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# National Country Report

***The United Kingdom***



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## IMPORTANT INFORMATION

It was announced on 26 March 2013 that the UK Border Agency (UKBA) had been abolished and split into two components, a visas section and an enforcement section – both of which will report directly to the Home Secretary from within the Home Office. At the time of writing, no further detailed information was publicly available about either the name of the new entity or the anticipated impact of this change for asylum decision-making processes or competences. Accordingly, information is presented as at the date of completion of this research (ie. 9 March 2013), and the term 'UKBA' is retained throughout the UK chapter.

In addition, a new Asylum Operating Model replaced the New Asylum Model as part of a major Home Office re-structuring exercise with effect from 01 April 2013. At the time of writing, no information was publicly available about these changes but, on the basis of information shared by way of consultation with stakeholders, it is understood that the new Asylum Operating Model will be phased in over a period of 18 months. It is expected that asylum applicants will continue to lodge claims as per current arrangements but that more detailed screening will be employed to route claims as part of new triage and workflow arrangements. Another aspect of the new arrangements believed to be prioritised for early implementation is the creation of a Non-Detained Fast Track (Probable Protection) workstream, i.e. a form of manifestly well-founded procedure. It is understood that other aspects of the new arrangements will be implemented later. Given the current uncertainty about the new Asylum Operating Model, it is not otherwise referenced in this research which is based on the situation as of 9 March 2013. Future updates will be provided when it becomes possible to properly observe and assess the impact of the new arrangements.

**The information is up-to-date as of 9 March 2013.**

## The AIDA project

The AIDA project is jointly coordinated by the European Council on Refugees and Exiles (ECRE), Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee. It aims to provide up-to date information on asylum practice in 14 EU Member States (AT, BE, BG, DE, FR, GR, HU, IE, IT, MT, NL, PL, SE, UK) which is easily accessible to the media, researchers, advocates, legal practitioners and the general public and includes the development of a dedicated website which will be launched in the second half of 2013. Furthermore the project seeks to promote the implementation and transposition of EU asylum legislation reflecting the highest possible standards of protection in line with international refugee and human rights law and based on best practice.



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# TABLE OF CONTENTS

|   |           |
|---|-----------|
| Statistics.....   | 7         |
| Overview of the legal framework.....  | 9         |
| Asylum Procedure .....  | 10        |
| <b>A. General.....</b>  | <b>10</b> |
| 1. Organigram.....  | 10        |
| 2. Types of procedures .....  | 11        |
| 3. List of Authorities that intervene in each stage of the procedure (including Dublin)   | 11        |
| 4. Number of staff and nature of the first instance authority (responsible for taking the decision on the asylum application at the first instance) ..... | 11        |
| 5. Short overview of the asylum procedure .....   | 12        |
| <b>B. Procedures.....</b>   | <b>14</b> |
| 1. Registration of the Asylum Application .....   | 14        |
| 2. Regular procedure .....  | 16        |
| <i>General (scope, time limits)</i> .....   | 16        |
| <i>Appeal</i> .....   | 17        |
| <i>Personal Interview</i> .....   | 18        |
| <i>Legal assistance</i> .....   | 20        |
| 3. Dublin .....   | 22        |
| <i>Procedure</i> .....  | 22        |
| <i>Appeal</i> .....   | 23        |
| <i>Personal Interview</i> .....   | 24        |
| <i>Legal assistance</i> .....   | 24        |
| <i>Suspension of transfers</i> .....  | 25        |
| 4. Admissibility procedures .....   | 25        |
| <i>General (scope, criteria, time limits)</i> .....   | 25        |
| <i>Appeal</i> .....   | 26        |
| <i>Personal Interview</i> .....   | 26        |
| <i>Legal assistance</i> .....   | 27        |

|  |           |
|--|-----------|
| 5. Border procedure (border and transit zones).....  | 27        |
| <i>General (scope, time-limits)</i> .....  | 27        |
| <i>Appeal</i> .....  | 28        |
| <i>Personal Interview</i> .....  | 29        |
| <i>Legal assistance</i> .....  | 29        |
| 6. Accelerated procedures.....   | 29        |
| <i>General (scope, grounds for accelerated procedures, time limits)</i> .....  | 29        |
| <i>Appeal</i> .....  | 31        |
| <i>Personal Interview</i> .....  | 32        |
| <i>Legal assistance</i> .....  | 33        |
| <b>C. Information for asylum seekers and access to NGOs and UNHCR</b> .....  | <b>34</b> |
| <b>D. Subsequent applications</b> .....  | <b>35</b> |
| <b>E. Guarantees for vulnerable groups of asylum seekers (children, traumatised persons, survivors of torture)</b> ..... | <b>37</b> |
| 1. Special Procedural guarantees.....  | 37        |
| 2. Use of medical reports.....   | 38        |
| 3. Age assessment and legal representation of unaccompanied children.....  | 39        |
| <b>F. The safe country concepts (if applicable)</b> .....  | <b>42</b> |
| <b>G. Treatment of specific nationalities</b> .....  | <b>43</b> |
| <b>Reception Conditions</b> .....  | <b>45</b> |
| <b>A. Access and forms of reception conditions</b> .....   | <b>45</b> |
| 1. Criteria and restrictions to access reception conditions.....   | 45        |
| 2. Forms and levels of material reception conditions.....  | 47        |
| 3. Types of accommodation.....   | 48        |
| 4. Reduction or withdrawal of reception conditions.....  | 49        |
| 5. Access to reception centres by third parties.....   | 50        |
| 6. Addressing special reception needs of vulnerable persons.....   | 50        |
| 7. Provision of information.....   | 51        |
| 8. Freedom of movement.....  | 51        |
| <b>B. Employment and education</b> .....   | <b>52</b> |
| 1. Access to the labour market.....  | 52        |

|   |           |
|---|-----------|
| 2. Access to education.....                     | 52        |
| C. Health care.....                             | 53        |
| <b>Detention of Asylum Seekers .....</b>        | <b>55</b> |
| A. General.....                                 | 55        |
| B. Grounds for detention.....                   | 55        |
| C. Detention conditions.....                    | 57        |
| D. Judicial Review of the detention order ..... | 59        |
| E. Legal assistance.....                        | 60        |

