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## Accelerated procedure

### General (scope, grounds for accelerated procedures, time limits)

There are two kinds of accelerated procedures: the non-suspensive appeal procedure (NSA) and the detained fast-track procedure (DFT).

### Non-Suspensive Appeal

Firstly where the claim is certified by the Home Office as clearly unfounded, there is no in-country appeal. These are called Non-Suspensive Appeal (NSA) cases. The majority of cases certified in this way are of applicants from a deemed safe country of origin, but cases are also certified as clearly unfounded on an individual basis. The applicant may often be detained, though not always, and guidance to Home Office decision makers refers to the procedure as a Detained Non-Suspensive Appeal (DNSA). About 7% of claims were certified clearly unfounded in 2014, and approximately 9% in the first three quarters of 2015.<sup>1</sup> Albania, India, Nigeria, Pakistan and Poland were the most common nationalities, between them accounting for 68% of those people whose claims were certified unfounded in 2014 and 62% in the first three quarters of 2015.<sup>2</sup>

The second accelerated procedure is a Detained Fast Track procedure (DFT) where the Home Office consider that the claim is capable of being decided quickly. In theory the two procedures are very different in that NSA implies that there is no merit, whereas DFT is based on speed. However, as described below, informally the DFT also appears to operate as an 'unfounded' procedure.

The most common reason for a claim to be certified as clearly unfounded and thus routed through the NSA procedure is that the asylum seeker comes from a country which is considered to be safe. Countries are treated as safe if they are designated as such in binding orders made under Section 94 Nationality Immigration and Asylum Act 2002 or in the Act itself.<sup>3</sup> (See section on the [Safe Country Concepts](#) <sup>[1]</sup>).

There is no time limit for a decision to be made in such a case, although the Home Office guidance states that the aim is to decide within 14 calendar days. The Home Office is responsible for making the decision. The policy is that all decisions on a potential NSA case must be made by a caseworker who is trained to make NSA decisions, and must be looked at by a second 'accredited determining officer' who decides whether to accept the first officer's recommendation.<sup>4</sup> The Independent Chief Inspector of Borders and Immigration noted a lack of objective standards in accrediting this officer, and of consistent understanding of this role and its remit.<sup>5</sup> Guidance to decision makers advises that where the claim is for asylum and human rights protection, both or neither should be certified as unfounded, since any appeals of the two issues must be heard together. The guidance also states that when the asylum seeker comes from a designated state the refusal should not normally be based on the credibility of the individual applicant but on objective country material.<sup>6</sup> This is general practice and is unlike the regular procedure where no such guidance is given and refusal is commonly based on credibility.

A claim may also be certified clearly unfounded and routed through the NSA on an assessment of the individual merits of the case, not only on the basis of a deemed safe country of origin

(1702 cases were individually certified in 2014).<sup>7</sup> This should only be done where the caseworker considers that the claim is incapable of succeeding before an independent tribunal.<sup>8</sup>

Not all asylum claimants from designated countries have their claim considered for certification as unfounded. The reason for this suggested to the Chief Inspector was pressure on asylum decision makers to process asylum decisions as quickly as possible to achieve target times for consideration, and the allocation of cases to those who are not trained in NSA procedures.<sup>9</sup>

## **Detained-Fast Track**

The defining characteristics of the DFT procedure have been speed and detention throughout the decision process. The criteria for being routed into the DFT only require that the case is considered after the screening interview to be capable of being decided quickly and that the asylum seeker is not excluded from the DFT.

After a series of legal challenges to the safety and fairness of the DFT process, its operation was suspended on 2 July 2015.<sup>10</sup>

The issues upon which the DFT has been challenged and found unsafe include treatment of vulnerable applicants, short timescales for preparation and access to legal advice and representation and the legality of grounds for detention pending appeal. In summary, the policy and operation of the system before suspension of the system was as follows.

The following groups of people were in theory excluded from the DFT:

- a. women who are 24 weeks pregnant or over;
- b. applicants with health conditions needing 24 hour medical care;
- c. applicants with physical disabilities which cannot be managed in detention;
- d. applicants with a mental or physical condition, including infectious and/or contagious diseases, which cannot be treated or managed in detention;
- e. applicants who lack the mental capacity or coherence to understand the process or present their claim;
- f. where there is independent evidence that applicants have been tortured;
- g. those under 18 and adults with dependent children;
- h. those accepted by a competent authority to be victims or potential victims of trafficking.

