IN THE COURT OF APPEAL **No. C4/2009/2614**
APPEAL FROM THE ADMINISTRATIVE COURT

R (SUCKRAJH)

Appellant / Claimant

-and-

(1) ASYLUM & IMMIGRATION TRIBUNAL
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents / Defendants

-and-

UNITED NATION HIGH COMMISSIONER FOR REFUGEES

Intervener

SUBMISSIONS ON BEHALF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

Introduction

1. This appeal concerns the operation of the UK Border Agency's ("UKBA") fast-track procedure for processing asylum claims, known as the Detained Fast Track ("DFT") procedure. The procedure involves detaining asylum-seekers at immigration detention facilities whilst their claim is processed and any appeal determined.

2. The United Nations High Commissioner for Refugees ("UNHCR") has a direct interest in this matter as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions, together with governments, for the problem of refugees.[1]

3. UNHCR intervenes, with the Court's permission, in light of its supervisory responsibility in respect of the 1951 Convention relating to the Status of

[1] Statute of the Office of UNHCR, GA Res. 428(V), Annex, UN Doc A/1775, at [1] (1950) **[Tab 1, UNHCR Submissions Bundle]**

Refugees ("the 1951 Convention") and its 1967 Protocol relating to the Status of Refugees ("the 1967 Protocol").[2] According to its Statute, UNHCR fulfils its mandate, *inter alia*, by, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.[3] UNHCR's supervisory responsibility is also reflected in both the Preamble and Article 35 of the 1951 Convention and Article II of the 1967 Protocol, obliging States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of these instruments. In domestic United Kingdom law, UNHCR has a statutory right to intervene before the First Tier and Upper Tribunals (Immigration and Asylum Chamber).[4]

4. Given that a number of provisions of the 1951 Convention, including the non-penalisation clause enshrined in Article 31, are applicable to refugees before they are formally recognised as refugees, assessing the treatment of asylum-seekers pertains to UNHCR's supervisory responsibility under this instrument. Furthermore, while the 1951 Convention does not explicitly regulate asylum procedures, fair and efficient asylum procedures are essential for the determination of refugee status[5]. As such UNHCR has the responsibility to express itself on the choice of the procedure and the safeguards it contains.

5. UNHCR has previously intervened in a number of cases before the English courts: e.g. *Fornah/K* [2006] UKHL 46, *Asfaw* [2008] UKHL 31 and *QD(Iraq)* [2010] 2 All E 971. UNHCR also intervenes in important cases in other countries and before the European Court of Human Rights ("ECtHR"), including *Saadi v UK* (2008) 47 EHRR 17 and *M.S.S. v. Belgium and Greece* (2011). When intervening, UNHCR addresses issues of refugee law, doctrine

[2] UNTS No. 2545, Vol. 189, p. 137 **[Tab 2]** and UNTS No. 8791, Vol. 606, p. 267 **[Tab 3]**.
[3] See above footnote 1, at para. 8(a).
[4] Amended Tribunal Procedure (Upper Tribunal) Rules 2008, in force since 15 February 2010.
[5] See UNHCR, *General Conclusion on International Protection,* ExCom Conclusion No. 65 (XLII) – 1991, 11 October 1991, at: http://www.unhcr.org/excom/EXCOM/3ae68c404.html; ExCom Conclusion No. 71 (XLIV) – 1993, at: http://www.unhcr.org/refworld/docid/4a7c4b882.html.

and general practice rather than to advance detailed submissions on the particular facts of individual cases.