## Statistics

**Table 1: Applications and granting of protection status at first instance in 2012**

|  | Total applicants in 2012 | Refugee status | Subsidiary protection | Humanitarian Protection | Rejections (in-merit and admissibility) | Otherwise closed / discontd | Refugee rate       | Subs.Pr. rate      | Hum. Pr. rate      | Rejection rate     |
|--|--------------------------|----------------|-----------------------|-------------------------|---|-----------------------------|--------------------|--------------------|--------------------|--------------------|
|  | A                        | B              | C                     | D                       | E                                       | F                           | $B/(B+C+D+E)$<br>% | $C/(B+C+D+E)$<br>% | $D/(B+C+D+E)$<br>% | $E/(B+C+D+E)$<br>% |
| <b>Total numbers</b>   | 28.260                   | 6.535          | 130                   | 1065                    | 14.160                                  | 2.295                       | 30%                | 0,6%               | 5%                 | 65%                |
| <b>Breakdown by countries of origin of the total numbers</b> |                          |                |                       |                         |   |                             |                    |                    |                    |                    |
| <b>Top 10</b>  |                          |                |                       |                         |   |                             |                    |                    |                    |                    |
| Pakistan   | 4.880                    | 600            | 0                     | 60                      | 3.280                                   | 370                         | 15%                | 0%                 | 2%                 | 83%                |
| Iran   | 3.250                    | 1.335          | 15                    | 65                      | 1.100                                   | 80                          | 53%                | 1%                 | 3%                 | 44%                |
| Sri Lanka  | 2.160                    | 370            | 0                     | 25                      | 1.010                                   | 65                          | 26%                | 0%                 | 2%                 | 72%                |
| Nigeria  | 1.445                    | 80             | 0                     | 70                      | 925                                     | 105                         | 7%                 | 0%                 | 7%                 | 86%                |
| Afghanistan  | 1.340                    | 205            | 0                     | 140                     | 735                                     | 105                         | 19%                | 0%                 | 13%                | 68%                |
| Syria  | 1.300                    | 865            | 35                    | 15                      | 235                                     | 30                          | 75%                | 3%                 | 1%                 | 20%                |
| India  | 1.220                    | 10             | 0                     | 0                       | 575                                     | 345                         | 2%                 | 0%                 | 0%                 | 98%                |
| Bangladesh   | 1.175                    | 35             | 0                     | 15                      | 1.240                                   | 200                         | 3%                 | 0%                 | 1%                 | 96%                |
| Albania  | 1.010                    | 80             | 0                     | 100                     | 375                                     | 105                         | 14%                | 0%                 | 18%                | 68%                |
| Eritrea  | 780                      | 615            | 0                     | 5                       | 135                                     | 25                          | 81%                | 0%                 | 1%                 | 18%                |
| <b>Others<sup>1</sup></b>                                    |                          |                |                       |                         |   |                             |                    |                    |                    |                    |
| Russia   | 160                      | 50             | 0                     | 0                       | 80                                      | 10                          | 38%                | 0%                 | 0%                 | 62%                |
| Somalia  | 680                      | 360            | 15                    | 15                      | 160                                     | 25                          | 65%                | 3%                 | 3%                 | 29%                |

Source: Eurostat

<sup>1</sup> Other main countries of origin of asylum seekers in the EU.

**Table 2: Gender/age breakdown of the total numbers of applicants in 2012<sup>2</sup>**

|                               | Number | Percentage of the total number of applicants |
|-------------------------------|--------|--|
| <b>Men<sup>3</sup></b>        | 18.845 | 67%  |
| <b>Women</b>                  | 9390   | 33%  |
| <b>Unaccompanied children</b> | 1.170  | 4%   |

Source: Eurostat

**Table 3: Comparison between first instance and appeal decision rates in 2012**

|                                  | First instance |            | Appeal       |            |
|----------------------------------|----------------|------------|--------------|------------|
|                                  | Number         | Percentage | Number       | Percentage |
| <b>Total number of decisions</b> | <b>21.879</b>  |            | <b>8.229</b> |            |
| <b>Positive decisions</b>        |                |            |              |            |
| <b>Total</b>                     | <b>7.772</b>   | 36%        | <b>2.192</b> | 27%        |
| <i>Refugee Status</i>            | <b>6.522</b>   | 84%        | -            | -          |
| <i>Subsidiary protection</i>     | <b>1.119</b>   | 14%        | -            | -          |
| <i>Hum/comp protection</i>       | <b>131</b>     | 2,00%      | -            | -          |
| <b>Negative decision</b>         | <b>14.107</b>  | 64%        | 5.447        | 66%        |

Source: UK Home Office

**Table 4: Applications processed under an accelerated procedure in 2012**

|  | Number  | Percentage |
|--|---|------------|
| <b>Total number of applicants</b>  | <b>21.785</b>   |            |
| <b>Number of applications treated under an accelerated procedure at first instance</b> | 2,278<br>(non suspensive appeal procedure) <sup>4</sup> | 20%        |

Source: UK Home Office

**Table 5: Subsequent applications submitted in 2012<sup>5</sup>**

|                                  | Number of subsequent applications submitted |
|----------------------------------|---|
| <b>Total number</b>              | 809   |
| <b>Top 5 countries of origin</b> |   |
| <b>Afghanistan</b>               | 101   |
| <b>Iran</b>                      | 96  |
| <b>Pakistan</b>                  | 71  |
| <b>Zimbabwe</b>                  | 53  |
| <b>China</b>                     | 49  |

Source: Eurostat

<sup>2</sup> The data provided to Eurostat by the UK include dependants as applicants. Thus the figures in table 2 do not add up to 100%, because the total figure includes dependant children.

<sup>3</sup> The gender of 25 applicants is unknown.

<sup>4</sup> These figures relate only to non-suspensive appeals. The Detained Fast Track also operates, and in 2011, 2118 applications were processed initially in that route. Figures are not available for 2012. 2278 is the accurate published figure for Non Suspensive Appeal (NSA) cases, but the Fast track figure includes detained NSA cases and so there will be double counting. This figure is derived from a Freedom of Information request, but the figure for Yarlswood, the women's fast track, is not included. More accurate figures will be available later in the year.

<sup>5</sup> This refers only to those which have been accepted as constituting a fresh claim. This is an estimated 10% of the total number of those who make further submissions.



## Overview of the legal framework

### ***Main legislative acts relevant to asylum procedures, reception conditions and detention***

| <b>Title in English</b>                                      | <b>Abbreviation</b> | <b>Weblink</b>  |
|--|---------------------|---|
| Immigration Act 1971   | IA 1971             | <a href="http://www.legislation.gov.uk/ukpga/1971/77/contents">http://www.legislation.gov.uk/ukpga/1971/77/contents</a> |
| Immigration and Asylum Act 1999                              | IAA 1999            | <a href="http://www.legislation.gov.uk/ukpga/1999/33/contents">http://www.legislation.gov.uk/ukpga/1999/33/contents</a> |
| Nationality Immigration and Asylum Act 2002                  | NIAA 2002           | <a href="http://www.legislation.gov.uk/ukpga/2002/41/contents">http://www.legislation.gov.uk/ukpga/2002/41/contents</a> |
| Asylum and Immigration (Treatment of Claimants etc) Act 2004 | AITOCA 2004         | <a href="http://www.legislation.gov.uk/ukpga/2004/19/contents">http://www.legislation.gov.uk/ukpga/2004/19/contents</a> |
| Borders Citizenship and Immigration Act 2009                 | BCIA 2009           | <a href="http://www.legislation.gov.uk/ukpga/2009/11/contents">http://www.legislation.gov.uk/ukpga/2009/11/contents</a> |

