

Working against the clock :
**inadequacy and injustice
in the fast track system**

Based on research by Bail for Immigration Detainees at
Harmondsworth Immigration Removal Centre in March 2006

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Preface

Bail for Immigration Detainees (BID) is an independent charity that aims to improve access to bail for all immigration detainees, to ensure that detention is subject to regular, independent, automatic review, and to end arbitrary detention in the United Kingdom. BID opposes the increasing use of detention in the UK. Where detention is to be used, BID calls for changes to bring the UK into line with human rights standards so that individuals are protected from arbitrary and prolonged detention by effective and accessible legal safeguards.

Appeals for help from immigration detainees provided the primary incentive for this research. In the months preceding this study, BID was contacted by hundreds of men and women detained at Harmondsworth and Yarl's Wood Immigration Removal Centres (IRCs) while their cases were 'fast-tracked' under the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005. An increasing number of these immigration detainees were appealing to BID for help and complaining about the inadequacies and injustices of the fast track system.

Working against the clock is a unique research project commissioned by BID and carried out largely by volunteers. It is the first piece of research to present a focused analysis of the fast track system at Harmondsworth IRC, based upon court observation and interviews with detainees and legal representatives.

The Government carried out an evaluation of the pilot phase of the fast track procedure at Harmondsworth IRC in September 2003. The results of the evaluation were not made available to the public, but BID was able to obtain a copy of the evaluation by filing a Freedom of Information (FOI) disclosure request. Unfortunately, a significant amount of the report was blacked out, rendering the contents of the report obscure and its findings largely unfathomable.¹

Working against the clock presents an analysis of the fast track system, using a small sample of cases to illustrate a range of issues, whilst providing a forum for the voices of immigration detainees and their legal representatives. The findings set out in this report present deplorable inadequacies and injustices in the fast track process. The concluding recommendations to the Immigration Service, Legal Services Commission, Immigration Judges, legal representatives, the public and detainees represent a powerful call for radical changes to this system.

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¹ A copy of this document is available on the BID website at www.biduk.org

1. Introduction

The use of detention to fast track asylum claims is a key part of the Government's plans to speed up the asylum determination process and quickly remove those whose claims are unsuccessful.²

A person can be detained as soon as they claim asylum in the UK, and held throughout any appeals they make, until they are removed from the UK or given refugee status, humanitarian protection or discretionary leave. The process operates a very quick timescale for deciding asylum claims, and the vast majority are refused.³

The Government view the detained fast track process as a success and the Five Year Strategy for Asylum and Immigration, published in February 2005, announced plans to extend its use, aiming for up to 30% of new claimants to be processed in detention.⁴ On 31 January 2006, 18% of those held in immigration removal centres were held for fast tracking.⁵

Ministers argue that fast track allows for a greater number of removals of failed asylum applicants and that only suitable and straightforward cases are fast tracked. They maintain that the system is fair because all those detained have automatic access on site to publicly funded legal advice⁶ and representation and, like all detainees, can challenge their detention by way of a bail application.⁷

² "The second aspect to the strategy is that the Government are introducing a new asylum process, building on the major successes that we have had in reducing abuse of the system and speeding up the treatment of applications. The reduced asylum intake will enable us to fast-track almost all new cases and to maintain contact with asylum seekers at key points in the process, so that we are in a better position to remove individuals whose claims are not justified." Charles Clarke MP, Official Report, 5 July 2005 : Column 191

³ For example, according to official figures, during the first three months of 2006, 410 new asylum applications went into Harmondsworth, of which 81% (330 people) received an initial decision. 99% were refused asylum with fewer than five people recognised as refugees. See: Table 19, Quarterly Asylum Statistics, 2006 <http://www.homeoffice.gov.uk/rds/pdfs06/asylumq106.pdf>

⁴ It has been indicated that the fast track pilot scheme will be 'rolled-out' if successful. This expansion will allow the government to meet its stated target of processing up to 30% of new asylum applicants within a fast track detained process (see: 'Controlling our borders: making migration work for Britain - five year strategy for asylum and immigration; Home Office, February 2005, <http://www.archive2.official-documents.co.uk/document/cm64/6472/6472.pdf>)

⁵ Approximately 2200 people are detained at any one time. This information provided by Tony McNulty MP, in answer to parliamentary question, Official Report, 17 Mar 2006 : Column 2599W

⁶ See for example, Tony McNulty MP, 4 Jul 2005 : Column 112W

⁷ "The majority of detainees are able to apply to be released on bail at any time to a Chief Immigration Officer, the Secretary of State, or an Adjudicator." Government response to Home Affairs Committee Inquiry on asylum removals, HAC fourth report, April 2003, p10

BID's casework experience is that the system is too fast to be fair, that detention policy is not followed, and that current rules governing publicly funded representation leave many detainees without representation at appeals and unable to apply for bail. BID's experience is that detainees may feel unable to disclose crucial information to support their asylum claim due to the speed of the process, and that people are languishing in detention for many months as they cannot be removed quickly even when their case fails, at great human and financial cost.

There is a dearth of research and information about the operation of fast track, the adequacy of the legal representation available and the ability of detainees to challenge their detention. In response, BID set up a small-scale study of asylum claims processed at Harmondsworth Immigration Removal Centre (IRC) in March 2006 which aimed to track a small sample to gather information to verify the complaints being made to BID by individual detainees, including:

- lack of time to prepare for the asylum interview or appeal, including gathering supporting evidence
- poor quality legal representation
- frequent withdrawal of publicly funded legal representation prior to the appeal
- lack of access to bail.

2. Research methodology

During a one-week period in March 2006, BID researchers observed all fast track asylum appeal cases that were heard before the Asylum and Immigration Tribunal (AIT) at Harmondsworth IRC (a total of 22 cases).

Fast track detainees whose cases were observed during this period were then contacted by telephone in detention and asked if they would agree to be interviewed about their experience. In total, 16 of the 22 detainees were able to participate in these interviews.⁸

The legal representatives of the 22 detainees were also asked if they would agree to be interviewed about their experience working within the fast track procedure. In total, seven legal representatives participated in interviews.⁹

60 days after BID observed the last appeal hearing, researchers made contact with detainees to find out whether they remained in detention.

This report presents the information gathered from court observation data, as well as from in-depth interviews with fast track detainees whose cases were observed and their legal representatives.

⁸ Researchers were unable to contact six of the detainees whose cases were observed. In three of these cases this was because of a language barrier (BID was unable to find a volunteer interviewer who would be able to conduct the detainee interview in the necessary language). In the other three cases the detainee had been released from immigration detention and BID was only able to learn of the (temporary) address for one of the detainees (this detainee was sent a letter but unfortunately BID received no reply). BID was able to interview the legal representatives that worked on two of these cases. All of the detainees that BID was able to contact agreed to participate in the study.

⁹ Researchers attempted to contact all of the legal representatives that were involved in the 22 cases, but had only limited success in contacting legal representatives who were working under strict deadlines and were often away from the office or preparing a client's case. However, all the legal representatives with whom researchers made contact agreed to participate in the study.

3. Summary of key findings

The sample of 22 cases tracked by researchers illustrates a number of serious injustices and inefficiencies in the fast track process. The evidence from this sample suggests that the merits test for public funding represents a significant obstacle to fast track detainees' ability to access legal representation. 60% of detainees were not represented at their appeal hearing, and only one had an application for bail made at the appeal.

All seven of the legal representatives interviewed said they didn't have time to prepare the appeal properly, yet only six requests for more time to gather supporting evidence were made at the appeal stage, of which four were granted.

Detainees interviewed said they felt confused by the process, and legal representatives said they didn't have time to explain things properly to their clients.

The detainees in the sample spent long periods in detention, and most were not quickly removed despite being refused. 60 days after the appeal hearing, six detainees (almost one third) were still detained and had not been removed from the UK.

Country of origin Of the 22 cases tracked, eleven of the detainees were from countries in Asia, seven were from countries in Africa, three were from European countries and one detainee was from a country in the Middle East.¹⁰

Outcome of the appeal/decision by the Immigration Judge

- In 14 of the cases the appeal was refused.
- In two of the cases the appeal was adjourned.¹¹
- Three cases were removed from the fast track procedure and therefore released from detention.
- In two of the cases the applicant chose to withdraw his claim for asylum.
- In one case the refusal of asylum by the Home Office was successfully appealed.

¹⁰ The most recent official figures show that the largest nationalities processed in Harmondsworth fast track in the first three months of 2006 were: Pakistan – 50 (13%); Turkey - 45 (11%); Bangladesh - (9%); Afghanistan - 40 (7%); Nigeria – 30 (6%); Jamaica - 15(3%); Uganda – 15 (3%). See: Table 20, Quarterly Asylum Statistics, 2006 <http://www.homeoffice.gov.uk/rds/pdfs06/asylumq106.pdf>

¹¹ In two of the 22 cases in the study, the Immigration Judge presiding over the asylum hearing made the decision to adjourn the case within the fast track procedure. BiD was able to learn the outcome of these asylum applications. One application was refused and the detainee was subsequently removed from the UK. However, one application was taken out of the fast track procedure and the detainee was released to an address in the UK.