6. UNHCR has, with the active co-operation of the United Kingdom Border Agency ("UKBA"), monitored the operation of the DFT procedure since 2006 and has produced reports in relation to it in 2008 and 2010 under the auspices of two projects - the Quality Initiative Project and the Quality Integration Project - described further below. On the basis of these studies, and drawing on international legal principles more generally, UNHCR wishes to make the following submissions relevant to this appeal:

6.1. There is a significant lack of clarity in UKBA policy as to the scope and criteria for applying the DFT procedure, such that adequate safeguards against arbitrary decision making cannot be said to be in place (see paragraphs 20-25 below);

6.2. The decision making within the DFT procedure itself has been shown to involve significant and repeated errors (see paragraphs 26-29 below);

6.3. The screening system to determine whether a case is appropriate for the DFT procedure also lacks sufficiently specific record keeping, and reasons for decision are not always known. This gives rise to further concerns as to the procedure's arbitrary and unlawful operation (see paragraphs 31-33 below);

6.4. The factual premise which allowed a fast track procedure involving detention to survive earlier challenges before the domestic courts and the ECtHR – in particular the fact that detention would be for c. 7 days – is no longer valid, given a change in UK policy permitting longer and unspecified periods of detention (see paragraphs 34-40 below);

6.5. The effect of complex cases being allocated to the DFT procedure and of there being inadequate guidance and safeguards in place in the

system to assess suitability for such a procedure is to render the detention involved unlawful and arbitrary (see paragraphs 41-50 below).

7. The body of these submissions addresses the two projects identified above, UNHCR's general guidance in this area and each of the propositions set out at paragraph 6. A bundle of additional material referred to in these submissions is served herewith.

The Quality Initiative Project and Quality Integration Project

8. Since 2004 UNHCR has been working collaboratively with the UKBA with the joint aim of improving the quality of first instance asylum decision-making. From 2004 to 2009 the work fell under the guise of the Quality Initiative Project under which UNHCR issued six reports setting out empirical findings and observations. The Fifth Report dated March 2008 includes the results of an audit of first instance decision-making under DFT at Yarl's Wood and Harmondsworth Immigration Removal Centres carried out between late 2006 to December 2007 ("Fifth Report") **[Tab 8]**. The Executive Summary to this report included the following statement:

> "In UNHCR's view, DFT decisions often fail to focus on the individual merits of the claim. Particular concerns highlighted in this report include an incorrect approach to credibility assessment, a high prevalence of speculative arguments and a lack of focus on material elements of the claim. There is also evidence that an excessively high burden of proof is being placed on applicants. Some Case Owners demonstrate a limited understanding of refugee law concepts and gender-specific issues are often not correctly addressed in decisions. The Office further notes concern regarding the assessment of medical evidence in decision making. Although many of these issues have been highlighted in previous Quality Initiative reports, they appear to be particularly accentuated in DFT decisions." (see p. vii).

9. The Quality Integration Project was established in 2010 as a follow-on to the Quality Initiative Project. In August 2010 UNHCR produced the first Quality Integration Report ("2010 Report") **[Tab 11]**. This was published by UKBA in February 2011.

10. In the 2010 Report UNHCR expressed its continued concerns at various aspects of decision making, and in relation to the adequacy of procedural safeguards intended to ensure that the speed of the DFT procedure does not negatively impact on the quality of decisions. It stated:

> "In this audit, UNHCR records continued concerns that these safeguards do not always operate effectively enough to identify complex claims and vulnerable applicants not suitable for a detained accelerated decision-making procedure." (p.5).

11. UNHCR considers that a number of the specific findings contained in the Fifth Report and in the 2010 Report may be relevant to issues in this appeal and they are referred to below.

12. The UK Government has responded positively to concerns raised by UNHCR in the reports (See Phil Woolas MP, 15 Dec. 2008; Damian Green MP, 7 Dec. 2010 **[Tab 9]**). Mr Green MP, Minister for Immigration, has accepted in whole or part the recommendations made in the 2010 Report. The UK Government has also consulted UNHCR on the policies in place in this area, including that governing the detention of the Appellant in this case (considered below). The UK Government will shortly commence a review of the screening of DFT cases and a UNHCR representative has been invited to sit on the working group that oversees the Government's work on screening.