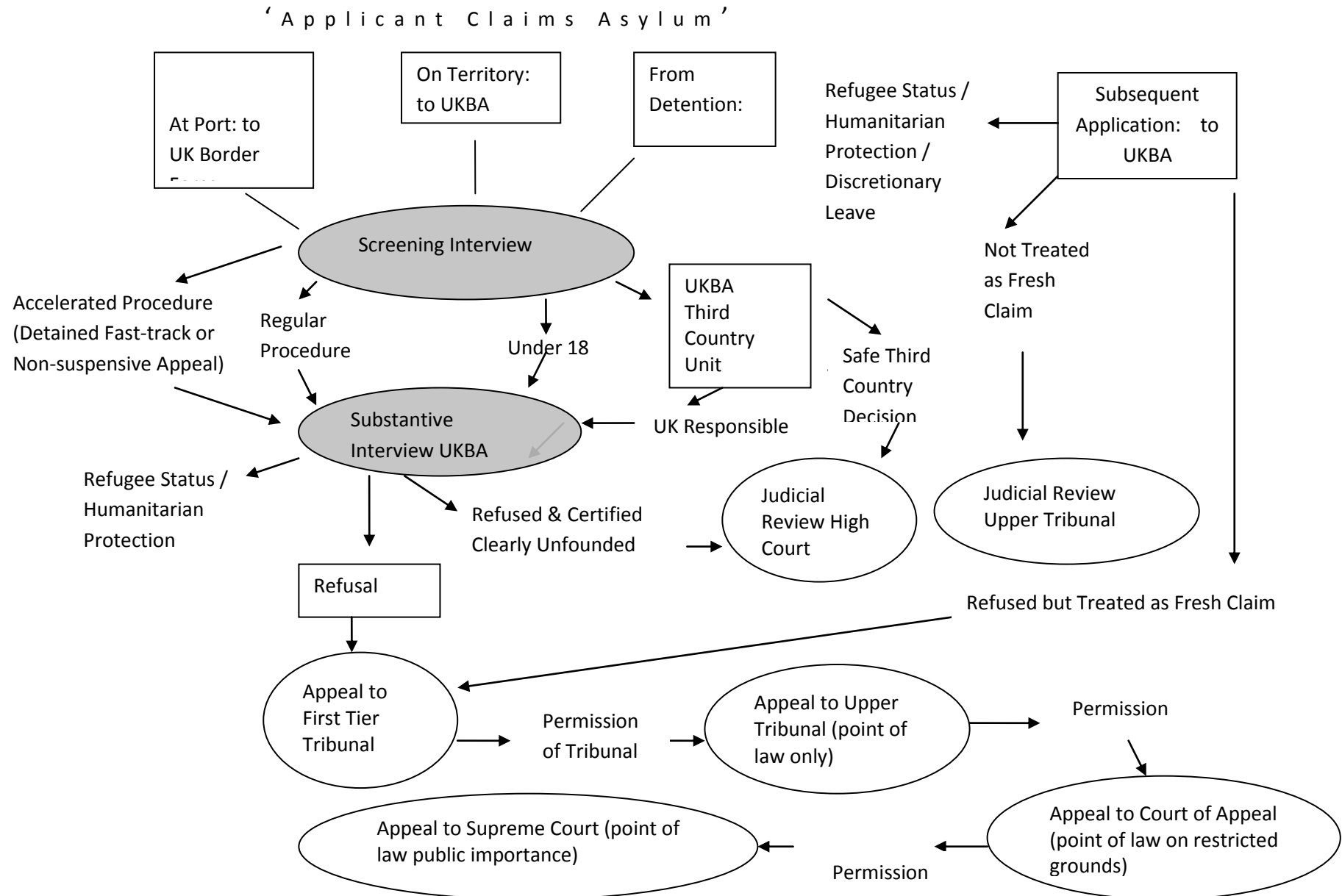
### ***Main implementing decrees and administrative guidelines and regulations relevant to asylum procedures, reception conditions and detention.***

| <b>Title in English</b>   | <b>Abbreviation</b>        | <b>Weblink</b>  |
|---|----------------------------|---|
| Statement of Changes in Immigration Rules HC 395 Part 11  | Immigration rules          | <a href="http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/">http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/</a>                   |
| Statement of Changes in Immigration Rules HC 395 Part 11B   | Immigration rules          | <a href="http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11B/">http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11B/</a>                 |
| Statement of Changes in Immigration Rules HC 395 Part 12  | Immigration rules          | <a href="http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part12/">http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part12/</a>                   |
| The Asylum Seekers (Reception Conditions) Regulations 2005 SI 7   | Reception Conditions Regs  | <a href="http://www.legislation.gov.uk/uksi/2005/7/contents/made">http://www.legislation.gov.uk/uksi/2005/7/contents/made</a>   |
| Asylum Support Regulations 2000 SI 704  | Asylum Support Regs 2000   | <a href="http://www.legislation.gov.uk/uksi/2000/704/contents/made">http://www.legislation.gov.uk/uksi/2000/704/contents/made</a>   |
| Asylum Support (Amendment) Regulations 2005 SI 11   | Asylum Support Regs 2005   | <a href="http://www.legislation.gov.uk/uksi/2005/11/made">http://www.legislation.gov.uk/uksi/2005/11/made</a>   |
| The Detention Centre Rules 2001 SI 238  | Detention Centre Rules     | <a href="http://www.legislation.gov.uk/uksi/2001/238/contents/made">http://www.legislation.gov.uk/uksi/2001/238/contents/made</a>   |
| Detention Service Orders  | DSOs                       | <a href="http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/detention-services-orders/">http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/detention-services-orders/</a> |
| The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 No. 560   | Fast Track Procedure Rules | <a href="http://www.legislation.gov.uk/uksi/2005/560/made">http://www.legislation.gov.uk/uksi/2005/560/made</a>   |
| Asylum Process Guidance   | APG                        | <a href="http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/asylumprocess/">http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/asylumprocess/</a>   |
| The Asylum and Immigration Tribunal (Procedure) Rules 2005 (S.I. 2005 No.230 (L.1)) Consolidated as at 19 December 2011 | Procedure Rules            | <a href="http://www.justice.gov.uk/downloads/tribunals/general/consolidated-ait-rules-191211.pdf">http://www.justice.gov.uk/downloads/tribunals/general/consolidated-ait-rules-191211.pdf</a>                 |

# Asylum Procedure

## A. General

### 1. Organigram



## 2. Types of procedures

### Indicators:

Which types of procedures exist in your country? Tick the box:

- regular procedure:                   yes                    no
- border procedure:                    yes                     no
- admissibility procedure:           yes             no
- accelerated procedure:           yes             no
- Dublin Procedure                    yes             no

Are any of the procedures that are foreseen in national legislation, not being applied in practice? If so, which one(s)? *All are applied.*

## 3. List of Authorities that intervene in each stage of the procedure (including Dublin)

| Stage of the procedure  | Competent authority   |
|---|---|
| Application at the border                                       | UK Border Force   |
| Application on the territory                                    | UK Border Agency  |
| Dublin (responsibility assessment)                              | UK Border Agency  |
| Refugee status determination                                    | UK Border Agency  |
| Appeal procedures :<br>-First appeal<br>-second (onward) appeal | First Tier Tribunal, Immigration and Asylum Chamber<br>Upper Tribunal, Immigration and Asylum Chamber |
| Subsequent application<br>(admissibility)                       | UK Border Agency  |

## 4. Number of staff and nature of the first instance authority (responsible for taking the decision on the asylum application at the first instance)

| Name in English         | Number of staff (specify the number of people involved in making decisions on claims if available) | Ministry responsible | Is there any political interference possible by the responsible Minister with the decision making in individual cases by the first instance authority?<br>Y/N |
|-------------------------|--|----------------------|---|
| <i>UK Border Agency</i> | 20,469 <sup>6</sup>  | Home Office          | No  |

<sup>6</sup> According to the UK Border Agency Annual Report and Accounts 2011-12, on 31 March 2012 the combined Agency and Border Force staffing figure was 20,469. It was not possible to identify the exact number involved in asylum decision-making which would likely be a relatively small proportion of this total figure.

## 5. Short overview of the asylum procedure

Responsibility for the asylum process rests with the Secretary of State for the Home Office, who is a government minister (the Home Secretary). The UK Border Agency (UKBA) is an executive agency of the Home Office covering asylum and immigration (until 1<sup>st</sup> April 2013 – see postscript). The UKBA is responsible for all aspects of immigration and asylum: entry, in-country applications for leave to remain, monitoring compliance with immigration conditions, and enforcement including detention and removal.

A first application for asylum in the UK can be made either on arrival at the border, or at the Asylum Screening Unit (ASU) in Croydon (South of London), or, where a person is detained, it may be made from the detention centre.

In all cases the application is first screened, which involves an interview in which biometric data is taken, health and family information, details of the route of travel, and the broad outline of the reasons for claiming asylum. On the basis of the screening interview the National Asylum Intake Unit of UKBA decides which route the application will follow. The alternatives are: unaccompanied children – referred to a local authority; accelerated procedure (detained fast track or clearly unfounded with non-suspensive appeal); safe third country procedure or dispersal to be dealt with by a regional office, which is the regular procedure. In all cases the procedure is a single procedure dealing with both refugee status and subsidiary protection.

