

# The Criminalisation of Asylum Seekers in the UK

By

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In 2003 the UK government announced a new strategy for refugee status determination. This strategy, known as the Detained Fast Track (DFT), or 'Super Fast Track' envisaged that claimants would remain in detention until they were granted asylum, humanitarian protection, discretionary leave, or removed from the UK. The detention of asylum applicants is deemed necessary by the Border and Immigration Agency (BIA) in order to ensure that failed asylum seekers are removed from the UK.<sup>1</sup> The DFT must therefore be considered against a backdrop of political pressure to be seen to be tackling the 'immigration problem.'

Not only does the DFT appear to detain asylum seekers for exercising their human right to claim asylum, but it entails a 'super fast track' timescale in which the asylum applicant is interviewed on day 2, served with a decision on day 3, has two days to lodge any appeals, and has the appeal hearing on day 9. Including all reconsiderations, the applicant will be appeals exhaustive on day 21 unless AIT grants permission to appeal to the Court of Appeal.<sup>2</sup> There are serious concerns over the impact on quality decision making this process has. Research produced by the organisation Bail for Immigration Detainees (BID) demonstrates that asylum cases heard in the DFT are significantly more likely to fail than those heard in standard asylum procedures.<sup>3</sup>

According to Home Office statistics, 21,660 initial asylum decisions were made in 2007. Of these 16% were to grant asylum, 10% were granted humanitarian protection or discretionary leave and 73% were refusals.<sup>4</sup> In 2007 14,895 appeals were determined by the AIT immigration judges in 2007, of which 72% were dismissed and 23% were allowed. This compares with 73% dismissed and 22% allowed in 2006.<sup>5</sup> However, according to Home Office statistics, of 330 initial asylum decisions made in DFT in the 4<sup>th</sup> quarter of 2007, 0% was recognised as refugees and 2% were granted humanitarian protection or discretionary leave.<sup>6</sup> There were no statistics on the DFT success rate at appeal for the same period.

Critics argue that the 'super fast' timescales of the DFT means that there simply isn't enough time to adequately prepare an asylum case. Supporting evidence, such as country of origin information, identity

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documents, or medical notes are extremely difficult to assemble under such short time frames. Furthermore, public funding for legal representation must satisfy a 'merit test' which means that many defendants go unrepresented at their appeal.<sup>7</sup> There are also fears over the quality of legal representation within the DFT.

Whilst such quick timetables are serious concerns that demand scrutiny, attention must be focused on the use of detention within refugee status determination. Not only does the use of detention affect the quality of decision making, but it has serious implications for the physical and psychological well-being of vulnerable asylum applicants. This paper will set out three concerns of the detained fast track: firstly, that the process by which asylum applicants is deemed eligible for the DFT is inadequate. This means that traumatised men, women and children are detained in the UK whilst exercising their right to claim asylum. This includes victims of torture and sexual violence. Secondly, whilst there exists a time scale for refugee status determination within the DFT, there is no such time scale for detention post decision. This means that appeals exhausted asylum seekers will remain detained until they are removed or released on bail under Home Office detention rules.<sup>8</sup> This can result in periods of detention for many months or even years. Thirdly, no adequate review mechanism is currently in place to challenge continued detention post asylum decision.

### **Inadequate Screening Process**

According to Home Office Statistics, as of 29 December 2007 there were 2,095 persons detained in the UK under Immigration Act powers. Of these, 1,455 or 69% had claimed asylum at some stage.<sup>9</sup> Suitability for the DFT is currently assessed in a 'screening interview' that may take place at a UK port, Asylum Screening Unit or at a local enforcement office. Claims are deemed suitable for DFT if after screening the case appears 'straightforward' and 'capable of being decided quickly.'<sup>10</sup> The further guidance given to Immigration officers is a 'Suitability List' which lists 55 countries 'likely to be suitable' for the DFT together with a list of claimants deemed 'unsuitable' for the detained fast track.<sup>11</sup> It will be demonstrated here that both pieces of guidance are inadequate.