Sources of UNHCR guidance

13. On 13 October 1986 the Executive Committee of the High Commissioner's Programme issued a Conclusion entitled, "Detention of Refugees and Asylum-Seekers" which noted with deep concern that large numbers of refugees and asylum-seekers were subject to detention pending determination of their protection needs and expressed the opinion that detention should normally be avoided and could be resorted to only where necessary in limited and prescribed circumstances **[Tab 4]**.[6]

[6] No 44 (XXXVII) – 1986; Executive Committee 37th Session. Contained in UN GA Doc 12A (A/41/12/Add.1) **[Tab 4]** See, also, other Executive Committee Conclusions Nos. 3 (XXVIII) – 1977, para. (a); 7 (XXVIII) – 1977, para. (e); 36 (XXXVI) – 1985, para. (f); 46 (XXXVIII) – 1987, para. (f); 47

14. The conclusion refers to Article 31 of the 1951 Convention which states:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

15. The first paragraph of Article 31 prohibits the penalization of refugees and asylum-seekers who have come directly and who can show good cause for their illegal entry or stay. Depriving asylum-seekers of their liberty for the sole reason of having sought asylum would be a penalty in the context of Article 31(1). The second paragraph of Article 31 permits States to apply some restrictions to the movement of asylum-seekers who have entered or are present in the territory unlawfully. However, any restrictions must be "necessary" and, where necessary, "shall only be applied until their status is regularized or they obtain admission into another country". Detention should, therefore, not be automatic[7]. Furthermore, Article 18 of Council Directive 2005/85/EC provides 'Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum'[8].

16. UNHCR has subsequently issued guidelines on this issue **[Tab 5]**.[9] The guidelines reiterate that as a general rule asylum-seekers should not be detained, that detention is an exceptional measure and that there should be a presumption against detention (guidelines 2 and 3). The guidelines list four situations in which detention of asylum-seekers may exceptionally be justified

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(XXXVIII) – 1987, para. (e); 50 (XXXIX) – 1988, para. (i); 55 (XL) – 1989, para. (g); 71 (XLIV) – 1993, para. (f); 85 (XLIX) – 1998, paras. (cc) and (dd); etc.

[7] UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-. Seekers, February 1999 **[Tab 5]**.

[8] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13 December 2005.

[9] UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-. Seekers, February 1999 **[Tab 5]**.

for limited purposes but these must be *clearly prescribed* in domestic law. The purposes for which detention may exceptionally be tolerated are: to verify identity; to determine elements on which the asylum claim is based, which has been indicated is for a preliminary interview or screening only; in cases of destruction of identity documents; and to protect national security (guideline 3). In line with a number of international decisions,[10] these measures should only be resorted to after a full consideration of all possible non-custodial alternatives to detention in the individual case, which might include bail, reporting conditions or "open centres" where asylum-seekers can be required to reside but with permission to leave and return during stipulated times of day (guideline 4).

17. UNHCR has also issued guidance on the purpose and scope of accelerated asylum procedures and the right to an effective remedy in relation to such asylum procedures **[Tab 10]**.[11] This guidance emphasises that states must not "dispense with key procedural safeguards or the quality of the examination procedure to meet time limits or numerical targets" and that "sacrificing key procedural safeguards and/ or setting short time limits for the examination may result in flawed decisions which will defeat the objective of an efficient asylum procedure, as they may prolong proceedings before the appeal instance." (see para. 6)

UNHCR's general observations about the use of the accelerated asylum procedure in the UK

18. In UNHCR's view[12], national procedures for the determination of refugee status and subsidiary protection status may include special procedural devices for dealing in an expeditious manner with applications which are