Potential safe third country cases are referred to the third country unit of UKBA, which decides whether to issue a certificate initiating a return to a safe third country, including to another EU Member State in the context of the Dublin Regulation. In this case the claim is not substantively considered in the UK. This decision can only be challenged by judicial review, an application made with permission to the High Court with permission of that court. Judicial review proceedings do not consider the merits of a decision, but only whether the decision maker has approached the matter in the correct way.

Where applications are certified as clearly unfounded this may be on an individual basis, but is more often on the basis that the applicant is from a country designated in law as safe. In these cases there is no appeal against refusal from inside the UK.

Asylum seekers are routed into the Detained Fast Track (DFT) if it is thought that the case can be decided quickly. In this case the asylum seeker is detained for the whole decision process including appeal. The target time for this whole process is 15 calendar days, including the first appeal.

In the regular procedure, decisions are made by a regional office of UKBA. There is no time limit for making a first decision, though it is policy to make the decision within 6 months. Reasoned decisions are sent by post. Appeal is to the First Tier Tribunal, an independent judicial body which is part of the unified tribunal structure in the Ministry of Justice. The appeal is suspensive and must be lodged within 10 working days of service of the refusal, or five working days if the appellant is in detention. The tribunal proceedings are broadly adversarial, with the Home Office represented by a presenting officer.

A further appeal on a point of law may be made to the Upper Tribunal with permission of the First Tier Tribunal, or, if refused, of the Upper Tribunal. Application for permission to appeal must be made within five working days of deemed receipt of the First Tier Tribunal decision. Asylum appeals before the First Tier and Upper Tribunals are heard by a specialist Immigration and Asylum Chamber.

Appeal from the Upper Tribunal to the Court of Appeal on a point of law may only be made with permission of the Upper Tribunal or the Court of Appeal. A final appeal to the Supreme Court may only be made on a point of law of public importance, certified by the Court of Appeal or Supreme Court. The Court of Appeal and Supreme Court are superior courts with a general jurisdiction.

The day to day operation of immigration and asylum decision-making is governed by immigration rules and guidance. Immigration rules are made by the Home Secretary and are approved by Parliament in a procedure that does not involve scrutiny. In relation to asylum most of the rules are concerned with the process rather than the substance of the decision. A breach of the rules is grounds for an appeal, although this is rarely relevant in asylum cases.

UKBA also issues detailed practical guidance for asylum decision-making. Guidance deals with a range of issues including the substance of decisions, country of origin information, and detailed procedural and administrative matters. The main source of guidance about dealing with asylum applications is asylum process guidance (APG). Guidance is not directly binding, but should be followed, and failure to do so can be grounds for an application for judicial review.

The immigration rules and guidance are available on the Home Office website, including information about countries of origin used in asylum decision-making

## B. Procedures

### 1. Registration of the Asylum Application

#### Indicators :

- Are specific time limits laid down in law for asylum seekers to lodge their application?  
 Yes       No

The Secretary of State for the Home Department is responsible in law<sup>7</sup> for registering asylum applications. This responsibility is allocated to the UK Border Agency (UKBA), an executive agency of the Home Office. If a person claims asylum on entry to the UK, immigration officers at the port have no power to take a decision on the claim, and must refer it to UKBA.<sup>8</sup>

Where a couple or family claim asylum, the children normally apply as dependants on the claim of one of their parents. Also one partner may apply as the dependant of the other. This means that the outcome of their claim will depend upon that of the main applicant. It is policy to inform women separately that they may claim separately from their partner.<sup>9</sup> However, there are concerns that this question may not always be asked in a confidential setting, and that the woman may not be aware of all the implications.

There is no specific time limit for asylum seekers to lodge their application. A claim may be refused if the applicant 'fails, without reasonable explanation, to make a prompt and full disclosure of material facts'.<sup>10</sup> However, 'applications for asylum shall be neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible'.<sup>11</sup> In practice, where someone is present in the UK in another capacity, e.g. as a student or worker, and then claims asylum after some years, whether or not they have overstayed their immigration leave, this may be treated as evidence that they are not in fear. Financial support and accommodation can be refused if the person did not claim 'as soon as reasonably practicable',<sup>12</sup> but not if this would entail a breach of human rights.<sup>13</sup> (See section on Reception Conditions)

First applications made from inside the UK must be registered by appointment at the Asylum Screening Unit (ASU) in Croydon in the South East of England unless the asylum seeker is in detention. This includes all applications not made at the port of entry, even if only hours after arrival, if the asylum seeker has left the port. Around 88% of asylum applications in the UK are not registered at the port of entry. These 'in country' applications are made at the ASU or from detention, or in exceptional cases an applicant who is destitute and whose condition is such that they cannot reasonably be expected to travel to the ASU may be permitted to register their claim at a Local Enforcement Office. Child unaccompanied asylum seekers are not expected to travel to the ASU if distance is an obstacle,<sup>14</sup> and nor are families with children in Scotland, and they may register their claim at a local office. Applicants with a disability or severe illness and who are physically unable to travel or who are imprisoned can request that their asylum application be registered in writing.<sup>15</sup> In practice, this is only permitted exceptionally. There is no government funding for fares to the ASU. In the absence of this, over a three year period, a charity in Scotland provided 257 grants from its own funds to pay for an overnight bus to

<sup>7</sup> S.113 Nationality Immigration and Asylum Act 2002.

<sup>8</sup> Immigration rules para 328.

<sup>9</sup> UKBA *Asylum Policy Instruction, Gender issues in the asylum claim* Para 7.1.

<sup>10</sup> Immigration rules para 339M.

<sup>11</sup> Immigration rules para 339MA.

<sup>12</sup> NIAA 2002 s.55.

<sup>13</sup> *Limbuela v SSHD* [2005] UKHL 66.

<sup>14</sup> UKBA *Asylum Process Guidance, Registering an asylum application in the UK* para 7.1.

<sup>15</sup> UKBA, *Asylum process guidance Postal claims* 3.4 and 4.1.

enable people to claim asylum.<sup>16</sup> Particularly where asylum seekers are newly arrived in the UK, and may be confused, disoriented and understanding little English, making this journey successfully is very problematic.

Applicants are required to telephone the ASU before they can apply in person. They must receive a call back from the ASU, which is a telephone interview giving personal details but not details of their asylum claim. They are then given an appointment to attend and register their claim. In the meantime they are unable to access financial support or government-provided accommodation. In exceptional circumstances – destitution or extreme vulnerability – UKBA can accept walk-in applications or offer a same - or next-day appointment. In practice, it is hard to prove that the applicant is destitute or sufficiently vulnerable and some applicants are still turned away and required to wait.<sup>17</sup> Unaccompanied children are treated differently. Once they are in contact with a local authority, with their social worker or legal representative they fill in a questionnaire prior to screening, and are cared for by the local authority.

Instances still occur when appointment times are not kept by UKBA, and asylum seekers, including those with small children may be kept waiting many hours or even sent away because the appointment cannot be kept. A person who claims asylum on being arrested or detained or during detention is not taken to the ASU but may be screened in detention or at a regional office or even in a police station.

At the screening interview, fingerprints are taken for comparison with databases including Eurodac, and the route of travel is inquired into. The asylum seeker is asked basic details of their claim. During 2012 UKBA changed the physical arrangements at the Asylum Screening Unit, including making available private areas for the screening interview. The lack of private space was one element which meant that screening interviews were not suited to identifying sensitive issues such as the fact that the asylum seeker had been tortured or raped since they could be overheard by others waiting.<sup>18</sup> This is significant because the decision as to which kind of procedure the application will be routed through, including whether the case will be routed into an accelerated procedure, is taken on the basis of the screening interview. It remains to be seen whether this change in screening arrangements will result in earlier disclosure of sensitive issues, readier identification of vulnerable individuals and fewer people being inappropriately routed into the detained fast track. The lack of childcare provision at the ASU remains an obstacle to disclosure of sensitive information such as an experience of torture or rape since children are in the same room as the parent while information on the basis of the claim is taken.