Representation at appeal

- 17 of the 22 fast track detainees in the sample (approximately 77%) did not have publicly funded legal representation at their appeal hearing.¹²
- 13 detainees (approximately 60% of the total sample) had no legal representation at their appeal hearing.¹³
- Four of these 17 detainees (approximately 22%) had privately funded legal representation at their appeal hearing.
- Over half of the detainees who were refused public funding for their case told BID they were not aware of their right to apply to for a review of this decision, their right to do so was not fully explained to them, or they had no time to find alternative representation.
- In four cases, Immigration Judges stated in court to unrepresented appellants that their lack of legal representation would not prejudice the outcome of the appeal.¹⁴

Length of time detained

- 60 days after the appeal hearing, six detainees (almost one third) were still detained and had not been removed from the UK.¹⁵

Exercising the right to apply for bail at the appeal hearing

- An application for bail was made at the appeal hearing in only one of the 22 cases.¹⁶
- Three of seven legal representatives interviewed stated that they were unable to prepare a bail application alongside preparation for an appeal within the time constraints.

¹² 5 of the 22 detainees in the study had publicly funded legal representation at their asylum hearing.

¹³ Some asylum applicants may assume that privately funded legal representation is of better quality than publicly funded legal representation. As noted, four of the fast track detainees in the sample had secured privately funded legal representation at their appeal hearing. Interview data from two of these cases reveals that the detainee had to secure private legal representation because they were dropped by their publicly funded legal representative. It is unclear whether this was the case in the other two cases, or whether these detainees simply preferred privately funded legal representation over publicly funded legal representation.

¹⁴ 13 out of the 22 detainees whose cases we observed were not represented in court. Researchers did not specifically ask observers to note the Judge's comments about the detainee's lack of representation. It is therefore possible that other Judges made similar comments but that observers did not note them on the observation form.

¹⁵ It was very difficult to find interviewees who were able to conduct tracking interviews in the necessary language. In most of the cases we were only able to phone the IRC switchboard to learn if the detainee has been released, removal or was still in immigration detention. In the three cases where researchers were able to conduct follow-up interviews with detainees who had not been removed and remained in detention, one detainee (R) said that his travel documents were being prepared but he hadn't yet been given a removal date. Another detainee (V) had been given a removal date. Another detainee (G) did not mention travel documents and said he wanted to apply for bail but he had nowhere to stay, no money and no surety.

¹⁶ In a few cases, applications for bail had been made prior to the appeal hearing. It was not possible to track how many detainees were able to apply for bail after the appeal hearing.

Lack of time to adequately prepare the case

- The vast majority of detainees interviewed (11 of 16) and every legal representative interviewed felt that they did not have enough time to gather evidence to present their appeal.
- All of the legal representatives interviewed felt that the time constraints of the fast track system did not allow them to adequately prepare and present their client's case for asylum.

Claims of torture are made but not investigated due to time constraints, risking a breach of detention policy

- In four of the 22 cases, allegations were made that the applicant had been a victim of torture.¹⁷ Detention policy states that those with independent evidence of torture should not normally be detained, but because of the lack of time, there is a risk that cases unsuitable for the fast track are being put into this system.

Failure to make applications to have cases taken out of fast track

- In 18 of the 22 cases (approximately 80%), no application to take the case out of the fast track procedure or to adjourn it were made. This was the case even though every legal representative felt they had inadequate preparation time at the appeal stage and frequently (four out of seven) disagreed with the fast-tracking of their client's case.

Restricted communication between lawyer and client

- One detainee interviewed mentioned that he had practical difficulties contacting his legal representative, whilst four of the seven legal representatives interviewed mentioned access to fast track clients as being problematic and restricted.¹⁸
- There was a common dissatisfaction shared by detainees and legal representatives about their restricted access to each other, which sometimes prevented face-to-face meetings. Four legal representatives raised this as a major problem of the fast track system.

Widespread confusion about the system amongst detainees

- Amongst the detainees interviewed, a high level of confusion existed about what the fast track system was and why they were in it.

¹⁷ Cases F, G, T and S

¹⁸ Researchers did not specifically ask about access issues during the detainee interview or the legal representative interview. When detainee or legal representatives did mention the issue of access it was unprompted. It is therefore possible that other detainees and legal representatives had similar concerns. The sole detainee to raise the issue of access to his legal representative said: "He [my legal representative] has got one leaflet which I really hate because it has a lot of restrictions. Every time I call there will be a reduction in funds, so I refrain from calling." (Case M).

4. Detention in the Harmondsworth fast track

Approximately 2250 people are detained under Immigration Act powers at any one time in ten IRCs and a number of prisons.¹⁹ Fast track facilities operate at three centres: Oakington Immigration Reception Centre, Yarl's Wood IRC and Harmondsworth IRC.²⁰

This research focused on the fast track process at Harmondsworth IRC, which since April 2003 has operated an accelerated decision and appeals process for adult men who have claimed asylum.²¹ There are around 500 beds at the centre, the largest in the UK, and around 200 of these are allocated to fast track cases.²²

Although the system has been operating for over three years, figures have only been available in the quarterly IND statistics since the beginning of 2005. Estimates based on an analysis of published statistics for 2005 show that over the year, approximately 1500 men were detained for fast tracking at Harmondsworth. Fewer than 20 were recognised as refugees and granted asylum and none were granted discretionary leave or humanitarian protection.²³

In the first three months of 2006, of the 330 initial decisions made at Harmondsworth, 99% were refused and 1% granted.²⁴ The vast majority (240 cases) of those refused made an appeal.²⁵ Figures provided to BID by AIT Harmondsworth show that between 1st January and 30th March 2006, 290 appeals were heard, of which seven were allowed, 233 dismissed, 10 withdrawn and 50 adjourned.

¹⁹ See: Quarterly Asylum Statistics, 2006 <http://www.homeoffice.gov.uk/rds/pdfs06/asylumq106.pdf>

²⁰ The last two of these three centres are sometimes referred to as 'Super' fast track facilities where adults can be held for an initial decision and throughout an accelerated appeals process, whereas at Oakington, most people are held only while an initial decision is made, and then, provided they have an 'in country' right of appeal are released to NASS accommodation. An identical fast track procedure has been in operation at Yarl's Wood Immigration Removal Centre since 11 May 2005, the only difference being that the Harmondsworth facility processes claims by single men while the Yarl's Wood facility processes claims by single women.

²¹ Introduced as a Statutory Instrument - the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 (as amended) which came into force on 4 April 2005.

²² According to figures provided to BID by IND in August 2005, the capacity at Harmondsworth IRC was 501. According to figures provided to BID in response to an FOI Act request in October 2005, fast track capacity at Harmondsworth was 200.

²³ Based on a cumulative analysis by BID of IND Quarterly Asylum Statistics.

²⁴ This compares to statistics for the overall decision rate for all asylum claims during the first three months of 2006, where 6260 initial decisions were made, of which 10% were granted asylum, 12% were granted humanitarian protection or discretionary leave and 78% were refused. See p3: Quarterly Asylum Statistics, 2006. These figures do not provide a breakdown of fast track and non-fast track decisions, so these figures will presumably include the cases determined at Harmondsworth IRC during this time.

²⁵ Statistics about success rate of appeals are included in the Quarterly Asylum Statistics, but do not provide a breakdown of the success rate for cases processed in the detained fast track.

The following tables set out information provided to BID under the Freedom of Information Act and illustrate the range of reasons why cases can be taken out of the fast track, the high refusal rate, and the long periods of detention for those who are removed.

Harmondsworth detained fast track cases, 1 October 2005 – 31 May 2006

Total initial decisions:	881
Refused:	877 (99.5%)
Granted asylum/HP/DL:	4 (0.5%)
Taken out of the process before the decision:	112
Taken out of the process after the decision:	172

Reasons for taking cases out of the fast track before the decision

Average time in detention before being taken out: 6.8 days	
- Granted Temporary Admission by the Home Office:	62
- Released by Home Office due to Medical Foundation appointment: ²⁶	21
- Claimant accepted as a minor: ²⁷	7
- Bail by AIT:	3
- Transfer to Oakington IRC:	4
- Transfer to Third Country Unit:	5
- Other:	9

Reasons for taking cases out of the fast track after the decision

Average time in detention before being taken out: 39.6 days	
- Case reclassified by the AIT:	53
- Given TA by the Home Office due to documentation issues:	35
- Given TA by the Home Office for other reasons:	25
- AIT allowed the appeal:	20
- AIT granted bail:	13
- Home Office accepted claimant was a minor:	2
- Released by Home Office due to Medical Foundation appointment:	2
- Released by Home Office for 'other reasons':	22

731 removals took place in this period, including some taken into detention before 1 October 2005
Average length of detention prior to removal from the UK – **68.6 days**

²⁶ In an arrangement with the Medical Foundation for the Care of Victims of Torture, IND will release detainees who are due to be seen by the Foundation.

²⁷ Unaccompanied under –18 year olds may not be detained in the fast track.