These exclusions have been drawn more narrowly over time as they have been amended. For instance all those with illness or disability were previously excluded, but they were amended to exclude only those whose conditions cannot be managed in detention.

The guidance said that a case may be suitable for the DFT where it appeared that further enquiries would not be needed, nor complex legal advice, corroborative evidence, or translation of documents.<sup>11</sup> Since the details of the asylum claim do not form part of the screening interview, in practice the complexity of the case is generally not apparent at the screening stage.<sup>12</sup> The UN Committee Against Torture was concerned that torture survivors and people with mental health conditions enter the DFT 'due to a lack of clear guidance and inadequate screening processes, and the fact that torture survivors need to produce 'independent evidence of torture' at the screening interview to be recognized as unsuitable for the DFT system'.<sup>13</sup>

In a similar manner, the screening process is not suited to identifying the complex protection issues that may arise in women asylum seekers' claims. UNHCR<sup>14</sup> and Human Rights Watch<sup>15</sup> have observed that the inadequate screening process followed by a personal interview under time pressure in detention (see section below on DFT Procedure: Personal Interview) are not conducive to disclosure of the atrocities that in particular women may have suffered.

Available space in the detention centre and whether the asylum seeker could easily be removed (e.g. because they had travel documents) influenced the decision to detain. Home Office guidance advises that these factors and ease of removal should be taken into account.<sup>16</sup>

All initial asylum claims are referred to a team called the National Asylum Allocation Unit (NAAU), who decide on which procedure should be used. Outside the hours of operation of that team, a referring officer must decide how to proceed, and where they take a reasoned view that the claim is suitable for the DFT or detained NSA route, they may decide to detain the person until the NAAU office re-opens.<sup>17</sup>

A very tight timescale was laid down for the DFT which required that decisions should be taken within 3 days of detention. In practice this time limit was very often not observed. For example, the Independent Chief Inspector of Borders and Immigration reported that only four out of 114 detainees received a decision within 3 days of arriving in detention. Another study found that 71% of those in the DFT waited two weeks or more for their initial decision.<sup>18</sup> There is no automatic sanction if initial interviews are not arranged or initial decisions are not taken within the specified time.

Applications to take the claim out of the DFT had to be made to the Home Office. There was no appeal against refusal to do so, but refusal could be challenged by judicial review (see section on Regular Procedure: Appeal [2]). Cases have been taken out of the DFT for instance because a person is shown to have suffered torture, or it is established that there are complex legal or evidential issues. This application is difficult to make successfully for a person who is not represented. In 2014 16% were taken out of the fast track before an initial decision was taken.<sup>19</sup> Referral letters from Freedom from Torture or the Helen Bamber Foundation have been said by practitioners to be the only reliable way to obtain a transfer out of the fast track.<sup>20</sup>

Asylum decisions in the DFT were taken by the Home Office caseworkers based in the detention centre.

In practice in 2014 66% of cases channelled into the DFT were initially refused and a further 8% withdrew their applications.<sup>21</sup>

Up to 2007 the Home Office issued lists of countries whose nationals were deemed suitable for the DFT. The list was of countries from which claims were normally treated as unmeritorious and refused. It was withdrawn in 2008, but suitability for the NSA procedure remained a criterion for inclusion in the DFT.<sup>22</sup> In a 2014 High Court challenge to the lawfulness of the DFT, the judge found that there was an operational list of countries which gave a guide to suitability for the DFT, but this was flexible, and changed over time.<sup>23</sup>

Since the main criterion is how quickly an asylum claim can be decided, no country of origin is excluded from the fast-track. The DFT continued through 2014 to be used for nationals of for instance Afghanistan (179 cases), in relation to which there are wide-ranging and complex protection issues, as set out in UNHCR's eligibility guidelines, and Sri Lanka (347 cases), whose human rights record has been the subject of international investigation and criticism<sup>24</sup>