Improvements made in the screening process at the ASU have not yet been applied in the other locations where screening can take place (ports, police stations, local immigration offices, detention centres and prisons).<sup>19</sup>

There is no provision for legal assistance at the screening interview except for unaccompanied children and those with mental illness. Applicants who have applied from within the UK may have had legal advice prior to screening, but those applying at port will not have had that opportunity.

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<sup>16</sup> Morag Gillespie, *Trapped: Destitution and Asylum in Scotland*, Scottish Poverty Information Unit, Institute for Society and Social Justice Research, Glasgow Caledonian University, 2012.

<sup>17</sup> Christel Querton, *I feel like as a woman I'm not welcome: a gender analysis of UK law, policy and practice*, Asylum Aid 2012.

<sup>18</sup> Independent Chief Inspector of Borders and Immigration, *Asylum: A Thematic Inspection of the Detained Fast Track*, ICIBI, 2012.

<sup>19</sup> Independent Chief Inspector of Borders and Immigration, *Asylum: A Thematic Inspection of the Detained Fast Track*, ICIBI, 2012.

## 2. Regular procedure

### General (scope, time limits)

#### Indicators:

- Time limit set in law for the determining authority to make a decision on the asylum application at first instance (in months):  N/A
- Are detailed reasons for the rejection at first instance of an asylum application shared with the applicant in writing?  Yes  No
- As of 31<sup>st</sup> December 2012, the number of cases for which no final decision (including at first appeal) was taken one year after the asylum application was registered

The UK Border Agency (UKBA) has responsibility for all aspects of immigration except for border control, which is the responsibility of the UK Border Force, which separated from the UK Border Agency in March 2012. The role of asylum caseworker within UKBA is a specialised one. Although asylum caseworkers are mainly located in Local Immigration Teams which have a broad immigration remit, they do only asylum and not immigration work. Subjects covered by the publicly available guidance for case workers include making an asylum decision. Guidance on gender issues in the asylum claim<sup>20</sup> sets out good practice in recognising gender-specific forms of persecution and the difficulties that women may face in accessing protection. The guidance recognises that discrimination may amount to persecution in countries where serious legal, cultural or social restrictions are placed upon women, and the need to be rigorous in understanding country of origin information when deciding women's claims.

There is no system in the UK for prioritising the cases of people who are particularly vulnerable or whose case appears at first sight well-founded. The only system for expediting decisions is the Detained Fast Track, discussed below as an accelerated procedure, and this generally results in refusal.

There is no enforceable time limit for deciding asylum applications, but the immigration rules say that the decision must be taken 'as soon as possible'.<sup>21</sup> If a decision is not taken within six months, the caseworker should inform the applicant of the delay, or, if requested, make an estimate of the time that the decision will take. In practice, 48% of men's claims and 45% of women's are decided within 30 calendar days; 55% of men's claims and 49% of women's are decided within six months.<sup>22</sup> Caseworkers are instructed to prioritise new cases, and if they are not concluded within 30 days, realistic estimates of time beyond six months are not usually given, and the case is likely to take very much longer. Only 64% of men's claims and 60% of women's are concluded within one year.<sup>23</sup> 70% of cases are concluded within 36 months. It is 'not unusual' for an asylum case to take 3 years to complete.<sup>24</sup> No legal remedy for this level of delay has yet been established. 'Concluded' in all these cases means either status granted or the person has left the UK. 'Cases not concluded' therefore include people where a final negative decision has been made, but the person has not left the UK. At the end of December 2012 there were 12,816 applicants, including dependants, who had applied since April 2006, and had not received an initial decision. 5,870 of these had been waiting more than six months. A further 6,100 were awaiting the outcome of an appeal.<sup>25</sup>

It is not possible to say how many applicants have been waiting for an initial decision for over a year, because the published figures are of decisions outstanding at six months. The figures for decisions outstanding after a year relate to the year's cohort, not the cumulative total, of decisions outstanding,

<sup>20</sup> UKBA *Asylum Policy Instruction: Gender Issues in the Asylum Claim* Section 2.

<sup>21</sup> Immigration rules para 333A.

<sup>22</sup> See [Asylum performance framework](#).

<sup>23</sup> See the UKBA's [website](#) for the percentage of asylum applications.

<sup>24</sup> Chief Executive of UKBA, Rob Whiteman, uncorrected evidence to Home Affairs Select Committee, *The Work of the UK Border Agency*, HC 792 Home Affairs Select Committee December 18 2012.

<sup>25</sup> Home Office Research and Statistics Directorate, December 2012 Monthly Asylum Statistics.



and it is not known how many of the cases not concluded from before April 2006 have not received a first decision.

In 2006, the then Home Secretary made a commitment that UKBA would deal with a backlog of 450,000 unresolved asylum cases by July 2011. Approximately 33,900 of these cases remained live and outstanding at December 2012. 64,600 had not been traced.<sup>26</sup> Resolution was defined as either that the person has left the country or else has been granted some kind of leave. In many of the unresolved cases (the 33,900) applicants have received a refusal but not left the UK.

## Appeal

### Indicators:

- Does the law provide for an appeal against the first instance decision in the regular procedure:
  - Yes  No
  - o if yes, is the appeal  judicial  administrative
  - o If yes, is it suspensive  Yes  No
- Average delay for the appeal body to make a decision: 9 weeks

There is a right to appeal from an initial asylum decision under the regular procedure. Appeals are made to the Immigration and Asylum Chamber of the First Tier Tribunal on both facts and law. This is a judicial body, composed of immigration judges and sometimes non-legal members. The Tribunal can assess and make findings of fact on the basis of the evidence presented including evidence which was not before the UK Border Agency (UKBA) decision-maker. The time limit for appealing is 10 working days from the date of service of the Home Office decision, and 5 working days if the person is in detention.<sup>27</sup> Lodging an appeal suspends removal from the UK.

Given the limited availability of publicly funded representation in practice these time limits are short and asylum seekers may resort to sending in the appeal forms without legal representation. The blank appeal forms are sent by the Home Office with the refusal letter, but administrative mistakes in lodging an appeal can result in the appeal not being accepted by the Tribunal office.<sup>28</sup>

A fee of £140 (€165) is required for an oral hearing of an asylum appeal in the regular procedure, (not if the case is in the Detained Fast Track). Applicants need not pay if they are receiving asylum support (section 95 - see section on Reception Conditions) or if they have public funding to be represented.<sup>29</sup> It is also possible to apply to have the fee waived, and destitute asylum seekers without asylum support would qualify for this, but may not have the advice or information to make the application. In practice most asylum seekers are not liable to pay the fee because most are receiving asylum support.

The complexity of the law and procedure and the barrier of language make it extremely difficult for an asylum seeker to represent themselves. Tribunal rules requires all evidence to be translated where relevant and sent to all parties in advance of the hearing. It is difficult for an unrepresented asylum seeker to know what is required, or to get access to resources and advice to prepare papers for a hearing.

The average time to complete an asylum appeal, from the appeal being lodged to the applicant being notified of the outcome, is 9 weeks.<sup>30</sup>

<sup>26</sup> Chief Executive of UKBA, Rob Whiteman, uncorrected evidence to Home Affairs Select Committee, *The Work of the UK Border Agency*, HC 792 Home Affairs Select Committee December 18 2012.

<sup>27</sup> Procedure Rules rule 7.

<sup>28</sup> Procedure Rules rule 9.