[10] See, e.g., United Nations Human Rights Committee ("HRC"), *A v Australia,* Communication No. 560/1993, 3 April 1997; HRC, *C v. Australia,* Communication No. 900/2000, 13 November 2002; HRC, *Bakhtiyari v. Australia,* Communication No. 1069/2002, 6 November 2003; Inter-American Court of Human Rights, *Vélez Loor v. Panama,* 10 December 2010.
[11] UN High Commissioner for Refugees, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*, 21 May 2010, available at: http://www.unhcr.org/refworld/docid/4bf67fa12.html
[12] UN High Commissioner for Refugees, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*, 21 May 2010, available at: http://www.unhcr.org/refworld/docid/4bf67fa12.html

obviously without foundation as not to merit a full examination at every level of the procedure. Applications that are "*clearly abusive*" or "*manifestly unfounded*" include those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 Convention or to any other criteria justifying the granting of international protection.[13]

19. Compelling protection reasons may also be a basis for processing a claim on a priority basis through an accelerated procedure, for example in cases which are clearly well-founded or for vulnerable persons, allowing a swift positive decision on the asylum application. However, such cases would, in UNHCR's view be unlikely to be suitable for the DFT process or other accelerated procedures that mandate detention because such persons are likely to be admitted to the territory forthwith.

Lack of clarity in the UKBA policy guidance

20. Given that accelerated procedures deviate from the normal timeframe considered necessary to complete an adequate assessment of an application, UNHCR submits that limited grounds for accelerating an examination should be clearly and exhaustively defined.[14]

21. The UKBA's current policy specifies that a claim "may be considered suitable" for DFT process where it "appears to be" a case where a quick decision "may" be made: DFT & DNSA – Intake Selection (Asylum Intake Unit Instruction), para. 2.2 (AB p. 445); also Enforcement Instructions and Guidance Chapter 55.4).

22. UNHCR considers that this policy should be interpreted so that "appears to be" is given an objective meaning. Thus, where a claim does not (objectively) appear suitable for an accelerated procedure it is contrary to UKBA policy for the individual to be detained in pursuance of the procedure. The policy

[13] UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, at: http://www.unhcr.org/refworld/docid/3ae68c6118.html. UN High Commissioner for Refugees, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*, 21 May 2010, available at: http://www.unhcr.org/refworld/docid/4bf67fa12.html

[14] See 2010 Report, Section 7 para. 6 p.21-2 **[Tab 11]**.

must at least be read as being subject to the requirement of reasonableness so that "appears to be" means "reasonably appears to be" (HWR Wade & CF Forsyth, *Administrative Law*, 10th ed. 2009, pp.354-362). It should, furthermore, be made clear that it is only if this criterion is satisfied that recourse to an accelerated determination could be appropriate.

23. UNHCR submits that the current UKBA policy for determining whether cases are suitable for DFT does not represent an adequate safeguard for asylum-seekers, especially in light of the automatic detention that follows (see below). UNHCR has previously expressed concerns on a number of aspects of the policy.[15] As indicated above, the sole criterion for subjecting a person to DFT is that a "quick decision" can be made. This criterion is, however, vague and does not adequately assist referring officers, Asylum Intake Unit staff or Judges as to whether the claims are suitable for an accelerated process.

23.1. The policy that DFT can be used where it appears that a "*quick decision* may be made" (DFT & DNSA – Intake Selection (Asylum Intake Unit Instruction), para. 2.2) is not a prescriptive criterion. *Which* cases in which a quick decision may be made is left entirely at large. The policy leaves it open to UKBA officials to apply their own personal criteria in determining whether a case is capable of quick decision. On one view, it even leaves it open to such officials to decide that a highly complex case is suitable for a quick decision, if for example they consider one particular part of the claim to be weak.

23.2. The policy identifies only two examples of cases where it "may" not be possible to make a quick decision: (i) cases where it *is foreseeable* that further inquiries *are necessary* to obtain clarificatory or corroborative evidence, without which a fair hearing *could not be made*, and where such inquiries *cannot* be concluded to allow a decision within the indicative timescales; and (ii) cases where it is foreseeable that translations are required without which a *fair and sustainable*

[15] 2010 Report para 5.1.2-5.1.4 p.14 **[Tab 11]**.

decision could not be made (DFT & DNSA – Intake Selection (Asylum Intake Unit Instruction), para. 2.3 AB p. 445). These examples exacerbate rather than mitigate the uncertainty in the guidance, and the unjustified breadth of the concept of a claim where a quick decision may be made, because in both these cases it would *certainly be inappropriate* for there to be a quick decision since in both cases the asylum applicant would be prejudiced and subject to unfair procedure.