Although policy has been to exclude some vulnerable groups from the DFT, in practice people in these groups were detained in the DFT.<sup>25</sup>

The lawfulness of the DFT was challenged in 2014 by the charity Detention Action. The High Court judge held that various shortcomings of the DFT process combined together meant that proper legal representation was essential. To ensure this it was necessary to have enough time between instructing a legal representative and the substantive interview. This did not exist in the

DFT as operated, and the judge concluded that this was a 'crucial failing', which was 'sufficiently significant that the DFT as operated carries with it too high a risk of unfair determinations for those who may be vulnerable applicants.'<sup>26</sup> Following this judgment, the Home Office made some adjustments to the operation of the DFT, including to ensure a clear 4 days between instructing a lawyer and the substantive interview.<sup>27</sup>

One of the key characteristics of the DFT is that the asylum seeker remains in detention after the refusal of their asylum claim, and pending hearing of their appeal, which is also heard in the detention centre. In 2015 Detention Action challenged in the High Court the lawfulness of the fast track appeal process. It was after the success of their challenge that the operation of the DFT was suspended. The cases and their effect are described below.

## Personal interview

There are no grounds in the accelerated procedure to omit a personal interview.

## Non-Suspensive Procedure

The same immigration rules apply to the interview as in the regular procedure (see section on Regular Procedure: Personal Interview <sup>[2]</sup>) but they must be conducted by NSA trained caseworkers in the NSA procedure.

## Detained-Fast Track Procedure

In the DFT procedure the interview was required to take place on the day after arrival. In practice asylum seekers in the DFT could wait on average 11 days for an interview. Independent Chief Inspector of Borders and Immigration, *Asylum: A Thematic Inspection of the Detained Fast Track*, ICIBI, 2012, accessible at: [http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Asylum\\_A-thematic-inspection-of-Detained-Fast-Track.pdf](http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Asylum_A-thematic-inspection-of-Detained-Fast-Track.pdf) <sup>[3]</sup>. The interview was conducted by a Home Office case worker. Unlike the regular procedure, the interview takes place in detention. No study has been done on the impact of personal interviews taking place in detention. Lawyers said that the quality of interviewing in the DFT was less skilful, tending to focus extensively on detail and not on the major issues in the claim.

Transcripts and tape recordings were provided of interviews in the DFT as in the regular procedure. Interpreters were available as in the regular procedure.

## Appeal

In the NSA the appeal is non-suspensive, i.e. they may not be made from within the UK. They must be made within 28 calendar days of leaving the UK.<sup>28</sup> The scope of the appeal is the same as for in-country appeals, but in practice it is very difficult to appeal from outside the UK. The Chief Inspector was told that of 114 NSA appeals lodged since 2007, only one appeal had succeeded. The report noted that non-suspensive appeals cases accounted for an increasing percentage of refused asylum seekers removed from the UK, rising to more than a quarter in 2012/13.<sup>29</sup>

In the DFT no removal would take place until the appeal is decided, but the appeals took place in a building adjoining the detention centre, and detention was maintained until the case is concluded or removed from the DFT.

There have been two different challenges to the lawfulness of detained fast track appeal process. These have resulted in the suspension of the operation of the DFT.

Firstly, detention pending appeal in the DFT was held by the Court of Appeal to be unlawful unless it is justified on normal detention grounds, i.e. with regard particularly to risk of absconding and imminence of removal. The Court found that the practice which had developed in the DFT was to detain people pending appeal in the DFT purely based on the criteria of speed and convenience without considering whether they were at risk of absconding. This was unlawful.<sup>30</sup>

In a second case, *Detention Action* challenged the lawfulness of the rules governing the fast track appeals. The rules provide that appeals in the DFT must be made within two working days of receiving the decision;<sup>31</sup> The Home Office must respond within two days, the hearing is required to take place three days later,<sup>32</sup> and the decision should be given two days after the hearing.<sup>33</sup> In practice, the time of fixing the hearing was not observed. Evidence before the High Court in the *Detention Action* case was that the average period from entry into the DFT until appeal rights were exhausted was 23.5 days. This varied as between centres from 33 days to 16.<sup>34</sup>