The DFT Asylum Process Suitability List clearly states that "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."<sup>12</sup> However, the screening interview does not intend to elicit any details of the substantive asylum claim. As a National Intake Unit instruction states, "immigration officers who conduct these screening interviews are *not expected to engage in any analysis of asylum claims.*"<sup>13</sup>

These instructions suggest that the decision to fast track asylum applications of those 55 nationalities that appear on the 'Suitability List' will be arbitrary. For as the Joint Council for the Welfare of Immigrants (JCWI) argues, "in reality the nationality of an asylum applicant will play a large part

in determining whether or not they will be detained.”<sup>14</sup> Similarly, the House of Lords, House of Commons Joint Committee on Human Rights (JCHR) “are concerned that the decision to detain an asylum seeker at the beginning of the process simply in order to consider his or her application may be arbitrary because it is based on assumptions about the safety or otherwise of the country from which the asylum seeker has come.”<sup>15</sup>

This list of unsuitable claimants includes women more than 24 weeks pregnant, unaccompanied children, persons with a medical or physical condition or learning disability requiring 24 hour nursing, persons with an infectious disease, persons with acute psychosis or persons with independent evidence that they have been tortured or a victim of trafficking.<sup>16</sup> However, given that the screening interview does not intend to address an applicant’s substantive claim for asylum, it is not clear how Immigration Officers would ascertain whether an asylum applicant is a victim of trafficking or torture. Moreover, Home Office policy itself recognises that traumatised claimants may be unable to reveal details about their claim under DFT timescales: “a torture victim’s potential shame, distress, embarrassment and humiliation about recounting their experiences are difficulties which may need to be overcome. They may find it particularly difficult in the atmosphere of officialdom.”<sup>17</sup>

Furthermore, it is not clear how it would be possible for a claimant to provide independent evidence that they had been tortured at the screening interview. The referral process to receive such independent evidence first requires a ‘pre-assessment’ appointment with a Medical Foundation caseworker in order to receive a full assessment by a doctor. The results of each stage are normally received within *10 working days* of each appointment.<sup>18</sup>

This means that victims of torture may be deemed suitable for the DFT if they cannot produce the required evidence. For example, the London Detainee Support Group (LDSG) stated that in their experience, torture victims were regularly detained for fast track purposes because asylum seekers were not asked about their claim or about their health at the screening interview where the decision to detain was made.<sup>19</sup>

The screening process also fails to identify gender related cases as some women’s asylum claims are being inaccurately being described as ‘straightforward.’ As Baroness Hale’s judgement in *R (Hoxha) v SSHD* [2005] makes clear “the complexity of cases raising gender-specific forms of persecution and abuse such as rape and sexual abuse means that they are extremely unlikely to be suitable for fast-tracking.”<sup>20</sup> According to research conducted by BID, women are being detained who are victims of sexual and gender violence. BID’s report *Refusal Factory* found that sexual and gender violence played a role in 14 out of 21 cases observed at Yarl’s Wood Detention Centre in a four-week period in 2007.<sup>21</sup> Such violence included sex trafficking, rape, torture, FGM, indecent assault, and domestic violence. Clearly, none of these 14 cases should have been deemed straightforward nor capable of being decided quickly. The Immigration Law Practitioners’

Association (ILPA) expresses a similar concern about the adequacy of the DFT screening process: “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.”<sup>22</sup>

According to Home Office statistics, as of 29 December 2007 there were 35 people detained solely under Immigration Act powers who were recorded as being less than 18 years old. This figure may be higher as asylum seekers claiming to be under 18 may be processed as adults if immigration officers dispute their age. According to a March 2008 report from the Children’s Commissioner, the asylum screening process fails to recognise unaccompanied children first and foremost as vulnerable and traumatised.<sup>23</sup> Screening practices were identified in the report as intimidating, confusing and frightening with basic needs not being met, such as attending to thirst, hunger or cleanliness.<sup>24</sup> The Children’s Commissioner reports that both age dispute policy and practice are potentially unfair to children and open to abuse which means that children or disputed minors may be deemed eligible for detention. According to evidence received by the Joint Committee on Human Rights the implications of detention for the welfare of children has been a source of growing concern among NGOs and Her Majesty’s Inspector of Prisons (HMIP).<sup>25</sup>