23.3. Furthermore, the emphasis in the policy guidance is whether a quick decision would be "possible" or "may be made" rather than whether it would be "suitable", which fails to place the correct emphasis on the paramount importance of protecting the rights of asylum-seekers to fair and appropriate procedures for determining their claims.

24. The UKBA policy provides no guidance as to other cases that would not be suitable for quick decision, such as cases raising uncertain country condition issues, complex refugee law issues or cases which are particularly factually detailed (see 2010 Report, para. 5.1.2 p.14 **[Tab 11]**). An Operational Instruction to caseworkers on flexibility within the DFT procedure reminds them to be mindful of the need for it to be possible for asylum applications to be fairly determined by DFT procedure.[16] This operational instruction is welcome. However, it does not increase clarity in the governing policy

[16] "Detained Fast Track Processes Operational Instruction, April 2005" on the subject of "Flexibility" **[Tab 6]**. The subject of the instruction is the circumstances in which an extension of time for processing of an application will be warranted, rather than identifying circumstances when removal from DFT process is warranted. It does provide one further example of cases that might not be suitable for DFT process, where a person is obtaining supporting evidence. So far as material it states:

> "This document gives guidance on when the timetable should be enlarged to ensure fairness within the Detained Fast Track system. It does not offer specific guidance on when cases should be removed altogether from the process, but caseworkers must be aware that cases should be removed from the process if it is not possible to consider the claim with the requisite degree of fairness within the fast track timescales (even when flexibly applied in accordance with the guidance set out in this document) and consequently the claim is not one which is capable of a quick decision. This might be the case, for example, if the caseworker is satisfied that the applicant is obtaining supporting evidence, that fairness requires that it be taken into account when making the initial decision on the asylum claim, and that it will not be available within a period consistent with Fast Track processing even if the timetable were to be enlarged. It must be remembered that removal from the fast track process should be considered in other situations where the requirements of fairness demand it."

documentation or provide a substitute for guidance directed at the issue of which decisions are suitable for quick decision.[17]

25. A further concerning feature of the UKBA policy is that it states that there is a presumption of *inclusion* in DFT:

> "There is a general presumption that the majority of asylum applications are ones on which a quick decision may be made, unless there is evidence to suggest otherwise." (para. 2.2.2)

This indicates that proper objective assessments are not being made as to suitability for DFT. It also raises particular concerns in relation to detention, dealt with further below.

Decision making within DFT

26. UNHCR has found that quality concerns identified in its previous reports appear particularly accentuated in DFT decisions. It has identified a failure to focus on the individual merits of claims, indications that the pressure of speed is undermining the quality of decision making and evidence that procedures for routing applications into DFT and for removing unsuitable cases from DFT often do not operate effectively to identify complex cases and vulnerable applicants.[18]

27. UNHCR has documented in detail in both its Fifth Report and the 2010 Report concerns relating to poor quality decision-making under DFT procedures.[19] Such concerns include over-emphasis on general findings that an applicant's credibility has been damaged,[20] insufficient pro-active use of

[17] An example of the sort of guidance that is lacking is provided, by analogy, with policy criteria that have been put in place in respect of an asylum processing pilot scheme at Solihull. The Solihull pilot is an accelerated process but one which does not involve detention (asylum-seeker are subject to limits on movement and other conditions). "Flexibility criteria" have been set out to assist in determining when claims cannot adequately be processed within one month. The Immigration Law Practitioners Association (ILPA) has recommended to practitioners that practitioners' rely on this guidance by analogy when seeking of removal of persons from DFT procedure. See *The Detained Fast Track Process- A best practice guide* (ILPA 2008), pp.23-4 **[Tab 7]**.