The Court of Appeal held that:

“[T]he time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases...The system is therefore structurally unfair and unjust. The scheme does not adequately take account of the complexity and difficulty of many asylum appeals, the gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from their clients who are in detention.”<sup>35</sup>

The Secretary of State for the Home Department requested permission to appeal the Court of Appeal’s ruling to the Supreme Court. However, on the 12 November 2015, the Supreme Court refused the Government’s permission to appeal thereby rendering the Court of Appeal’s judgment definitive.<sup>36</sup>

Since DFT appeals have been found to be unlawful, and the system suspended, people whose appeals were heard in the DFT should now have their appeals reheard, and should only be detained if their detention is allowed within the terms of normal detention policy. They cannot be removed until the appeals have been reheard. This was confirmed by the President of the Tribunal in First Tier Tribunal decisions on 4 August 2015.<sup>37</sup> The President provided a standard letter for appellants to apply to the FTT to have their appeal decision set aside and reheard.

## Legal assistance

Unlike in the regular procedure, fast track detainees are entitled to have a publicly funded legal adviser present at their initial interview. However, the judge commented in *Detention Action v SSHD* [2014] EWHC 2245 (Admin) that:

“Legal representatives are not excluded from the interview, if the applicant already has a representative, but where the applicant does not have one, the presence of a lawyer is not facilitated.” (para 96)

Asylum seekers in the DFT are not guaranteed legal representation before the tribunal. Research in 2011 revealed that 63% of asylum seekers were unrepresented at their DFT appeal,<sup>38</sup> and Freedom of Information requests showed that in 2012, 59% asylum-seekers in Harmondsworth were unrepresented at the first appeal. 1% won their appeals, compared to 20% of those with a representative.<sup>39</sup>

To obtain publicly funded legal advice in making their claim they are limited to a representative from a solicitors firm with a contract to do DFT work and who is available. There is substantial dissatisfaction among asylum seekers with the quality of legal representation available in the DFT. Lawyers who work in the DFT say that it is very difficult to do the work effectively. They may have no opportunity to take instructions or meet the client before the asylum interview. This was endorsed by the High Court in the 2014 Detention Action judgment.

Where a client already has a legal aid lawyer before being detained in the DFT, the same lawyer can continue to advise them before and after their interview in the DFT. Otherwise, as mentioned above, the asylum seeker only has access to those lawyers who have a contract for publicly funded work in the DFT, unless they have sufficient means and resources to contact and pay a lawyer privately.

Legal aid for the appeal is assessed on the merits of the case as described above.