As reported by the JCWI, the following instructions given to immigration officers who conduct fast-track screening interviews give the alarming impression that claims are included in the fast track procedure even where doubt exists as to their suitability: “it is far better to refer a case that subsequently turns out to be unsuitable than not to refer a case that is suitable.”<sup>26</sup> That there appears to be a presumption in favour of detaining asylum applicants on the DFT is extremely worrying, and has grave implications for the well-being of vulnerable adults and children.

## **Detention Post Asylum Decision**

The legality of detaining applicants for the purpose of the fast track process was challenged in the case of *Saadi*.<sup>27</sup> The case ultimately ended in the European Court of Human Rights which ruled that detaining asylum seekers who were not at risk of absconding was in accordance with Article 5(1) (f) ECHR<sup>28</sup>. The European court also found that detaining for a short, tightly controlled period of time was not disproportionate. This was for a period of 7 days in the *Saadi* case. However this ruling does not consider post decision detention.

Once an asylum seeker comes to the end of the status determination procedure, they will remain in detention unless a successful bail application is made, or they are removed from the UK. However, BID argues that bail is rendered a meaningless option for failed asylum seekers if the applicant has no community contacts or friends to act as sureties. Furthermore, the Joint Committee on Human Rights (JCHR) states that “we

have heard considerable evidence that although the right to apply for bail is available to all detained asylum seekers after seven days, in reality many detainees are not aware of, or are unable to exercise, this right because of language difficulties, a lack of legal representation and mental health issues. Bail hearings, when they occur, are usually unsuccessful.<sup>29</sup> Official figures provided to the JCHR show that in two years, only 19 bail applications were successful at Yarl's Wood (twelve per cent of the 149 made).<sup>30</sup>

Under Article 5 of the European Convention on Human Rights, and mirrored in domestic policy, detention pending deportation is only lawful if deportation is imminent. Removal is either voluntary through the International Organization for Migration's (IOM) assisted voluntary return scheme, or is enforced by the home office. Whilst Home Office case owners are responsible for addressing any barriers to removal such as lack of travel documents, there are difficulties in accessing travel documents for certain countries. As the Joint Committee on Human Rights states "there is a significant risk that a period of detention which IND initially intended to last for a few days can turn into weeks, months and even years."<sup>31</sup>

BID also expresses concern about the decision to continue to detain those failed asylum seekers who cannot be imminently removed from the UK. "In BID's experience there is a pervasive dishonesty amongst the Immigration Service about when removal can and cannot be effected. The practice of detaining people who can't be removed, but at the same time refusing to accept that they can't be removed results in breaches both for the right to liberty and the right to security if they are sent to other states or returned with inadequate documents."<sup>32</sup> The London Detainee Support Group expresses similar concerns "asylum seekers who have been given deportation orders are often detained indefinitely where travel documents are unobtainable [...] both the Immigration Service and the AIT consistently show great reluctance to release on temporary admission or bail in these circumstances, despite the evident impossibility of removal, the stated reason for detention."<sup>33</sup> As BID points out there is nothing in the DFT Suitability List to alert Immigration Officers to problems in removing certain nationalities.<sup>34</sup>

According to the National Coalition of Anti-Deportation Campaigns (NCADC), the Home Office may hold information on file as to why an asylum seeker cannot be removed which may be instrumental in the asylum seeker's bail application. However, whilst it is possible to request a copy of all recorded information on file for a small fee under the Data Protection Act, many asylum seekers are not necessarily aware of this right.<sup>35</sup>

Whilst Home Office figures were not available for the average length of time spent in detention for adults, research indicates that it is significantly longer than the 7 day period found lawful in the *Saadi* case. HM Inspectorate of Prisons (HMIP) reports that the number of people in detention at Yarl's Wood for over three months rose from five per cent in 2005 to eleven per cent in 2006.<sup>36</sup> Moreover, of six women who had been released from DFT interviewed by BID for *Refusal Factory* the time in

detention ranged from one month to eleven months, with an average length of time in detention of 5.3 months.<sup>37</sup> The Joint Committee has recommended that “where detention is considered unavoidable to facilitate the removal of asylum seekers who are at the end of the process, subject to judicial oversight the maximum period of detention should be 28 days.”<sup>38</sup> However, there still remains no limit on the time spent in detention post asylum decision.