[18] 2010 Report, 2.1.3, p.2.

[19] The 2010 Report noted some areas of improvement but the greater majority of the concerns highlighted in the Fifth Report remained prevalent (Key Observations, Section 2) **[Tab 12]**.

[20] 2010 Report, para. 4.1.7 p.6; Fifth Report, 2.3.12 to 2.3.23 pp.9-12, 2.4.3 to 2.4.4 p.25. **[Tab 11]**.

objective country information,[21] placing an inappropriate burden of proof on applicants[22], failing to seek appropriate information from applicants[23], and a lack of clear understanding of criteria under the 1951 Convention.[24] It is UNHCR's view that the greater the flaws in decision making processes generally, the greater caution is to be applied to any process sanctioning detention on the basis that decisions can reliably be made quickly.

28. The concerns are particularly acute given that 99% of applications decided under DFT procedure fail.[25]

29. The absence of clear guidance has also been identified by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg. Mr Hammarberg criticised the UK's detention practices under the DFT in a report in September 2008, stating that, "one problematic aspect of [it] is the high degree of discretion and broad powers of the immigration officers". More specifically he stated:

> "the Commissioner notes with concern the absence of a special and precise legal framework regarding detention of asylum-seekers in "Fast Track Processes".
> …
> It is of concern that the criteria and details of asylum-seekers' DFT are not contained in law (primary or secondary legislation) but in an internal, administrative manual of immigration officers. The manual is available at the site of the UKBA but part of it ("a small amount") is not public on the ground that it "may damage the effectiveness of the immigration control". In addition, the criteria …under which the aforementioned manual allows administrative detention are not characterized by precision, a fact that may lead to an excessive use by immigration officers of their discretion to detain asylum-seeker.
>
> Therefore, the Commissioner recommends that the United Kingdom authorities consider regulating this issue by introducing special legislation fully in compliance with the standards laid down by the European Convention on Human Rights…"

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[21] 2010 Report, para. 4.1.9 p.7; Fifth Report, 2.3.40, p.15. **[Tab 11]**.
[22] 2010 Report, para. 4.1.10 p.7. **[Tab 11]**.
[23] 2010 Report para 5.1.6 p. 15. **[Tab 11]**.
[24] 2010 Report para. 4.2, pp.12; Fifth Report 2.3.24 to 2.3.41, pp.12-15. **[Tab 11]**.
[25] See Control of Immigration: Quarterly Statistical Summary, United Kingdom, First Quarter and Second Quarter 2010 (Third Quarter not yet available) **[Tab 13]**.

30. Notwithstanding the inclusion in UKBA of the guidance relating to vulnerable persons, UNHCR submits that Mr Hammarberg's criticisms remain germane.[26]

Deficiencies in reasoning

31. A further important safeguard which UNHCR has found to be lacking concerns the statements of reasons as to why a claim has been found capable of being decided quickly:

> "Despite full access to UKBA's applicant case files and CID, UNHCR observed inconsistent practice as regards AIU staff minuting of reasons for deciding a case was suitable for DFT. Some files recorded no reasoning whilst many provided standard wording to the effect of "case can be decided quickly". UNHCR did not observe any recorded instance of AIU staff explicitly and substantively considering the individual elements of the claim against the "quick decision" criteria." (2010 Report, para. 5.1.9 **[Tab 11]**; also Fifth Report 2.3.88, p.23 **[Tab 8]**).

32. The failure to provide substantive reasons may be a product of the presumption of inclusion already referred to. Since the presumption is that a claim will be subject to DFT, it may be that a positive reasoned decision is only made and recorded if the claim appears not to be capable of being the subject of a quick decision. The lack of reasoning is also present in relation to refusals to remove claims from DFT. UNHCR submits that makes all the more compelling the need for clear guidance and criteria.[27]

33. As in the UK, accelerated procedures entail detention of the individual concerned, the grounds for resorting to such procedures must also be in accordance Article 5(1)(f) ECHR and the related case law of the European Court of Human Rights.