<sup>29</sup> HM Courts and Tribunals Service, *Immigration and Appeals Tribunal Fees Guidance*.

<sup>30</sup> Ministry of Justice, *Tribunals Statistics, Quarterly*, Q2 2012.

Asylum seekers give evidence in person at the appeal hearing, and the Tribunal provides interpreters. Hearings are public. Decisions are in theory public documents, but decisions of the First Tier Tribunal are not published.

There is an onward appeal to the Upper Tribunal on a point of law. This is with permission of the First Tier Tribunal. Application must be made within 5 working days of receiving the refusal. If the First Tier Tribunal refuses permission, an application for permission may be made to the Upper Tribunal. If this is refused, there is no appeal, but application may be made to the High Court, or in Scotland the Court of Session, for permission to apply for judicial review within a specially shortened time limit of 16 calendar days (as compared with three months for a usual judicial review application). Permission will only be granted on grounds (a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and (b) that either—  
(i) the claim raises an important point of principle or practice; or  
(ii) there is some other compelling reason to hear it.<sup>31</sup>

Lodging an appeal or an application for permission to appeal against an asylum refusal suspends removal from the UK.

If permission is granted to appeal to the Upper Tribunal, the Upper Tribunal's decision may be appealed again with permission on the same limited grounds on a point of law only to the Court of Appeal. In rare cases permission may be given for a final appeal to the Supreme Court where the Court of Appeal or Supreme Court certify that the case concerns a question of law of public importance.

Although the asylum decision is appealable in the regular procedure, there are many decisions affecting asylum seekers against which there is no right of appeal: e.g. a decision to detain, or giving directions for removal, or the refusal to treat further submissions as a fresh claim (subsequent asylum application), or a decision to remove to a safe third country. Where there is no right to appeal the only recourse is to judicial review. This is a procedure which does not examine the merits of the complaint, but only whether the decision maker has acted correctly, for instance by taking into account relevant considerations and not being influenced by irrelevant considerations. Judicial review is only available with the permission of the reviewing court. Judicial review was the preserve of the High Court until October 2011, since when categories of immigration and asylum judicial reviews have been gradually being transferred to the Upper Tribunal, a process which is still continuing.<sup>32</sup> Opponents of these transfers argue that the High Court is more independent and experienced in the public law principles which underpin judicial review. Those in favour of the transfer argue that immigration and asylum cases are best decided by those with specialist expertise.

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in the regular procedure?  Yes  No
- If so, are interpreters available in practice, for interviews?  Yes  No
- In the regular procedure, is the interview conducted by the authority responsible for taking the decision?  Yes  No
- Are interviews ever conducted through video conferencing?  Yes  No

<sup>31</sup> Rule 54.7A Civil Procedure Rules.

<sup>32</sup> Regulations are made implementing the power in Borders, Citizenship and Immigration Act 2009 s.53.

Applicants are entitled to a personal interview,<sup>33</sup> and this is standard practice. Interviews may be dispensed with in defined circumstances including where: a positive decision can be taken on the basis of the evidence available; the facts given in the application only raise issues of minimal relevance or which are clearly improbable or insufficient or designed to frustrate removal, or the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his control. Where a refused asylum seeker returns to the UK and wishes to claim again, guidance to the UK Border Agency (UKBA) officers is that this should be treated as a further submission.<sup>34</sup> In this case they may be refused an interview. Applicants under 12 years old are not normally interviewed. In summary, it is very rare for an asylum applicant over 12 years of age on their first application in the regular procedure not to have an interview.

Personal interviews are conducted by the authority responsible for taking the decisions, i.e. by UKBA caseworkers. Asylum seekers are entitled to have a legal representative with them at the personal interview, but there is no public funding for this and so few are able to do so in practice. Where there is a legal representative present, their role is not to put the asylum seeker's case, but to ensure that their client is able to participate fully and properly in the interview. Legal representatives say that this role can be difficult to fulfil since the warning which the UKBA caseworker reads out at the beginning of the interview says that they cannot interrupt. The legal representative's professional standard may conflict with this if for instance there is a problem with the interpretation, or the caseworker is not taking full notes.<sup>35</sup> Some UKBA caseworkers and legal representatives may not be aware of the full scope of the representative's role.

Interpreters are required by the immigration rules and are provided by UKBA. There is a code of conduct for these interpreters, but in practice asylum seekers are unaware of it and of what to expect from their interpreter unless they have a legal adviser who has informed them about this beforehand. Lawyers, NGOs and refugee groups frequently report problems with interpreters including misinterpretation, the interpreter not being fluent in the asylum seeker's language or having a very different dialect so that there is misunderstanding. Since inconsistencies on matters of detail in the asylum interview are a common reason for refusing asylum, problems with interpreting can have a significant impact. If the asylum seeker has a representative present, best practice in this case suggests that the representative should interrupt the interview. UKBA caseworkers are not always familiar with this, and it can be difficult for problems of interpretation to be raised and rectified at the time they occur. Asylum seekers are allowed to take an interpreter of their own choosing to the interview, but there is no public funding for this in most adult cases, so taking one's own interpreter is unusual.

Normal good practice is that asylum seekers are asked at the screening interview whether they wish to be interviewed by a man or a woman, and the policy and practice is to respect this preference, subject to availability of staff.<sup>36</sup>

Audio-recording of interviews is permitted and should be allowed on request by the asylum seeker, although this can be difficult to insist upon if the applicant is not represented. The recording must be provided to the applicant after the interview. Verbatim transcripts of the interview are provided to the applicant shortly after the interview and five working days are allowed to make comments or corrections before the first instance decision is taken.

There are no reported instances of interviews being carried out through video link, and there does not appear to be any provision for this.

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<sup>33</sup> Immigration rules para 339NA.

<sup>34</sup> UKBA, *Asylum Process Guidance: Routing Asylum Applications*, para.3.9.

<sup>35</sup> Immigration Law Practitioners Association *Making an Asylum Application: a best practice guide* 2002.

<sup>36</sup> UKBA *Asylum Policy Instruction, Gender issues in the asylum claim* Para 7.1.

The guidelines on gender issues require provision of child care so that parents do not have to have their children present while being interviewed about possibly traumatic experiences.<sup>37</sup> This is in place in regional offices except London and Liverpool.<sup>38</sup>

### Legal assistance

#### Indicators:

- Do asylum seekers have access to free legal assistance at first instance in the regular procedure in practice?  
 Yes       not always/with difficulty       No
- Do asylum seekers have access to free legal assistance in the appeal procedure against a negative decision?  
 Yes       not always/with difficulty       No
- In the first instance procedure, does free legal assistance cover:  
 representation during the personal interview     legal advice     both     Not applicable
- In the appeal against a negative decision, does free legal assistance cover  
 representation in courts       legal advice       both       Not applicable

Free legal assistance is available to asylum seekers as part of the state funded scheme of free legal aid in restricted areas of legal practice for people who have not sufficient resources. Although the immigration rules provide<sup>39</sup> that asylum seekers shall be allowed 'an effective opportunity' to obtain legal advice, access to this is not guaranteed.

Legal aid is available for appeals, subject to a means test and in England and Wales a merits test, and availability of a representative.

In England and Wales, legal aid for initial advice on an asylum claim is paid as a fixed fee of £413 (490€). Exceptions include unaccompanied children applicants, and where the representative can evidence that they have undertaken work that equates to over 3 times the value of the fixed fee. This can act as an incentive to a representative to do less work rather than more, since the Legal Services Commission assesses the claim for costs and can reduce it, meaning that the representative may do substantial work over the £413 level, and yet not be paid for it if the LSC does not accept that 3 times the level of work was done or warranted.