### **Absence of Adequate Review Mechanism**

Written evidence submitted to the Joint Committee on Human Rights express concern over the lack of judicial oversight of the decision to detain and the lack of automatic judicial reviews of detention.<sup>39</sup> As HMIP explains, “there is no systematic process in place to identify and release those who are not fit to be detained, or who do not meet the detention criteria.”<sup>40</sup>

HMIP also raises concern about the number and quality of reviews of detention, stating that ‘we find monthly (non-judicial) reviews are repetitive, do not reflect changed circumstances, including the longevity of detention, and in some cases are missing altogether.’<sup>41</sup> Moreover, the HMIP Inquiry into the Quality of Healthcare at Yarl’s Wood revealed that “when we examined immigration files which contained reviews of detention, those reviews seemed remote and uninformed. There was little sign that emerging and often deteriorating medical conditions were properly taken into consideration in decisions about continuing detention.”<sup>42</sup>

As BID reports, Detention Centre Rule number 35 (3) requires health services to alert the detaining authorities if detention or continued detention might be injurious to health, and if there is an allegation of torture or evidence of suicidal intent.<sup>43</sup> Worryingly, HMIP found that “there was no system to communicate other areas of concern raised under this rule and there was evidence of inappropriate, informal contact between healthcare and immigration staff about fitness to detain with little record of what was said or arrangements for follow-up.”<sup>44</sup>

Several reports have made the link between immigration detention and mental health problems. Dr Katy Rojbant presented the findings of her study on depression and anxiety of immigration detainees to the Annual Conference of the Division of Clinical Psychology.<sup>45</sup> The study found that 75.8% of detained asylum seekers had levels of depression that demanded clinical help compared with 26.2% of the control group that had never been detained.<sup>46</sup>

In response to a Parliamentary Question from Lord Avebury, the Home Office reported that in the 6 month period between March and November 2007, 57 complaints were made by immigration detainees regarding their treatment at Yarl’s Wood IRC.<sup>47</sup> Three confidential complaints were made to the BIA, whilst Serco, the private security firm that runs Yarl’s Wood received 18 complaints regarding healthcare, 14 regarding

catering and 22 relating to staff conduct.<sup>48</sup> Furthermore, there were 5 incidents of self-harm requiring medical treatment in August 2007, with 152 individuals on formal self-harm risk during the same month period.<sup>49</sup> The March 2007 inspection of Dover IRC by HM Chief Inspector of prisons revealed particular concerns about mental health provision and staff training in recognising and dealing with previously experienced trauma or torture.<sup>50</sup>

## Conclusion

Immigration Removal Centres are the physical manifestation of the current trend to criminalise the asylum seeker. Detaining asylum seekers during the refugee status determination process is one aspect of current UK policy that is premised on exclusion, deterrence and removal. Recent UK policy emphasises border control in place of establishing a just and fair protection regime. Further barriers for asylum seekers to avail themselves of protection in a 'safe' country include visa restrictions, increased powers for border police, the imposition of carrier sanctions, minimal resettlement places offered, biometric registration and heat detectors at borders. This restrictive climate is of serious concern as these non-entrée measures fail to distinguish those migrants who are in need of international protection from those who are seeking economic opportunities. This has succeeded in displacing the 'refugee problem' by moving activity underground. This has resulted in the proliferation of people smuggling by trafficking rings, and seeking illegal routes of entry into the UK which in turn legitimates the criminalization of the asylum seeker.