5. The development of detained fast track processes ²⁸

In March 2000, Oakington Reception Centre opened to detain asylum seekers “where it appears that their claims are capable of being decided quickly.” Barbara Roche MP, then Immigration Minister, announced that the centre would “strengthen our ability to deal quickly with asylum applications, many of which prove to be unfounded.” ²⁹

In 2003, then Home Office Minister Beverly Hughes announced that the fast track process would be extended to Harmondsworth IRC. The minister declared that a much faster appeals process would be used for “straightforward claimants” and that quick decision-making would facilitate speedy removal of unsuccessful applicants for asylum. ³⁰

The process at Harmondsworth enables an initial decision on an asylum application in two to five days (see the fast track timetable at Appendix A). ³¹ The procedure applies to single male applicants who are from countries where the Secretary of State deems there to be, in general, no serious risk of persecution (see Appendix B). With the introduction of the 2004 Nationality, Immigration and Asylum Act, the criteria for inclusion into the fast track procedure was expanded to include a category of “clearly unfounded claims.” This applies to applicants who “fit a description of persons” coming from a country or part of a country where there is generally no risk of persecution to people fitting that description. ³² Although nationality is a major factor in deciding which cases are suitable for the fast track, ministers have stated that:

“Any claim from any country may be fast-tracked where it appears after screening to be one that may be decided within the indicative process timescale.” ³³

Harmondsworth IRC has three on-site court facilities that can each process two asylum appeal hearings a day. Depending upon the volume of cases, a maximum of 30 appeals can be heard each week.

²⁸ See the Operational Enforcement Manual, at Chapter 38.4, for a brief history of the fast track process.

²⁹ ‘Written answer to a parliamentary question’, the United Kingdom Parliament, 16 March 2000

³⁰ Home Office Press release 074/2003, 18 March.

³¹ ‘Asylum statistics United Kingdom 2003’, Home Office, November 2004. See: <http://www.homeoffice.gov.uk/rds/pdfs04/hosb1104.pdf>, p 71

³² Section 27.

³³ Tony McNulty MP, Official report, 12 Sept 2005 : Column 2447W

Fast track detainees at Harmondsworth, as at Yarl's Wood, are offered legal representation under a duty solicitor scheme that is run by the Legal Services Commission (LSC). Under this scheme, the LSC awards special contracts to selected organisations to represent fast track asylum applicants. As of November 2005 there were 77 firms and organisations doing fast track work.³⁴

The decision to process an asylum claim at Harmondsworth is made by an immigration officer.³⁵ The type of case deemed suitable is set out in the 'Detained fast track processes suitability list' (see Appendix C) and individuals with complex asylum cases are not supposed to be included in the fast track.³⁶

The Government has argued that the following safeguards are built into the system:

- (1) only those cases that are 'straightforward' are included in the fast track procedure
- (2) the suitability list ensures that individuals who are unsuitable for the fast track are not included in the scheme
- (3) the duty solicitor scheme ensures fast track detainees have access to legal representation through the process
- (4) the timeframe of the fast track procedure is "flexible"
- (5) legal representatives may make three types of legal applications at appeal, including an application to transfer the claim from the fast track system to the mainstream system.

If a case is found to be unsuitable for the fast track it will be transferred to the non-detained determination process.³⁷

³⁴ Information from the ILPA Fast Track Sub-Committee.

³⁵ "When officers come across a person who makes an application for asylum, they should consider whether he or she meets the Detained Fast Track Suitability List criteria. All potentially suitable applicants will be referred to the National Intake Unit (NIU) Oakington co-ordinator who will confirm if they are accepted into either the process at Oakington, Harmondsworth or Yarl's Wood."

³⁶ In a statement submitted as evidence in an application for judicial review of the Harmondsworth fast track process the Assistant Director of the Harmondsworth fast track team explained: "Individuals will only be considered suitable if their claims appear, upon initial screening, to be relatively straightforward and capable of being decided quickly." "An application for judicial review (RLC v SSHD): First statement of Alan Mungham on behalf of the defendant", CO/5532/03, 4 February 2004, para. 4

³⁷ The Home Office has stated that these safeguards "enable appellants who may not be suitable for the fast track process to be transferred from the pilot scheme to the main appellate system."

6. The fast track under attack

There has been widespread criticism of the fast track since its inception and throughout its expansion from non-governmental and human rights organisations.

In April 2003, JUSTICE criticised the fact that the fast track had come into force "...without forewarning or consultation with groups and individuals with an interest in immigration and asylum appeals in the UK" ³⁸ and stated:

"It is a matter of serious concern that asylum seekers should now be detained for a relatively prolonged time for the sake of administrative convenience." ³⁹

The speed of the process has attracted widespread condemnation for its effect upon the protection of those seeking asylum. The rapid assessment of asylum claims has been criticised for placing severe time constraints on asylum applicants and their legal representatives. The Law Society of England and Wales has stated that "due to the tight time limits imposed, the procedure does not provide all applicants with a fair hearing."

JUSTICE believes that the timescales are:

"...not sufficient to enable the asylum seekers to make their case, document their need for protection, receive meaningful advice from a lawyer, or effectively challenge a negative decision on appeal. In sum, the process is not one that can deliver fair decisions." ⁴⁰

The Refugee Legal Centre has stated that:

"Implicit in such processes is the notion that from the outset cases dealt with under these processes are bound to fail and do not warrant the investment of careful consideration. This is reflected in the blanket refusal of cases dealt with under these processes. Very fast decision-making processes such as in Oakington and Harmondsworth enable the Immigration and Nationality Directorate to reduce substantially the average time taken to process all initial decision cases." ⁴¹

The European Council on Refugees and Exiles (ECRE) has noted its concern about the development of fast track asylum procedures in several western European countries.

³⁸ 'Submission to the Inquiry into asylum and immigration appeals: Committee on the Lord Chancellor's Department', JUSTICE, April 2003, p 9 - see: <http://www.justice.org.uk/images/pdfs/appeals.pdf>

³⁹ Ibid, p 10

⁴⁰ 'Inquiry into asylum and immigration appeals: Committee on the Lord Chancellor's Department', JUSTICE, April 2003, see: <http://www.justice.org.uk/images/pdfs/appeals.pdf>, p 10

⁴¹ National Audit Office Study on Asylum: Deciding applications for asylum, Refugee Legal Centre submission, July 2003

"...channelling certain nationalities into special accelerated procedures lacking essential safeguards creates a real risk of refoulement and may amount to discrimination among refugees in violation of international law. Operating fast-track procedures for certain types of applicants and reducing their rights not only risks sending people back to face persecution but can lead to delays and appeal hearings to correct mistakes." ⁴²

The Medical Foundation for the Care of Victims of Torture has expressed concerns that the speed of the fast track procedure at Harmondsworth may mean that allegations of torture are not dealt with appropriately, stating that "...we have found cases where allegations of torture have been made and no one has referred them to us. We have been told that the process was just 'too quick' for a referral." ⁴³

The decision-making, or screening, process to place individual cases into the fast track system has been criticised as inadequate, and lacking transparency. The Immigration Law Practitioner's Association (ILPA) has pointed out:

"it is a mystery of the fast track process how the straightforwardness of claims can be accurately assessed when the screening interview elicits no or virtually no information about the substance of the claim." ⁴⁴

6.1 BID's concerns about the fast track

BID's concerns about the fast track are based on casework experience of detainees contacting us for help and concern about the UK's failure to follow international and domestic legal principles designed to prevent arbitrary detention.

6.1.1 Extending the use of administrative detention

Article 5 of the European Convention on Human Rights (ECHR) protects the right to liberty, and the European Court has held:

"that where a national law authorises deprivation of liberty – especially in respect of a foreign asylum-seeker – it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness." ⁴⁵

⁴² 'Memorandum to the JHA Council: practical cooperation - improving asylum systems'; European Council on Refugees and Exiles (ECRE), April 2006, p3 - see <http://www.ecre.org/statements/praccoop.doc>

⁴³ 'Medical Foundation response to the Conservative Party's Manifesto and to Labour's five-year asylum plan'; Medical Foundation for the Care of Victims of Torture, 01 March 2005, see: <http://www.allaboutgiving.org/news/article.aspx?articleid=3742>

⁴⁴ 'Fast track asylum determination procedures: how best to represent your clients'; Immigration Law Practitioners' Association (ILPA) continuing professional development training guide, November 2005, p 16

⁴⁵ *Amuur v France*, Application 17/1995/523/609

The Home Office instructions to immigration officers remind those making the initial decision to detain and to maintain detention that, "... to comply with article 5, they should bear in mind that detention must be used for the purpose for which it was authorised; must be for a reasonable period; and that if it becomes apparent that the purpose of the power, for example, removal, cannot be effected within that reasonable period, the power to detain should not be exercised."⁴⁶

The Immigration Service is required to consider alternatives to detention in all cases and is permitted to use detention only when there is no alternative. According to the Home Office policy on detention, "There is a presumption in favour of temporary admission or temporary release", and "reasonable alternatives to detention must be considered before detention is authorised. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified."⁴⁷

If it is not possible to remove someone within a reasonable period, they should not be kept in detention.⁴⁸ In practice, the use of detention is not restricted to those shortly to be removed. Increasingly, detention is being used for the sake of administrative convenience, in particular in the fast track process. Asylum applicants whose cases are processed in the fast track are often detained from the moment of their arrival, throughout their asylum claim and appeal stages, and after the exhaustion of their appeal rights if they are unsuccessful.