There is a disincentive for lawyers to give publicly funded advice to clients before their screening interview, since clients may be dispersed to another region after screening and before the full asylum interview. If this happens, both practical necessity and legal aid rules mean that in most cases the solicitor cannot continue to represent that client. The maximum that the solicitor can claim for work done before screening is £100 (120€) if they then cease to represent. To take full and proper instructions and to advise may take several hours with an interpreter also engaged. Very few solicitors can afford to do this level of work and only be paid £100 for it. Most asylum seekers go to the screening interview without having had legal advice.

The fee payable at the pre-appeal stages of a claim is generally too low to warrant a thorough examination of the case. Save in the least complex of cases, therefore, lawyers are often unable to assess the merits accurately. Since they must do so before granting legal aid for an appeal – and

<sup>37</sup> UKBA *Asylum Policy Instruction, Gender issues in the asylum claim* Para 7.1.

<sup>38</sup> Christel Querton, *I feel like as a woman I'm not welcome: a gender analysis of UK law, policy and practice*, Asylum Aid 2012.

<sup>39</sup> Immigration rules para 333B.

compliance is measured through key performance indicators – the system operates to discourage lawyers from granting legal aid at appeal.<sup>40</sup>

Legal assistance is not provided at the Asylum Screening Unit or at the port of entry, and asylum seekers must find their own representatives. Free legal assistance (funded as described above) is limited to advising the asylum seeker before and immediately after their asylum interview. This may include making additional written representations to UKBA, which as a matter of usual policy are only allowed within five days after the interview. With some exceptions (including unaccompanied children and people with mental illness, there is no public funding for a legal representative to attend the asylum interview.<sup>41</sup>

The disincentives described above do not apply in Scotland, where fees are not fixed, and there is no merits test for representing at a first appeal. For an appeal to the Upper Tribunal where the First Tier Tribunal has not given permission to appeal, a lawyer in Scotland must assess the merits of the case, and payment may be disallowed if the Scottish Legal Aid Board takes a different view.

The number of representatives offering publicly funded advice on asylum has reduced. The amount that is payable per case in England and Wales has been reduced, most recently with a 10% across the board reduction to Legal Aid implemented in October 2011. The two major non-governmental organisations which offered immigration and asylum advice have closed, Refugee and Migrant Justice in 2010 and Immigration Advisory Service in 2011. In 2011/12 £12 million less (about 14 mio €) was spent on legal aid for asylum cases despite an increase in asylum claims.

In April 2013 the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force, abolishing legal aid in most immigration cases. The resultant financial pressure, combined with the widespread maximum allocations of new cases, limited to 100 under the new April 2013 contract means that legal firms doing immigration and asylum work either need to reduce the number of workers they employ, or open branch offices to attract a further allocation of cases in the hope that these will be viable. The net effect of all this is yet to be seen. There is no government obligation to provide publicly funded representation to any particular level in any region. The availability of publicly funded legal representation in any region of the UK is determined in part by the number of new cases which the former Legal Services Commission (renamed the Legal Aid Agency) permits. The level of legal aid cases allocated for new contracts from April 2013 is proportionate based on historical usage within each region. Therefore in areas where there is a shortage of legal advice there is no governmental procedure for remedying this., i.e. there is no public law or enforceable governmental obligation to provide a level of service in a particular region. Moreover, asylum seekers may be dispersed (moved to another part of the country) where legal advice may be difficult to access. They may also be dispersed away from a solicitor who initially advised them about their asylum claim.

The cumulative impact of the closure of immigration and asylum law firms and departments, the tighter limits on legal aid and the new Act coming into effect in April 2013 is that there is a shortage of good quality publicly funded advice and representation for asylum seekers. One writer estimates that the loss of legal aid funding in immigration and asylum amounts nationally to the work of around 250 full-time experienced caseworkers and solicitors,<sup>42</sup> and the continued reduction in public funding threatens more reductions in the voluntary sector.<sup>43</sup> Thus the provisions on eligibility for legal aid need to be read in the context of limited availability of representatives in practice.

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<sup>40</sup> Julie Gibbs and Deri Hughes-Roberts, *Justice at Risk: Quality and Value for Money in Asylum Legal Aid*, Runnymede Trust, (2012) and see Christel Querton, *I feel like as a woman I'm not welcome: a gender analysis of UK law, policy and practice*, Asylum Aid 2012.

<sup>41</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1 Part 1 para 30.

<sup>42</sup> Sheona York, *The end of legal aid in immigration: a barrier to access to justice for migrants and a decline in the rule of law*, Journal of Immigration, Asylum and Nationality Law, (2013) Vol. 27.2.

<sup>43</sup> Deri Hughes-Roberts, *Rethinking Asylum Legal Representation: promoting quality and innovation at a time of austerity*, Asylum Aid 2013.

In Scotland, supply is more closely matched with demand, although there are also measures to contain costs.<sup>44</sup>

In the East Midlands of England, a pilot scheme, the Early Legal Advice Project (ELAP)<sup>45</sup>, ran until the end of December 2012 which entailed more high quality advice given at an early stage. The applicant spent more time with a legal advisor who was able to give higher level advice, both before and after the asylum interview, and there was more opportunity for dialogue between the legal advisor and UKBA. Legal aid was paid at an hourly rate (capped to a maximum) rather than a fixed fee. The aim was to discover whether more good quality legal advice earlier in the process would result in more soundly based decisions, giving asylum seekers greater security in the process, more sustainable first decisions, and less money wasted in the cost of appeals.<sup>46</sup> The pilot which preceded this Early Legal Advice Project found decisions were more soundly based, refugees more rapidly recognised and integrated, and UKBA more able to keep to its target of completing cases within six months.<sup>47</sup> The full scheme will be evaluated in 2013.

### 3. Dublin

#### Indicators:

- Number of outgoing requests in the previous year: not available
- Number of incoming requests in the previous year: not available
- Number of outgoing transfers carried out effectively in the previous year: 1011 in 2011
- Number of incoming transfers carried out effectively in the previous year: 268 in 210

#### Procedure

#### Indicator:

- If another EU Member State accepts responsibility for the asylum applicant, how long does it take in practice (on average) before the applicant is transferred to the responsible Member State? Not available

UK legislation provides for different lists of 'safe third countries' to which an asylum seeker can be returned without their asylum claim being considered in the UK. They are called 'third' countries because they are not the UK and not the country of origin.

The First List is set out in the statute and consists of EU member states (except Bulgaria and Romania), Iceland, Norway and Switzerland. There is no reference to the Dublin Regulation, but the legislation states that the listed countries are to be treated as places in which a person will not be at risk of persecution contrary to the Refugee Convention, and from which they will not be sent in breach of the

Refugee Convention or ECHR.<sup>48</sup> In relation to a person who can be removed to one of these countries, the Dublin regulation is applied.

<sup>44</sup> Scottish Legal Aid Board, *Best Value Review: Immigration And Asylum* 2011.

<sup>45</sup> The project was run by the UKBA and Legal Services Commission (LSC).

<sup>46</sup> Julie Gibbs and Deri Hughes-Roberts, *Justice at Risk: Quality and Value for Money in Asylum Legal Aid* Runnymede Trust, 2012.

<sup>47</sup> Jane Aspden *Evaluation of the Solihull Pilot for the UK Border Agency and Legal Services Commission*. The Stationery Office, London, 2008.

<sup>48</sup> Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (AITOCA) Schedule 3 Part 2, first list.