The Home Office currently envisages that 30% of asylum applicants will have their claims processed on the DFT.<sup>51</sup> As this paper has intended to highlight, traumatised men, women, and children may be selected for the DFT and remain in detention for indefinite periods of time. It has been argued here that the safeguards currently in place are inadequate to protect victims of sexual violence, trafficking, torture, and those with mental health problems from the being detained as part of the DFT process. An investigation of the DFT screening process, 'suitability list' and current detention review mechanism must be demanded immediately, in order to prevent vulnerable persons from being detained seemingly for exercising their human right to claim asylum.

This paper is based on research undertaken on behalf of Bail for Immigration Detainees for their September 2007 publication '*Refusal Factory.*'

## Notes

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<sup>1</sup> House of Lords House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, Tenth Report of Session 2006-07 section 209

<sup>2</sup> Bail for Immigration Detainees, *Detained Fast Tracking of Asylum Claims information sheet*, undated

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<sup>3</sup> See Bail for Immigration Detainees, *Working Against the Clock*, July 2006 and Bail for Immigration Detainees, *Refusal Factory*, September 2007

<sup>4</sup> Home Office, *Asylum Statistics Fourth Quarter 2007*,

<sup>5</sup> Home Office, *Asylum Statistics Fourth Quarter 2007*

<sup>6</sup> Home Office, *Asylum Statistics Fourth Quarter 2007*

<sup>7</sup> To be eligible for legal aid the legal representative must assess the case as having more than a 50% chance of succeeding.

<sup>8</sup> These are set out in the Home Office Operational Enforcement Manual Chapter 38

<sup>9</sup> Home Office, *Asylum Statistics Fourth Quarter 2007*

<sup>10</sup> Border and Immigration Agency, *Suitability for Detained Fast Track and Oakington Processes*, 28 July 2007

<sup>11</sup> Border and Immigration Agency, *Suitability for Detained Fast Track and Oakington Processes*, 28 July 2007

<sup>12</sup> Border and Immigration Agency, *Suitability for Detained Fast Track and Oakington Processes*, 28 July 2007

<sup>13</sup> Home Office National Intake Unit, *New Asylum Model Immigration Service Operational Instruction*, 10/02/2006 (my emphasis)

<sup>14</sup> Joint Council for the Welfare of Immigrants JCWI Memorandum dated 12/10/2006

<sup>15</sup> House of Lords, House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers 10<sup>th</sup> Report of Session 2006-07, Volume I – Report and Formal Minutes* para 226

<sup>16</sup> Border and Immigration Agency, *Suitability for Detained Fast Track and Oakington Processes*, 28 July 2007

<sup>17</sup> Asylum Policy Instruction, *The Medical Foundation for the Care of Victims of Torture*, last updated 28/02/2008

<sup>18</sup> Asylum Policy Instruction, *The Medical Foundation for the Care of Victims of Torture*, last updated 28/02/2008

<sup>19</sup> The Association of Visitors to Immigration Detainees, Memorandum dated 29/09/2006 cited in House of Lords House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers Tenth Report of Session 2006-07 Volume II- Oral and Written Evidence*

<sup>20</sup> Cited in Kilroy para 26

<sup>21</sup> Bail for Immigration Detainees, *Refusal Factory* September 2007

<sup>22</sup> Fast Track Scheme ILPA Training 24/11/2005 Prepared by Ravi Low-Ber, Refugee Legal Centre para 38

<sup>23</sup> Office of the Children's Commissioner, Children's Commissioner uncovers failings in the care of vulnerable children, 07/03/2008

<sup>24</sup> Office of the Children's Commissioner, Children's Commissioner uncovers failings in the care of vulnerable children, 07/03/2008

<sup>25</sup> House of Commons House of Lords Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, Tenth Report of session 2006-07 Section 244

<sup>26</sup> National Intake Unit- New Asylum Model Immigration Service Operational Instruction', Home Office, National Intake Unit (NIU), 10/02/2006) quoted in Joint Council for the Welfare of Immigrants JCWI Memorandum dated 12/10/2006

<sup>27</sup> House of Lords, House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers 10<sup>th</sup> Report of Session 2006-07, Volume I – Report and Formal Minutes*, para 2212



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<sup>28</sup> Article 5 of the ECHR provides “everyone has the right to liberty and security of person.” No one shall be deprived of his liberty save in the circumstances specified in Article 5 (1) (a)-(f) and in accordance with a procedure prescribed by law. Article 5(1) (f) states that a person may be arrested or detained to prevent his effecting an unauthorised entry into the country or where action is being taken against them with a view to deportation or extradition.