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[26] Memorandum of Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visits to the United Kingdom on 5-8 February and 31 March-2 April 2008, Strasbourg 18 September 2008, CommDH(2008)23 paras 21, 23, 24, 51-52**.**

[27] 2010 Report para. 5.3.2 p.18 **[Tab 11]**.

A new factual premise

The premise and reasoning in *Saadi*

34. In *Saadi*[28] the Court of Appeal, the House of Lords and the Grand Chamber of the ECtHR held that a fast track procedure[29] involving the detention of asylum-seekers can comply with Article 5 ECHR and domestic law in the circumstances then obtaining. However, in UNHCR's view, aspects of the ongoing operation of DFT procedure are not compliant with Article 5 ECHR, or with the judgments of the domestic and Strasbourg Courts in that case.

35. It was central to the reasoning of the Court of Appeal, House of Lords and ECtHR that the justification for DFT is twofold: (i) it enables the government efficiently to prevent unauthorised entry; and (ii) it benefits asylum-seekers themselves, both in individual cases by enabling easy cases to be determined quickly, and generally by reducing "the queue" (Lord Steyn, *Saadi* (HL) para. 47).

36. Thus, the ECtHR noted the position of the UK Government that,

> "People who come to the UK may be fleeing terrible persecution and it is important that their claims are dealt with swiftly. So rather than being stuck in administrative limbo they are able to get on with rebuilding their lives …. It is in everyone's interest that both genuine and unfounded asylum seekers are quickly identified." (Mrs Barbara Roche, Saadi (HL), para. 12)

37. To similar effect, in the House of Lords, Lord Slynn had stated that, "Getting a speedy decision is in the interests not only of the applicants but of those increasingly in the queue" (*Saadi* (HL) par. 47). And this was expressly adopted by the ECtHR (para. 76-7), which said, "the policy behind the creation of the Oakington regime was generally to benefit asylum seekers." The factual premise for argument was that determinations would occur "in

[28] *R (Saadi) v Secretary of State for the Home Department* **[2002] 1 WLR 3131 and** *Saadi v UK* **(2008) 47 EHRR 17**

[29] The procedure at issue was the first incarnation of fast track procedure involving detention in the UK which applied at Oakington detention centre. Oakington detention centre subsequently closed. DTF procedure applies at Yarl's Wood and Harmondsworth detention centre.

about seven days" or within "a matter of a few days" (see Court of Appeal at paras. 20, 27, 28, 67; HL at paras. 11-12; ECtHR at para. 79). It was only on this basis that DFT was considered to be permissible under Article 5(1)(f).

The change in Government policy

38. Since the 2002 *Saadi* decision in the House of Lords the United Kingdom Government has changed its policy. This has been summarised to Parliament in the following terms:

> "… the period of detention for making a quick decision will not be allowed to continue for longer than is reasonable in all the circumstances. We will aim to make decisions within 10 to 14 days, but there will be occasions where it is quicker—for example, at Harmondsworth or a non-NSA decision at Oakington. However, we will continue to detain for the purpose of deciding the claim quickly, even beyond the 10 to 14 day time scale, unless the length of time before a decision can be made looks like it will be longer than is reasonable in all the circumstances." (Hansard, 16 Sept 2004, Col 157-8 WS, Mr Desmond Browne, Minister for Citizenship and Immigration)

39. As will be apparent, this policy is materially different from the policy under consideration in *Saadi*. The DFT is now uncertain and unlimited in duration. While it may achieve decisions within 10 days, such periods may be extended on "*reasonable*" grounds – which are unspecified, and so potentially permits detention for a lengthy period of time. The result is that it is very difficult accurately to describe United Kingdom Government policy as a policy of detention *in order to effect a speedy determination* of asylum applications, as it was described in *Saadi* (e.g. (CA) para. 22; (HL) 44, 47, (GC) 77, 80).

