Agency’s equality and non-discrimination policy would be helpful.

Post interview

It may be helpful to talk about getting a decision but we can see no possible gain to talking about the post-decision stage here. There are errors, for example

“If your legal representative thinks that there is a less than 50% chance of success at this appeal, they do not have to continue to help you” is a legal aid test only, it is not the test for whether lawyer should continue acting for a client.

“If you are refused permission to stay, you are expected to return home” is confusing and, potentially misleading. A person may misunderstand that this means they are expected to return after the Agency’s decision, rather than once appeal rights have been exhausted.

Conclusion

We and others have been asked to comment on the pre-briefing in isolation – without knowing

- Who will deliver it
- To whom
- When

- Where
- How

Even from behind this veil of unknowing we can identify that the pre-briefing will not work as currently conceived. The difficulties point toward greater difficulties with the proposed Asylum Operating Model and unanswered questions: what information will and will not be gleaned at screening? On the basis of what information will triage take place? What will happen to a person put into the wrong decision-making stream? What records will be kept of what has occurred at each stage of the process? How successful will Executive Officers be in making sustainable decisions? We consider that not only is it undesirable to produce a pre-briefing in this form, it is undesirable to produce the Asylum Operating Model in the form in which it is currently conceived.

Addendum

ILPA has experience of being commissioned by the Community Legal Service to draft leaflets, including on asylum, to be distributed through law centres, citizens advice bureaux etc. – i.e. for persons already in the UK, who were considering making a claim for asylum. We worked with professional copywriters, with ILPA checking the law and the copywriters working to ensure that the leaflets were short enough and clear enough to do the task for which they were intended. The experience of working on these leaflets with a series of drafts going back and forth over weeks has helped us to understand the importance of being crystal clear about all aspects of the use of a leaflet before drafting. We also learned a lot about how much information people can take it, and what is likely to confuse.

ILPA
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