<sup>29</sup> House of Lords, House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers 10<sup>th</sup> Report of Session 2006-07*, cited in *Bail for Immigration Detainees, Refusal Factory*, September 2007

<sup>30</sup> *ibid*

<sup>31</sup> House of Lords, House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers 10<sup>th</sup> Report of Session 2006-07, Volume I – Report and Formal Minutes para 275*

<sup>32</sup> *Bail for Immigration Detainees, Memorandum to Joint Committee on Human Rights*, October 2006

<sup>33</sup> LDSG memorandum dated 22/09/2006 cited in House of Lords, House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers 10<sup>th</sup> Report of Session 2006-07, Volume II – Oral and Written Evidence, Ev148*

<sup>34</sup> *Bail for Immigration Detainees, Refusal Factory*, September 2007 Section 5.4

<sup>35</sup> NCADC, *Briefing on SAB*, undated

<sup>36</sup> HM Inspectorate of Prisons, *Inquiry into the Equality of Healthcare at Yarl’s Wood Immigration Removal Centre*, October 2006

<sup>37</sup> *Bail for Immigration Detainees, Refusal Factory*, September 2007

<sup>38</sup> House of Lords, House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers 10<sup>th</sup> Report of Session 2006-07, Volume I – Report and Formal Minutes para 276*

<sup>39</sup> House of Lords, House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers 10<sup>th</sup> Report of Session 2006-07 section 271*

<sup>40</sup> HM Inspectorate of Prisons, *Inquiry into the Quality of Healthcare at Yarl’s Wood Immigration Removal Centre*, October 2006, cited in *Bail for Immigration Detainees, Refusal Factory*, September 2007

<sup>41</sup> Anne Owers, HM Chief Inspector of Prisons, Memorandum dated 03/10/2006 cited in House of Lords, House of Commons Joint Committee on Human Rights, *The Treatment of Asylum Seekers 10<sup>th</sup> Report of Session 2006-07, Volume II – Oral and Written Evidence, Ev333*

<sup>42</sup> *Inquiry into the quality of healthcare at Yarl’s Wood immigration removal centre 20 – 24 February 2006* by HM Chief Inspector of Prisons, para 3.64 Cited in *Bail for Immigration Detainees, Refusal Factory*, September 2007

<sup>43</sup> *Bail for Immigration Detainees, Refusal Factory*, September 2007

<sup>44</sup> *Inquiry into the quality of healthcare at Yarl’s Wood immigration removal centre 20 – 24 February 2006* by HM Chief Inspector of Prisons, para 3.63 Cited in *Bail for Immigration Detainees, Refusal Factory*, September 2007

<sup>45</sup> *Medicine Today, Immigration Detainees Suffer Serious Depression and Anxiety*, 18 December 2007

<sup>46</sup> *Medicine Today, Immigration Detainees Suffer Serious Depression and Anxiety*, 18 December 2007

<sup>47</sup> House of Lords 14 Nov 2007 : Column WA22

<sup>48</sup> House of Lords 14 Nov 2007 : Column WA22

<sup>49</sup> Freedom of Information Request, *Self-harm in Immigration Detention- August 2007*

<sup>50</sup> HM Chief Inspector of Prisons, *Report on an announced inspection of Dover Immigration Removal Centre 19 - 23 March 2007*, 21st September 2007

<sup>51</sup> House of Commons House of Lords Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, Tenth Report of Session 2006-07 Section 218

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