DFT procedure arbitrary and unlawful as currently operated

40. Both the common law and Article 5 ECHR require that executive powers to detain individuals are properly and adequately structured.

41. Administrative law requires that a policy be in place: *Refugee Legal Centre* [2005] 1 WLR 2219, paras. 18-19; *B v Secretary of State for Work and Pensions*

[2005] 1 WLR 3796, para. 43. The policy must be sufficiently prescriptive in its terms to enable decisions to be made accurately and in conformity with the policy objective, and to ensure that they are made "consistently from case to case" (ibid).

42. Likewise, Article 5 ECHR, as interpreted by domestic courts in the UK, imposes a requirement that policies guiding the exercise of discretion in the context of detention have sufficient *quality* if they are not to be arbitrary: MXL [2010] EHHC 2397, para. 80.[30] The law must indicate the scope of the discretion to detain and the manner of its exercise with sufficient clarity in order to give the individual adequate protection against arbitrary interference: *Al-Nashif v Bulgaria* (2003) 36 EHRR 37, para 119; *R v Governor of Brockhill Prison ex p Evans* [2001] 2 AC 19, p.38 (Lord Hope). Blake J has recently held that: "There need to be *criteria* for the exercise of the broad power to detain foreign nationals under primary legislation": MXL [2010] EWHC 2397 para. 92(1) (emphasis supplied).

43. UNHCR submits that it is of utmost importance that in cases where individuals (i) have their asylum claim subjected to accelerated procedure with the attendant risk of mistakes and unfairness arising and (ii) are automatically deprived of their liberty as a consequence of that decision, that positive and properly recorded decisions in each individual case as to the reasons why they are suitable for accelerated process and why the UKBA criterion for DFT applies to the claim.

44. UNHCR submits that the current criterion for applying the Fast Track procedure is vague and not sufficiently prescriptive to be suitable for determining the use of an accelerated asylum process in general, and one involving a deprivation of liberty, in particular.

[30] "In my judgment the published policies of the executive designed to inform as to how the discretion to detain should be exercised, are relevant criteria within this principle and thus form part of the measures cumulatively representing the quality of the law from the point of view of Articles 5." (Blake J)

45. It is submitted that the absence of adequate safeguards in relation to the types of cases considered unsuitable for accelerated procedures (such as those set out above) means that UKBA policy provides insufficient structure to ensure that the discretion is exercised consistently, reasonably and fairly. It does not provide an adequate safeguard against arbitrariness in decision making. This lack of adequate safeguards at the stage of entry into the DFT also means that the detention itself is rendered arbitrary and unlawful.

46. UNHCR submits that the deficiencies identified above illustrate that the DFT policy as drafted and operated in the United Kingdom lacks the quality of law required by cases such as *Amuur v France* (1996) 22 EHRR 533[31].

47. In addition, as explained above, the United Kingdom Government's current policy leaves open the possibility for detention to exceed 10-14 days and to be of unlimited duration. It therefore departs in important respects from the factual premise of the judgments of the Courts in *Saadi*.

48. It is hoped that concerns such as those raised above will be amongst the issues addressed by the Government's screening review. And the Government's commitment to address some of the concerns raised by UNHCR is welcome. However, at present, and at times material to the present appeal, the DFT procedure does not include adequate safeguards against arbitrariness, either in relation to identification of cases suitable for accelerated procedures or the detention that applies automatically thereafter.

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[31] In this case the ECtHR made clear in the context of a deprivation of liberty of an asylum-seeker that the principles of legality apply especially strictly *in order to avoid all risk of arbitrary deprivation of liberty*:

> "50. … In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies 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. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies. …"

49. For the reasons set out above UNHCR submits that the problems which the Appellant's case have illustrated in relation to the United Kingdom's DFT procedure are not isolated in nature, and that they give rise to serious issues of compatibility with domestic and international law.

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