Available statistics show that detention can be for long periods. The Government have said that in the fast track at Harmondsworth IRC "...over half of unfounded cases are removed within 42 days of the application being made and over 85% within about three months."⁴⁹ Figures disclosed to BID, set out above, show the average duration of detention is about 69 days, or two-and-a-half months. These figures also show an average length of detention of nearly 40 days for the significant number whose cases are taken out of the fast track (around 19% or 172 people between October 2005 and May 2006), including those found to be children and those with 'documentation issues'. These figures suggest serious flaws in the screening process, as well as detention that is prolonged to the point where it may become unlawful.

⁴⁶ OEM Chapter 38.1.1.1.

⁴⁷ 'Operation enforcement manual', Home Office, Immigration and Nationality Directorate, paragraph 38.3

⁴⁸ See Woolf LJ in *R v Governor of Durham Prison ex p Hardial Singh* [1983] Imm AR 198

⁴⁹ Five year strategy for asylum and immigration, Home Office, 7 February 2005, Annex 2, New Asylum Model, p 35

6.1.2 Detainees unable to exercise their right to apply for bail

All detainees have a right to challenge their detention by way of an application for bail to an Immigration Judge. When a bail application is made in court, the onus is on the Immigration Service to convince the Immigration Judge that detention is necessary.⁵⁰

Yet, once in the fast track, there are no provisions for automatic bail applications as there are, for example, in criminal proceedings. Legal representatives funded by the LSC are not obliged to make bail applications for their clients.⁵¹ Recent figures obtained by BID from the AIT show that a very small number of bail applications are being presented - as few as ten detainees out of potentially 1100 have had bail applications made on their behalf.⁵²

The LSC have expressed concern about the lack of bail applications being made, and changed the fast track contract in October 2005 to make it a requirement for suppliers to consider whether a bail application should be made at the appeal hearing.

New reporting requirements were introduced from 1 July 2006, when the LSC wrote to all fast track duty solicitors expressing its concerns about fast track clients being able to exercise their right to bail. Suppliers are now required to record reasons for not making a bail application and give the client the chance to request a review of the adviser's decision not to grant public funding (Controlled Legal Representation, or CLR) and to complete and return a form to the LSC on a monthly basis.⁵³ The impact of this new guidance is yet to be evaluated as it post dated this study.

6.1.3 A 'one size fits all' approach

BID is concerned that there is no protection built into the system to prevent cases being put into the fast track merely because they fit criteria such as nationality. This begs the question whether asylum cases are being decided on their individual merit, as they should be, or whether the Home Office is applying a 'one size fits all' approach. The following instructions given to immigration officers who conduct fast-track screening interviews give the alarming impression that such an approach exists, suggesting that claims are included in the fast track procedure even where doubt exists as to their suitability:

⁵⁰ The Guidance Notes for Adjudicators from the Chief Adjudicator state: "The burden of proving that the presumption in favour of liberty does not apply lies on the Secretary of State. As detention is an infringement of the applicant's human right to liberty, you have to be satisfied to a high standard that any infringement of that right is essential." (Paragraph 2.5.1)

⁵¹ Ophelia Field, 'Alternatives to detention of asylum seekers and refugees', United Nations High Commissioner for Refugees, Division of International Protection Services (POLAS), Legal and Protection Policy Research Series, March 2006, p. 208, see: <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=4474140a2>

⁵² Response to BID FIO request from E Mackie, IND, December 2005

⁵³ Letter from LSC to suppliers, 1 June 2006

“It is far better to refer a case that subsequently turns out to be unsuitable ... than not to refer a case that is suitable.”⁵⁴

6.1.4 Failure to follow detention criteria

An asylum seeker can be detained on the authority of an immigration officer under Immigration Act powers at any stage of their application for asylum. Asylum seekers should only be detained under Immigration Act powers where they meet the detention criteria set out in detail in the Operation Enforcement Manual (OEM). Asylum seekers who are detained for fast track must also meet the criteria that are set out in the suitability list (see Appendix C).

The OEM sets out categories of people who are “normally considered suitable for detention in only very exceptional circumstances...”⁵⁵ These include pregnant women (unless there is a clear prospect of early removal), those suffering from serious medical conditions or the mentally ill, and those whose claims that they have been tortured are supported by independent evidence. In BID’s experience, the Immigration Service has sometimes failed properly to apply the criteria for detention, which are in many cases ignored completely. BID is therefore concerned that victims of torture and rape and other trauma are in the fast track.

⁵⁴ ‘National Intake Unit - New Asylum Model Immigration Service Operational Instruction’, Home Office, National Intake Unit (NIU), 10 February 2006.

⁵⁵ ‘Operation enforcement manual’, Home Office, Immigration and Nationality Directorate, paragraph 38.10

7. Legal challenges and changes to the fast track

In 2004, the Refugee Legal Centre mounted a legal challenge to the fast track process, arguing that the system was too fast to be fair and seeking a four-day, rather than three-day, timetable for the Secretary of State's decision in fast track cases. The challenge did not succeed in changing the timetable. However, the court found that there was "a gateway risk of injustice" inherent in the fast track system, caused by "potential rigidity" in the system. The court ruled that the Harmondsworth fast track procedure was fair only "so long as it operates flexibly" in accordance with a written published policy.⁵⁶ The Court of Appeal required the Home Office to develop a clearly stated procedure setting out the circumstances in which deadlines should be extended for a flexible approach to the three-day initial decision making process.⁵⁷ Although the recommendation to formalise the flexibility of the process was made on 12 November 2004, the Flexibility Policy was not released until 26 April 2005.

This document is designed to assist Home Office Presenting Officers (HOPOs) in deciding whether the fast track timetable should be lengthened for a particular case, and to enable legal representatives to ensure that the ingredients of fair procedure are present. In the RLC case Lord Justice Sedley concluded:

"To assert, without any real evidence to support it, that a general principle of flexibility is "deeply ingrained" [in the fast track system] is not good enough. Putting the relevant issues in writing ... is not simply a bureaucratic reflex. It will concentrate official minds on the proper ingredients of fair procedure; it will enable applicants and their legal representatives to know what these ingredients are taken to be; and if anything is included in or omitted from them which renders the process illegally unfair, the courts will be in a position to say so."⁵⁸

The flexibility policy notes:

"while it is important that the integrity of the fast track process should be maintained insofar as it is reasonably possible to do so, this guidance must be applied in accordance with the key principle of ensuring fairness in the asylum determination procedure."

⁵⁶ Paras. 24 – 25

⁵⁷ The Detained Fast Track Processes Operational Instruction, otherwise known as 'the Flexibility Policy', was necessitated by a decision reached by the Court of Appeal in *R (RLC) v SSHD* [2004 EWCA Civ 1481]. It is published on the Home Office website at: <http://www.ind.homeoffice.gov.uk/6353/18383/flexibilitydoc?view=Binary>

⁵⁸ Para. 19

The policy provides several reasons why the time frame for a decision in a case may be extended. Flexibility is called for in the case of illness; in the case of non- or late attendance of the representative; in the case of inadequate interpretation; in the case of non-cooperation; if the applicant or their representative asks for more time to prepare for the interview; and lastly, if following an interview the representative says that more time is required for them to file material relevant to the claim.

According to ILPA,

“the flexibility policy does not make specific provision for the loss of time caused by the Home Office or its agents, for example delay in producing a claimant for an interview with his or her representative, or delay in making an interview room available.”⁵⁹

It should be noted that the provisos given are not to be interpreted as an exclusive list but give guidance on how to ensure that the overriding objective of fairness is achieved.

In 2004, the High Court also considered a case in which a man was detained for five weeks under a fast track procedure. The court found that the detention became unlawful after six days, when it should have been clear to the Home Office that the claim would not be processed in a short time.⁶⁰

ILPA has suggested that in situations where delays on the part of the Home Office shorten the applicable timescales, legal representatives should make references to the following observation of Collins J in the Johnson case:

“anything quicker [than the published fast track process] would be impossible to justify.”⁶¹

The legality of detaining fast track applicants at Oakington for administrative ease was challenged in *R (Saadi and others) v SSHD*. In his judgment of 7 September 2001, Collins J held that detention for the sole purpose of expediency was disproportionate to Article 5(1) of the European Convention on Human Rights (ECHR) that states: “Everyone has the right to liberty and security of person.”⁶²

⁵⁹ ‘Fast track asylum determination procedures: how best to represent your clients’, Immigration Law Practitioners Association (ILPA) continuing professional development training guide, November 2005, p24

⁶⁰ *R (Johnson) v SSHD* [2004] EWHC 1550 (Admin)

⁶¹ *Ibid*

⁶² *R (Saadi and others) v SSHD* [2001] EWHC Admin 670, judgment by Collins J, para 3.