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1. Immigration Statistics: July to September 2015 Asylum Table AS01q, November 2015.
  2. Home Office Research and Statistics Directorate, Immigration Statistics: Asylum Table 13, Q3 2015.
  3. Nationality, Immigration and Asylum Act 2002, Section 94, accessible at <http://bit.ly/1eqvY4g> [4].
  4. UK Visas and Immigration, Asylum decision-making guidance: Non-Suspensive Appeals (NSA): Certification under s.94, para. 2.3, accessible at <http://bit.ly/1CfhMAf> [5].
  5. Independent Chief Inspector of Borders and Immigration: An Inspection of the Non-Suspensive Appeals process for 'clearly unfounded' asylum and human rights claims July 2014, accessible at <http://bit.ly/1Bq4LIW> [6].
  6. UK Visas and Immigration, Asylum decision-making guidance: Non-Suspensive Appeals (NSA): Certification under s.94, para. 2.2, accessible at <http://bit.ly/1CfhMAf> [5].
  7. Home Office Research and Statistics Directorate, Immigration Statistics: Asylum Table 13, Q4, 2014 though 142 of these were from EU countries.
  8. NA (Iran) v SSHD [2011] EWCA Civ 1172.
  9. Independent Chief Inspector of Borders and Immigration: An Inspection of the Non-Suspensive Appeals process for 'clearly unfounded' asylum and human rights claims July 2014.
  10. House of Commons: Written Statement (HCWS83) Home Office Written Statement made by: The Minister of State for Immigration (James Brokenshire).
  11. Home Office, Asylum Process Guidance, Detained Fast Track Processes, Para.2.2, accessible at <http://bit.ly/1Rcy1oo> [7].
  12. Independent Chief Inspector of Borders and Immigration, Asylum: A Thematic Inspection of the Detained Fast Track, ICIBI, 2012.
  13. UNCAT, Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013).
  14. UNHCR, Quality Initiative Project, Fifth Report to the Minister, 2008; UNHCR, Quality Integration Project First Report to the Minister, 2010.
  15. Human Rights Watch, Fast Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK, 2010, available at: <http://bit.ly/1Rcz08a> [8].
  16. The Home Office, Asylum Process Guidance, Detained Fast Track Processes para 5.2 Operational Considerations, affirmed in R (on the application of Detention Action) v SSHD [2014] EWCA Civ 1634 para 37.
  17. The Home Office, Asylum Process Guidance, Detained Fast Track Processes Para 3.1.1, accessible at <http://bit.ly/1Rcy1oo> [7].
  18. Tamsin Alger and Jerome Phelps, Fast Track to Despair, Detention Action, 2011, accessible at <http://bit.ly/1Lhrl16> [9].
  19. Home Office Research and Statistics Directorate, Immigration Statistics: Outcomes of main applicants accepted onto the Detained Fast Track Process, Vol 4 Table 12 Q2 2015.
  20. See Asylum Policy Instruction Medico-Legal Reports From The Helen Bamber Foundation and the Medical Foundation Medico Legal Report Service July 2015 para 2.11.
  21. Home Office Research and Statistics Directorate, Immigration Statistics: Outcomes of main applicants accepted onto the Detained Fast Track Process, Vol 4 Table 12 Q4 2014.
  22. Home Office, Asylum Process Guidance, Detained Fast Track Processes, para.2.2.
  23. Detention Action v SSHD and Equality and Human Rights Commission [2014] EWHC 2245 (Admin) para 62.
  24. UNHCR, Eligibility Guidelines For Assessing The International Protection Needs Of Asylum-Seekers From Afghanistan, 2010, accessible at <http://bit.ly/1GuAKa5>; [10] UNHCR, Eligibility Guidelines For Assessing The International Protection Needs Of Asylum-Seekers From Iraq, 2012, accessible at <http://bit.ly/1BIJUXt> [11].
  25. E.g. Independent Chief Inspector of Borders and Immigration, Asylum: A Thematic Inspection of the Detained Fast Track, ICIBI, 2012; Tamsin Alger and Jerome Phelps, Fast Track to Despair, Detention Action, 2011.
  26. Detention Action v SSHD and Equality and Human Rights Commission [2014] EWHC 2245 (Admin), para 221.
  27. House of Lords debates, 6 Jan 2015: Column WA113.
  28. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2604 rule 19.

29. Independent Chief Inspector of Borders and Immigration: An Inspection of the Non-Suspensive Appeals process for 'clearly unfounded' asylum and human rights claims July 2014.
30. R (on the application of Detention Action) v SSHD [2014] EWCA Civ 1634.
31. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2406 Schedule rule 5.
32. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2406 Schedule rules 7 and 8.
33. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2406 rule 10.
34. Detention Action v SSHD Equality and Human Rights Commission intervening [2014] EWHC 2245 (Admin) para 83.
35. The Lord Chancellor v Detention Action [2015] EWCA Civ 840, para 45.
36. Detention Action, The Detained Fast Track: the end of the road, 12 November, accessible at <http://bit.ly/1MCHLKh> [12].
37. Appeal refs AA/09953/2014; 10216/2014; 04846/2015; PA 00087/2015; AA/ 03971/2015; 05737/2015; 02797/2015; 03692/2015.
38. Tamsin Alger and Jerome Phelps, Fast Track to Despair, Detention Action, 2011, accessible at <http://bit.ly/1LhrlI6> [9].
39. Detention Action, DFT Briefing, 2013, accessible at: <http://bit.ly/1JX05NV> [13].

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- [3] [http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Asylum\\_A-thematic-inspection-of-Detained-Fast-Track.pdf](http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Asylum_A-thematic-inspection-of-Detained-Fast-Track.pdf)
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