This decision was subsequently overturned by the Court of Appeal, and on 31 October 2002, the House of Lords upheld the Court of Appeal's decision, allowing that detention in "reasonable conditions" for a time period that is "not excessive" is proportionate.⁶³ The House of Lords in *Saadi v SSHD*⁶⁴ accepted that detention of seven to ten days at Oakington solely for the purpose of fast processing was lawful. An application to challenge this decision was lodged with the European Court of Human Rights on 18 April 2003 and declared admissible on 27 September 2005.⁶⁵

On 11 July 2006, the court announced its judgement.⁶⁶ While recognising that the detention of a person is a major interference with personal liberty and must always be subject to close scrutiny, the court stated that a balance must be struck "between the requirements of society and the individual's freedom."⁶⁷ Detention is permitted under article 5 (1)(f) which states that:

"the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

Immigrants, until their claim for immigration clearance or asylum has been heard, are not yet authorised to be in the country. Detention is lawful if it is a genuine part of the immigration process. The court held that the seven-day detention of Mr Saadi at Oakington was a bona fide application of the policy on fast-track immigration decisions, which was not excessive in the circumstances. It did not set a maximum period.

The court found:

"All that is required is that the detention should be a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and that it should not otherwise be arbitrary, for example on account of its length."

⁶³ R (Saadi and others) v SSHD [2002] 1 WLR 356.

⁶⁴ [2002] UKHL 41

⁶⁵ Decision number 13229/03, www.echr.coe.int

⁶⁶ Saadi v. UK [2006] (Application no. 13229/03) www.echr.coe.int

⁶⁷ Para 44

Three of the seven judges dissented from the majority judgement, and their Joint Dissenting Opinion provides interesting reading for future challenges. In this Opinion, they noted:

“The possibility of detaining an asylum seeker at any time during the asylum procedure on the grounds that it was to “prevent his effecting an unauthorised entry into the country” would represent great legal uncertainty for the person concerned [...] Paradoxically, [...] the applicant was detained for seven days, and was then released from detention after his asylum claim had been refused.”

The court unanimously found a violation of article 5(2), which states that:

“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

Other than references to policy statements, the first time that Mr Saadi was given a reason for his detention was when his representative was informed on 5 January, when Mr Saadi had already been detained for 76 hours. The court found that this was not prompt and was therefore a violation.

As BID has argued elsewhere in this report, in our view, detention is unfair, often unnecessary and inhibits people's ability to argue their substantive case. BID notes that these are issues that the European Court can't necessarily look at or consider under Art 5(1) but nevertheless represent a real issue for immigration detainees in the UK. BID also believes that the average length of time that most detainees are now detained for fast track has become excessive.

8. Research findings

8.1 Lack of time to gather evidence risking breaches of detention policy

The decision to place an asylum claim in the fast track procedure is made on the basis of the screening interview when the applicant claims asylum (either at a UK port, an Asylum Screening Unit or at a local enforcement office). Immigration officers who conduct these screening interviews are not expected to engage in any analysis of asylum claims.⁶⁸ According to the Fast Track Process Instructions these Officers must however "...be alert to asylum claimants who may be suitable for the Detained Fast Track (DFT) process," and, in cases where a claimant is not referred to the process they must "...enter a note of the reasons for non referral."⁶⁹ Based upon the limited information gathered at the screening interview, the National Intake Unit (NIU) decides if the case is suitable for the fast track procedure.

As set out above, Government policy on detention, contained in the OEM, states that certain categories of people should be detained "in only very exceptional circumstances". Among them are survivors of torture.⁷⁰

Court observation data gathered during this study suggests that survivors of torture are also being detained at Harmondsworth. In four of the 22 cases, allegations were made that the applicant had been a victim of torture.⁷¹

When asked "Do you know why your client was chosen for the fast track procedure?", the legal representative of Case T replied,

"No. They thought they could complete the matter quickly... He was a torture victim. I don't really know why he was in the fast track as [the applicant's country of origin] is not on the White List."

Case E provides an example of a case where an allegation that the applicant had been a victim of torture and was suffering from mental health problems was made, but was not considered by the Immigration Judge. In her request for the case to be taken out of the fast track, the legal representative informed the Judge that a medical and psychological assessment appointment had been made for the appellant on a date that was outside of the fast track timeframe.

⁶⁸ 'National Intake Unit - New Asylum Model Immigration Service Operational Instruction', Home Office, National Intake Unit (NIU), 10 February 2006.

⁶⁹ Ibid.

⁷⁰ OEM, Chapter 38.10

⁷¹ Cases F, G, T and S

Neither the appellant's claim that he was a torture victim nor his current mental state was considered in court. Yet it was only once the applicant's case had been removed from the fast track procedure that the torture allegation could be substantiated.

8.2 The merits test and crisis in the funding regime

All fast track detainees are entitled to publicly funded legal representation during the initial stages of their asylum application and at interview. This is known as Legal Help. However, they may not be entitled to publicly funded legal representation for any appeal against refusal of asylum depending on the merits of the case as perceived by their legal representative. Fast track detainees at Harmondsworth and Yarl's Wood are offered representation under a duty solicitor scheme that is run by the Legal Services Commission (LSC). Representation by a duty solicitor at the appeal stage (known as Controlled Legal Representation – CLR) is subject to satisfying the merits test for public funding. This means that only those cases that can be identified as having a moderate or better chance of succeeding in court are awarded public funding. Those cases where the chances of success appear to be borderline or unclear may also be awarded public funding.⁷² If the prospects of success are considered poor (less than 50%) the representation for the appeal is to be refused. In a recent letter from the LSC to all fast track duty solicitors, legal representatives are reminded that:

“In many fast track cases the prospects of success will be unclear because you will only have had a very limited amount of time to take instructions and prepare the case. You should grant CLR where the prospects are unclear or borderline. They may remain unclear until you have taken full instructions from your client on the reasons for refusal, applied the law to the facts, obtained any expert evidence or objective country material relevant to your case, interviewed any witnesses and had full disclosure of relevant documents from the Immigration Service/Home Office.”⁷³

BID found that the merits test for public funding for legal representation represents a significant obstacle to fast track detainees being able to obtain representation for their appeal in court. Many representatives are deciding that the prospects of success are less than 50%, leaving the detainee with no legal representation – whereas the Home Office is always represented. Court observation data showed that approximately 77% of the sample were deemed not to qualify for public funding at the time of their appeal. As a consequence, 13 of the 22 fast track detainees (approximately 60%) were not legally represented at their asylum appeal hearing.⁷⁴

⁷² ‘Immigration specification of the General Civil Contract’

⁷³ Ibid.

⁷⁴ Five of the 22 detainees had publicly-funded legal representation. Four of the 22 detainees had privately-funded legal representation.

The following exchange from the court proceedings of Case D also demonstrates that the concept of the merits test is sometimes not adequately explained to applicants:

Applicant: "I want to get in touch with an organisation to find out why I don't have a representative in this case because in the forms that were read to me it does state I am entitled to a lawyer"

Immigration Judge: "You had a representative in the interviews. You are not entitled as a right to have a lawyer here out of public funds and I did assure you that not having a lawyer would not prejudice your case. Lawyers are not charities."

Legal representatives on the duty solicitor scheme must strictly apply the merits test to all their cases. Representing a case that does not merit public funds can result in severe penalties for legal representatives and their firms. Under new rules soon to come into force, they could lose their contract to do asylum work if they do not win at least 40% of the asylum appeals they grant public funding to. Some solicitors who feel that their success rate will be lessened if they grant public funding for a fast track appeal may refuse to grant funding for a case which has some merit. Failing to represent a case that has merit or where the merits are "unclear" or "borderline" is contrary to LSC guidance, but BID fears that this is occurring. BID is also concerned that some solicitors may be refusing public funding when arguably the merits test is met and then requesting payment at the hearing on a private basis.

Failing to represent a client or requesting payment when the merits test is met, are clearly unethical practices and BID was extremely disturbed to discover incidences of both amongst our sample. This is nothing less than complicit exploitation of an unfair system whereby lawyers and caseworkers carry out the initial stages of work on a case and then use the merits test as an excuse not to carry out their ethical duties of providing proper representation, dropping their client at the appeal stage. It is very clearly against Law Society guidance, best practice and is in breach of professional ethics.

When asked, "If you did not have a lawyer at your appeal could you explain why not?", another detainee replied: "The lawyer said to me 'I don't have time... He didn't tell me anything about a poor prospect of success'" (Case N).

BID was able to interview nine of the 13 detainees who went before an Immigration Judge with no legal representation. Four of these 13 detainees said that they had been asked to fund their own legal representation. One detainee said:

"[The lawyer] said you give me £1200 and I'll deal with your case. I didn't have the money so I represented myself" (Case R).

The detainee of Case I was told by his legal representative that his case had merit but that the firm wanted £1,000 to represent him at appeal. He could not afford to pay so was unrepresented at his appeal. This is clearly in breach of the LSC guidance and also unethical and contrary to Law Society guidance.

Legal representatives must refuse CLR in those cases where the prospect of success in court is assessed to be clearly below 50%.⁷⁵ However, the responsibility of legal representatives does not end once CLR is refused. Representatives must inform their client of their decision to refuse public funding and also give them a review notification form (also known as a CW4 form) which, in theory, enables them to challenge that decision.⁷⁶

BID was interested to find out how many of the detainees in this sample were actually given a CW4 Form. Of the 9 detainees interviewed who went before the Immigration Judge without any legal representation, four said they had received a CW4 form and five said they had not.

One detainee who received a CW4 form said that he did not know what it was, suggesting that some legal representatives may fulfil their obligation to give their client a form but fail fully to explain the situation.⁷⁷ A second detainee said: "The CW4 was sent but only arrived the day before the court hearing, too late to do anything about it" (Case O).

The condensed timeframe of the fast track means that some detainees are "dropped" by their representatives on the day of their appeal hearing, making it impossible to seek alternative representation. In BID's view, this is often due to the insistence by the LSC that if funding is granted on the basis that the prospects of success are unclear, the decision must be revisited prior to the hearing.

One legal representative expressed great dissatisfaction about the LSC's understanding of the fast track procedure:

"LSC funding is also a massive issue because of the fact that the LSC does not understand the fast track procedure. In this case the LSC initially refused to cover the costs of translation because they were too high. We needed massive amounts of documentation translated and authenticated at short notice. To get a qualified person to do this at short notice is expensive. The LSC does not understand the specific time constraints that we are working under and they do not differentiate between fast track cases and those cases in the general asylum system when they are making funding decisions."

⁷⁵ 'Immigration specification of the General Civil Contract'

⁷⁶ "...if you refuse CLR you must inform your client of their right of review and provide them with CW4 having completed your part. You can assist your client in completing the application for Review under Legal Help. If they wish to apply for a Review, and an appeal is lodged or to be lodged, it is best practice to notify the AIT of this and ask that the appeal not be listed until the Funding Review Committee has heard the appeal", 'Immigration specification of the General Civil Contract'

⁷⁷ Case F

The experience of another legal representative also suggests that legal representatives may not be receiving LSC funding support within an appropriate timeframe:

“We needed expert evidence in relation to newspaper reports of army membership... That was quite rushed, even given the adjournment. We really had to push the experts. I’m not sure if I got LSC funds in time.” (Case J)

8.3 Lack of time to adequately prepare the case

In most fast track cases, applicants are given only two days to appeal the initial decision to refuse the claim for asylum. During this time, the appellant and his legal representative, if any, must consider and draft full grounds of appeal. This would usually include formulating what will usually be complex legal arguments, supported by precedent, and gathering extensive supporting evidence. This may include a detailed witness statement, employment records, medical/psychological evidence or assessment and country specific information or expert evidence. Original documents frequently need to be obtained, translated and authenticated.

Legal representatives have complained that the speed of the fast track procedure does not allow them to follow best practice in taking instructions from their client at the initial meeting that takes place on the day of the asylum interview. One said:

“... you are always flying by the seat of your pants. You are working against the clock... Outside the fast track you have time to go away and come back, which is better... You don’t have to overload the client with information and then start taking instructions on a potentially traumatic history. In fast track you have to do this all at once. Any longer than the three hours [allocated for the meeting], you or the client are not thinking straight...I wouldn’t advocate this system, it has huge problems. It would be better to have time to go away and clarify and have time to come back and take further instructions.” (Case K)

In six of the 22 cases a request was made for more time at the appeal stage, in order to gather supporting evidence. This request was granted in four cases. Of the 16 fast track detainees that were interviewed, eleven said that they were unable to gather evidence in time for the appeal.

It is clear that this lack of time leaves detainees feeling harshly-treated and disadvantaged by the system. The following statement was made by a detainee whose request for more time was refused in court:

"To appeal you need grounds and evidence to show in court. Two days is not enough for someone to find evidence to work on his case so he can stand strong in court. You do appeal because you can but you are not appealing in confidence. You have no time and the lawyer has no time to look at your case and where you are weak and where you are strong. So you are pushed to appeal with no evidence... If you have evidence in court, then you have confidence. If you have nothing, no one will listen to what you are saying. [The Home Office] had evidence and the time to work on the case and our weaknesses." (Case K)

None of the legal representatives who was interviewed felt they were given sufficient time to properly prepare the client's appeal.

One of the legal representatives, who was able to get her client removed from the fast track, explained the difficulties in preparing an appeal in the given timeframe:

"...basically time limits are absolutely horrendous...The way we get documentation in piecemeal fashion from the Home Office in respect to the refusal makes preparation over a short period even harder" (Case E).

The time pressures also affect cases that are adjourned to allow the applicant and his legal representation to gather supporting evidence. One legal representative made this observation in respect to a case where a short adjournment was allowed:

Interviewer: if you had had more time what else would you have been able to do to prepare your client's case?

Legal representative (case J): We were disappointed with the expert evidence; we would have had time to get a better expert instead of one just ready to do a report at very short notice. We would have got a more detailed witness statement.

This suggests that even when flexibility is applied, the ability of legal representatives to adequately prepare their client's case is still compromised if the case remains in the fast track procedure. A legal representative who was able to get her client's case taken out of the fast track described the action she had taken:

Legal Representative (Case E): ... since his case has been removed from the fast track we were able to procure a country expert report. Certain information is not available in the public domain and since he is from a minority group in [country of origin] it is essential that we get a country expert to comment on the organisations he was a member of in [country of origin]. We definitely would not have been able to do this if the case remained in the fast track.

8.4 Restricted communication between lawyer and client

One of the reasons that Harmondsworth was selected as a fast track facility is because of on-site court facilities. The Home Office states of Harmondsworth:

“Legal visits take place seven days a week between 09:00 to 20:00. All legal appointments are facilitated within 24 hours of the request being made.”⁷⁸

Yet our study found that detainees have difficulties in accessing their legal representatives, whilst access to their clients for legal representatives was problematic and restricted.

The legal representative dealing with Case K stated:

“We got a phone call late in the day, the day before the interview. I tried to book a Legal Visit for the morning and no one was available on the switchboard to let me. I faxed to book a legal visit at 10 a.m. and I got there at 9:30 or 9:45 but it’s up to them how quick they are with security.”

The representative dealing with Case M stated:

“One of my colleagues has had to go three times to Harmondsworth for appointments with fast track clients on the rota, and each time it was cancelled. She had to wait outside because they had problems getting an interpreter, and the guards would not let her in. They even asked her, at the guard house, to wait in the MacDonald’s!”

8.5 Widespread confusion about the system amongst detainees

The Office of the Immigration Services Commissioner (OISC) includes in its training to immigration caseworkers a list of information that the client needs to be given at initial interview, which includes explaining fairly complex legal points. This list includes: confidentiality procedures; organisational procedures including complaints; the role of the representative; the role of any interpreter present; the asylum application process including refugee and European Convention of Human Rights definitions; that removal cannot take place pending the outcome of the claim unless it is certified as manifestly unfounded; that the application lapses if the applicant leaves the UK; the implications of the different grants of leave; the implications of a failed application.⁷⁹

⁷⁸ Home Office documentation circulated to practitioners by ILPA

⁷⁹ OISC training materials, 2005

BID's research suggests that there is pressure on fast track legal representatives to take short cuts when giving initial information, adding to detainees' confusion, bewilderment, frustration and stress.

In three cases, the detainee said that they didn't know that their case was being dealt with in the fast track and didn't understand what it was (Cases F, K and S).

In response to the question "Who explained the process to you?", the detainee from Case K responded, "No-one. They just said your case is being fast tracked. When they said this, I didn't know what fast track was. I didn't know anything."

8.6 Lack of legal representation in court at appeal

Thirteen of the 22 detainees in our sample (approximately 60%) went before an Immigration Judge with no legal representation. Statistics released to BID under the Freedom of Information Act show that in January and February 2006, of 132 appeals, 72 appellants (55%) were not represented,⁸⁰ demonstrating that BID's sample week was broadly representative.

Our court observation data documents four cases where Immigration Judges assured applicants that their lack of legal representation would not prejudice their case. Through the court interpreter, one appellant was told by the presiding Judge,

"The Home Office Presenting Officer and I are here to help you. You are not disadvantaged by your lack of representation".

The Judge presiding over Case C said that since the applicant was un-represented, he himself would "try to assist his presentation". In another case the Judge explained to the un-represented applicant that she would ask him the questions that his representative would have asked (Case O).

In BID's view it is not acceptable for Judges to suggest that the role of an absent legal representative could be assumed by either the Immigration Judge or the Home Office Presenting Officer (HOPO). The role of the Immigration Judge is to adjudicate the case, while the role of the HOPO is to argue against the asylum claim. It is not the responsibility of either to argue for the asylum claim and to suggest otherwise may give the detainee the misapprehension of the court process and the false impression that he would be wrong to assert his need for a legal representative.

⁸⁰ 2006, 69 appellants were represented at their appeal and 31 were not. In February, 63 were represented and 41 were not.

In BID's view, it is not accurate for a Judge to suggest to an applicant that his lack of legal representation will not prejudice his case, especially when the case is being processed within the fast track procedure.

It is unrealistic to assume that an individual who finds himself detained in a foreign country, who may be dealing with trauma and who may not understand English would be able to present his subjective case. It is out of the question that a detainee without legal representation could familiarise himself with UK immigration law within the given timeframe in order adequately to represent himself. Yet over half of the detainees in our study were forced into a position where they had to try to present their case without legal assistance.

8.7 Failure to make applications to have cases taken out of fast track:

The advantages of taking the case out of the fast track for the preparation of evidence and the ultimate success of the case have been highlighted above. Yet the picture which emerged from the research was of a great proportion of un-represented detainees who had no capacity to make the legal applications to adjourn their case or to remove it from the fast track.⁸¹

Out of a total of 22 hearings observed, only four applications to remove the case from the fast track were made, only three applications for adjournment were made and only one application for bail was made.⁸²

A legal representative who had made an application commented, when explaining why her client's application was refused:

"...[the] Judge was confused about whether he had the power to de-fast track the case and that was why it had to be argued on the day of the appeal" (Case E).

One of the major reasons given for the lack of applications is the intense time pressures experienced by legal representatives. When asked if he had made any application at any stage for his client to be removed from the fast track, the legal representative involved in Case K replied,

⁸¹ Paragraph 28(1) and Paragraph 30(1) of The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 outline the provisions for adjourning and removing a case from the Fast Track respectively.

⁸² In a few cases, legal representatives interviewed said that these applications had been made prior to the hearing but were not made by the barrister in court and so were not encountered by our court monitors.

“No, there was insufficient time. We were battling even to present his case. There wasn't time to interview him properly and we had to conduct the interview by phone only. The only day I saw him was for five minutes on the day of his hearing”.

The solicitor involved in Case T also suggested that the time constraint was the major reason why he did not attempt to get his client's case taken out of the fast track, even though that detainee claimed to have survived torture. To the same questions he responded,

“No. It was too quick. Although he was a torture victim he did not have any scars or torture marks.”

The solicitor's explanation here is unconvincing and BID finds the solicitor's strategy here very concerning. Where lack of sufficient time to put the case properly was so evident to the solicitor, it seems clear that he or she should have asked for an adjournment to seek more time and it was an error not to do so.

8.8 Lack of access to bail and failure to safeguard the right to liberty

ILPA advises fast track legal representatives that “it may be worth spending valuable time making a bail application on the first day on which instructions are received”⁸³ and emphasises that post-decision, separate applications should be made for bail and to remove the case from fast track at the appeal hearing.⁸⁴ The General Civil Contract also emphasises the importance of bail applications.⁸⁵

However, even in cases where detainees specifically requested that their legal representatives make an application on their behalf an application was sometimes not made. One detainee explained:

⁸³ “...although if the client is a port applicant, paragraph 22(1B) of Schedule 2 to the Immigration Act 1971 means that bail cannot be granted until 7 days have elapsed from the date of arrival in the UK (and note the requirement in AIT practice direction 19.1 for the AIT to list the bail application within 3 working days of receipt “if practicable”).” ‘Fast track asylum determination procedures: how best to represent your clients’, Immigration Law Practitioners’ Association, ILPA continuing professional development training guide, November 2005, p 18

⁸⁴ “...detention has to be justified in accordance with normal detention criteria... Consideration should therefore be given to applications for (a) bail & (b) for the case to be removed from the fast track at the appeal hearing. These are separate applications. Justification has to be provided on a file if (a) is not pursued at the hearing (paragraph 24 of the Fast Track Specification).” Ibid, p 26

⁸⁵ “The Asylum Adviser is required to consider whether a bail application should be submitted on the client's behalf. The Asylum Adviser should always consider making a bail application at the asylum appeal hearing. If an Asylum Adviser decides not to make a bail application at this stage they should record their reasons on the file. This will be monitored on audit. They must also inform the client of their right of review of the Asylum Adviser's decision and provide them with the review notification form CW4. Asylum Advisers are reminded that they may make a bail application at any stage in the proceedings where there is merit to do so.”

“My solicitor didn’t care that much. I asked him why I should be in the fast track because it meant that I couldn’t access my documents or have my cell phone to contact anybody. He was with me during the interview. I asked my solicitor about bail so I could print off documents from the internet and my solicitor didn’t want to do it because he just said ‘They will not allow you.’”

Another fast track detainee related a similar experience, stating that “My solicitor wouldn’t help with a bail application.” (Case M)⁸⁶

Of the 22 cases monitored in this study, only one application for bail was made at the appeal hearing.

8.9 Non-removal and continued detention of unsuccessful fast track asylum applicants

In 2005 there was an unannounced inspection of Harmondsworth IRC by HM Inspectorate of Prisons. HMIP’s report explains the isolation of some detainees who have been served with removal orders but who, for various reasons, cannot be removed:

“...some detainees, fast tracked and refused, were still at Harmondsworth weeks or months later, awaiting removal. At this stage both the assigned caseworker and the assigned duty representative seemed to have disengaged from the case.”⁸⁷

The fast track aims to take applicants from their initial application through to integration or removal in approximately five weeks. The decision to remove may not, however, immediately be followed by physical removal of the applicant. Administrative delay, difficulties in obtaining travel documents and non-cooperation or bureaucratic delay by the country of origin may mean that an unsuccessful applicant continues to be detained well after the decision to remove has been made.

⁸⁶ However, it should be noted that in this case the legal representative made an application for adjournment as well as a successful application to de-fast track the case. Thus this legal representative made two of the four applications made within the 22 cases observed.

⁸⁷ ‘Report on an unannounced inspection of Harmondsworth Immigration Removal Centre’, HM Chief Inspector of Prisons, 14-17 February 2005, p 19

BID was able to learn about the decision from the appeal hearing we observed in all of the 22 cases. The decisions reached by the Immigration Judges are as follows:

- In 14 of the cases the appeal was refused.
- In two of the cases the appeal was adjourned.
- Three cases were removed from the fast track procedure and therefore released from detention.
- In two of the cases the applicant chose to withdraw his claim for asylum.
- In one case the refusal of asylum by the Home Office was successfully appealed.

At the end of the court observation period, 18 of the 22 detainees were still being held in immigration detention. This includes those cases where the asylum claim was refused (14), those cases where the case was adjourned within the fast track (2), and those cases where the claim for asylum was withdrawn and the applicant was awaiting voluntary return (2).

Several of the detainees raised problems with their removal without prompting. They expressed frustration and desperation that they remain in detention following the exhaustion of their appeal rights, either because it is impossible in practice to remove them to their home country, or because there are considerable administrative delays by the Immigration Service in processing their removal. The following exchange from an interview with one of the fast track detainees (case V) is representative of that frustration:

Interviewer: Have the Immigration Service given you a date for when you are going to be removed from the UK?

Applicant: No, they don't tell me anything.

Interviewer: If the Immigration Service are not sending you home quickly, do you know why?

Applicant: I don't know, probably they don't find it profitable to do it now. There's somebody here who signed - meaning consented - to be removed but it's been three months and they still keep him here. It's a real mess. I don't understand what they're doing.

Interviewer: How long do you think it will take for IS to remove you?

Applicant: Taking the example of other friends here, I can guess they could keep me for another three months, I would say.

One lawyer commented:

"I think the system is unjust and unfair. We are not given ample time to prepare for bail hearings and the client is detained for a longer period than is necessary. The time the client spends in detention is not used to properly prepare the case. Even when the case is finished and determined the client is still stuck in detention." (Case V)

When BID made attempts to contact the 18 detainees who were detained at the end of their appeal, it was revealed that 12 of the asylum applicants were no longer being held in immigration detention and six were still detained. This means that 27% of the fast track detainees included in this study (almost one third) have been in detention for a period of more than 60 days.

9. Conclusion and recommendations for action

The Government argues that safeguards are built into the fast track. The findings of this research demonstrate that these safeguards do not exist in practice or are systematically failing.

In BID's view, the Government's desire to speed up the asylum determination process does not justify depriving people of their liberty for the administrative convenience of the state. BID urges IND to end the use of detained fast track processes.

While detained fast track processes are in use, based on the findings of this research, and BID's experience of assisting detainees, BID calls for:

The Immigration and Nationality Directorate of the Home Office to:

- >> Establish a maximum period for detention for those detained for fast track processes.
- >> Provide for an automatic independent review of detention of those in the fast track.

The Department for Constitutional Affairs and the Legal Services Commission to:

- >> Scrap the merits testing for fast track asylum appeals: BID supports ILPA in calling for full legal representation in fast track appeals without merits testing or alternatively amending the merits test so that only those cases that are considered "bound to fail" are refused funding.
- >> Remove fast track appeals from the 40% success rate at appeal target: The outcome of fast track appeals should not be taken into account when calculating whether solicitors have reached the 40% target. BID opposes the introduction of this target in any case, as all asylum seekers should be entitled to equality of arms with the Home Office and have a representative to argue their case.
- >> Require publicly funded representatives to automatically present a bail application on behalf of their fast track clients.

Immigration Judges to:

- >> Refuse to preside over fast track cases where a legal representative is not present. The ability of unrepresented fast track detainees to adequately put forth their claim for asylum is highly questionable.

Legal representatives to:

>> Make bail applications for all fast track clients. Once a bail application is made the Immigration Service must explain why detention is necessary.

>> Make applications for all fast track cases to be removed from the fast track procedure. You should query the suitability of the case to be fast tracked and seek reasons as to why it is considered suitable. Once an application is made to take a case out of the fast track, the onus must be on the Immigration Service to explain why the case can be dealt with within the fast track procedure.

>> Properly apply the merits test: Do not refuse to grant CLR unless you are certain that the prospects of success are poor. Given the nature of the fast track, and the guidance from the LSC, you should grant CLR where the prospects of success are unclear or borderline.

>> Inform your client when you have refused CLR of their right to review and provide them with a CW4 Form. You can assist your client in completing the Form under Legal Help.

The public and for detainees to:

>> Put your concerns about the fast track procedure in writing. Send a letter to your local MP to register your complaints about the detention of asylum seekers under the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005.

BID would like to see any responses received (fax to 0207 247 3550).

Appendices

- A Home Office Fast Track Timetable
- B List of countries likely to be suitable for the Detained Fast Track
- C Detained Fast Track (DFT) asylum processes suitability list, as of February 2006

Appendix A: Fast track timetable

- >> Day 1 Arrival
- >> Day 2 Legal representative interview & asylum interview.
- >> Day 3 Service of Decision & refusal of leave to enter, if decision is a refusal
- >> Day 4 First of two days in which to appeal.
- >> Day 5 Second of two days in which to appeal to the AIT. AIT send notice of appeal to Fast Track.
- >> Day 6 First of two days on which appeal bundle can be lodged.
- >> Day 7 Second of two days in which appeal bundle lodged.
- >> Day 9 Appeal hearing.
- >> Day 10 First of two days in which determination must be promulgated
- >> Day 11 Appeal determination promulgated.
- >> Day 12 First of two days in which to seek a reconsideration hearing.
- >> Day 13 Second of two days in which to seek a reconsideration hearing.
- >> Day 15 IAT determine whether to allow a reconsideration hearing. If refused then two days to apply to Court of Appeal.

- >> Day 17 Reconsideration hearing.
- >> Day 18 ARE if no application to Court of Appeal. Tribunal promulgate reconsideration hearing (not clear- might be two days).
- >> Day 19 First of two days to seek permission to appeal to Court of Appeal.
- >> Day 20 Second day to seek permission to Court of Appeal.
- >> Day 21 Tribunal determines permission to Court of Appeal Application.

Appendix B: List of countries likely to be suitable for the Detained Fast Track

Annex 2

LIST OF COUNTRIES LIKELY TO BE SUITABLE FOR THE DFT

Notes:

1. Generally speaking any asylum claim from a national of the countries below should be referred to the NIU unless the claimant falls within one of the excluded categories above listed as unsuitable for the DFT.
2. Claims in respect of countries or, where appropriate groups within countries not on the list below should also be referred to the NIU if you have reason to believe that the claim may be decided quickly.

Afghanistan	Mali
Albania (NSA)	Mauritania
Bangladesh	Mauritius
Benin	Moldova (NSA)
Bolivia (NSA)	Mongolia (NSA)
Botswana	Mozambique
Brazil (NSA)	Namibia
Bulgaria (NSA)	Niger
Burkina Faso	Nigeria (NSA – males only)
	Nigeria (females)
Cameroon	Pakistan
Canada	Romania (NSA)
Central African Rep	St Lucia
Chad	Serbia & Montenegro (NSA)
China	(including Kosovo)
Congo (Brazzaville)	Senegal
Djibouti	Somaliland (not Somalia)
Ecuador (NSA)	South Africa (NSA)
Equatorial Guinea	Sri Lanka (NSA)
Gabon	Swaziland
Gambia	Tanzania
Ghana (NSA – males only)	Togo
Ghana (females)	
Guinea-Bissau	Trinidad and Tobago
Ivory Coast	Turkey
India (NSA)	Uganda
Jamaica (NSA)	Ukraine (NSA)
Kenya	Vietnam
Macedonia (NSA)	Zambia
Malaysia	
Malawi	

NSA :asylum claims from nationals of countries(or groups within countries) on the designated NSA list at Section 94 of the Nationality, Immigration and Asylum Act 2002 will, if refused and certified as clearly unfounded, be subject to the Non-Suspensive Appeals (NSA) procedure ie the claimant will have no right of appeal against the decision whilst in the United Kingdom.

**Appendix C: Detained Fast Track (DFT) asylum processes suitability list,
as of February 2006**

Annex 1

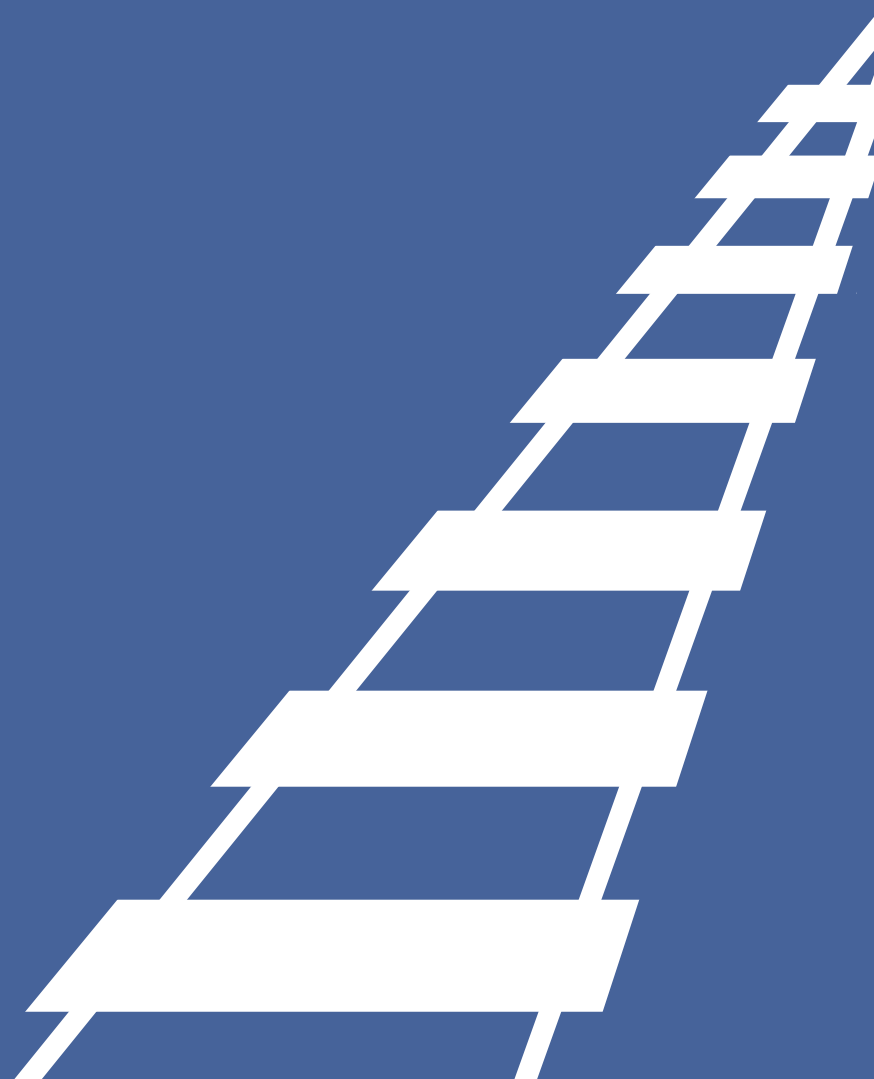
Detained Fast Track (DFT) Asylum Processes Suitability List

February 2006

1. Any asylum claim, whatever the nationality or country of origin of the claimant, may be fast tracked where it appears, after screening to be one that may be decided quickly.
2. It is the responsibility of the duty officer at the National Intake Unit (NIU) to identify claims suitable for DFT processing in detention at Oakington, Harmondsworth or Yarl's Wood.
3. To assist screening staff in making referrals, this covering note includes advice as to which claims may be unsuitable for referral and are unlikely to be accepted into the DFT together with a list of countries (see Annex 2) which may well give rise to claims which may be decided quickly. However, if you are unsure as to whether a case is suitable for referral to the NIU then do not hesitate to discuss the case by telephone with the NIU.
4. The guidance in this instruction should not be taken as implying any departure from the fundamental principle that all asylum claims are looked at on a case by case basis and decided on their individual merits.

A. CLAIMANTS UNSUITABLE FOR DFT

- Pregnant females of 24 weeks and above.
- With any medical condition which requires 24 hour nursing or medical intervention.
- With a Disability, except the most easily manageable.
- With an infectious/contagious disease.
- Presenting with acute psychosis, eg schizophrenia and requiring hospitalisation.
- Presenting with physical and/or learning disabilities requiring 24 hour nursing care.
- Where there is independent evidence that the claimant has been tortured.
- Where detention would be contrary to government policy eg where the claimant is an unaccompanied asylum seeking child.
- Age dispute cases not falling within one of the three criteria set out below.



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