Whether the person can be removed to one of these countries is determined in the first instance by whether they can be shown to have travelled through that country. Fingerprinting is a routine part of the screening process, carried out in all cases, and fingerprints are sent to the Immigration Fingerprint Bureau (IFB) which automatically runs a fingerprint check on the EURODAC database.<sup>49</sup>

Enquiries as to the route of travel are also a routine part of the screening process in all cases. Together with the results of a EURODAC search, the asylum seeker's account of their route of travel will determine whether the application is referred to the Third Country Unit. UKBA guidance lays down that a response from the Third Country Unit to the Screening Unit should be received in Dublin cases within two days,<sup>50</sup> with a decision as to whether the applicant should be detained and whether the Dublin regulation will be applied. In practice Dublin decisions are usually taken quickly, although it may take more than two days. If there is a EURODAC match there will usually be a reference to the Third Country Unit and a Dublin decision.

In practice a Dublin decision (i.e. a decision that the Dublin regulation applies) normally entails a decision that the asylum claim will not be considered in the UK. Lawyers say that the UK rarely applies the humanitarian clause of the Dublin Regulation, and that the only exception which the UK regularly makes to issuing a certificate in Dublin cases is where the applicant has a spouse, parents or children who are refugees in the UK. However, at the stage of making a Dublin decision the information that the asylum seeker has close family in the UK may not have been disclosed. Family information and other reasons to apply the humanitarian or sovereignty clauses are not actively sought at the screening interview. In practice such grounds will be raised only as a challenge to the Dublin decision once it is made.

In general applicants are detained when the Dublin decision is made. Information about the Dublin procedure is given once the person is in detention. They are not informed prior to the issue of the certificate that a Dublin decision is under consideration and may not be informed that a request has been made to another Member State or the progress of that request. Applicants are generally detained until removal, which usually happens under escort.

Once the EU Member State or Schengen Associated State takes or is deemed to take responsibility for examining the asylum application on the basis of the Dublin Regulation, the claim is refused on third country grounds without its substance being considered. The only challenge is by judicial review. This is on very limited grounds, generally that the Dublin regulation has not been properly applied because for instance the person has family in the UK, or that human rights will be breached and the humanitarian clause should be applied (see also the next section).

The UK is infrequently asked to take back asylum seekers under the Dublin regulation, usually being a country of destination rather than transit.

On the Second List, see section 4 below.

## Appeal

### Indicators:

- Does the law provide for an appeal against the decision in the Dublin procedure:
  - Yes  No
  - o if yes, is the appeal  judicial  administrative
  - o If yes, is it suspensive  Yes  No
- Average delay for the appeal body to make a decision: Not available.

<sup>49</sup> UKBA, *Asylum Process Guidance, Third Country Cases: Referring and Handling* para 2.2.

<sup>50</sup> UKBA, *Asylum Process Guidance, Third Country Cases: Referring and Handling* para 4.2.

There is no appeal on *asylum grounds* against a decision that a person may be returned to another country on the First List – i.e. through the Dublin regulation, and no appeal against a decision in the Dublin procedure may be made on the grounds that the asylum seeker would be sent to another country in breach of their rights under the European Convention on Human Rights (ECHR) or in breach of the Refugee Convention.<sup>51</sup> The one ground of appeal available against a Dublin removal (i.e. a removal to a First List country) is that the person's ECHR rights would be breached *in* the receiving country. A human rights appeal of this kind may only be brought *in* the UK if the UK Border Agency (UKBA) does not certify that the human rights appeal is clearly unfounded, but UKBA is required to certify that it is clearly unfounded unless there is evidence to the contrary.<sup>52</sup> Legal challenges to Dublin removals therefore include judicial review of this certification. In cases where an appeal is available an out of country appeal must be brought within 28 calendar days (where the human rights appeal is certified clearly unfounded); an in-country appeal (where the human rights appeal is not certified) must be brought within 10 working days.

The result is that the only suspensive appeal against a Dublin removal is a human rights claim where this is not certified by the UKBA as clearly unfounded. Otherwise, the decision to remove under the Dublin Regulation can only be challenged by judicial review, including if UKBA oppose an argument under the Dublin Regulation itself that the UK should take responsibility. The certificate that a human rights claim is unfounded can also only be challenged by judicial review.

On the Second List, see section 4 below.

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in the Dublin procedure?  Yes  No

No personal interview takes place in the Dublin procedure.

The decision that the Dublin procedure is to be used is made on the basis of a Eurodac hit and/or information obtained in the screening interview about the route of travel. Once the Dublin decision is issued the claim is not substantively considered in the UK.

### Legal assistance

#### Indicators:

- Do asylum seekers have access to free legal assistance at the first instance in the Dublin procedure in practice?  Yes  not always/with difficulty  No
- Do asylum seekers have access to free legal assistance in the appeal<sup>53</sup> procedure against a Dublin decision?  Yes  always/with difficulty  No

Before a Dublin certificate is issued an asylum seeker has the same opportunity as any other asylum seeker to obtain access to free legal representation. They are affected by the limited resources and the lack of incentive for legal representatives to advise before the screening interview (see above, Legal Assistance section in regular procedure). Once the Dublin decision is issued they are likely to be

<sup>51</sup> Asylum and Immigration (Treatment of Claimants, etc) Act (AITOCA) 2004 Schedule 3 Part 2.

<sup>52</sup> AITOCA 2004 Schedule 3, Part 2.

<sup>53</sup> The ticked box concerning appeals refers to judicial review since there is no appeal.



detained. If they already have a legal representative that person may continue to represent them. If not, they may, again subject to resources, obtain access to representation in detention (see below concerning advice in detention). There are no special restrictions on legal aid in Dublin cases, and judicial review is funded by legal aid.

### Suspension of transfers

*Indicator:*

- Are Dublin transfers systematically suspended as a matter of policy or as a matter of jurisprudence to one or more countries?  Yes  No
  - o If yes, to which country/countries? Greece

Transfers to Greece were generally suspended as a matter of practice following the European Court on Human Rights judgment in *MSS v Belgium and Greece*<sup>54</sup>, and in anticipation of the Court of Justice of the European Union decision in *NS C-411/10*.<sup>55</sup> This was an executive decision applying to all potential transfers to Greece, and is kept under review in conjunction with the European Asylum Support Office and UNHCR.<sup>56</sup> However, decisions can still be made to return asylum seekers to Greece under the Dublin procedure, even if they are not implemented. There is no automatic legal mechanism to prevent such returns actually being carried out. Challenges must be made in individual cases, and practitioners say that some returns to Greece have been made since the decisions in *M.S.S. v Belgium and Greece*. Some individual cases of proposed returns to Italy and Cyprus are now suspended following the grant of permission to appeal to the Supreme Court in the case of *EM (Eritrea) [2012] EWCA Civ 1336*. In order for this to happen, legal representatives need to apply in each individual case for it to be stayed. There is no automatic policy of doing so.

The UK does not automatically assume responsibility for examining asylum applications where transfers are suspended. If discussions with the receiving country become protracted so that it appears there is no realistic prospect of the transfer taking place, the asylum seeker may be released from detention. Once released from detention in these circumstances, asylum seekers have sometimes been granted accommodation and cash support. However, the precise conditions for qualification for support during a challenge to a Dublin removal are presently under consideration and not fully established.

## 4. Admissibility procedures

### General (scope, criteria, time limits)

The only admissibility procedure in the UK is the safe third country procedure, either removal to an EU country using the Dublin regulation, or another safe third country. There is no screening for admissibility on the basis of the merits of the case. The Dublin regulation has been discussed above. This section deals with decisions to remove the asylum seeker to a safe third country other than an EU Member State or other country using the Dublin Regulation.

As described above, in effect the Dublin regulation countries constitute the First List. Legislation gives a power to create a Second List. A country on the Second List is treated as a place to which non-nationals can be returned without a breach of the Refugee Convention, either in that country or through risk of

<sup>54</sup> European Court of Human rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011.

<sup>55</sup> The Parliamentary Under-Secretary of State, Home Office House of Lords 25 Oct 2011 : Column WA121

<sup>56</sup> Parliamentary Under Secretary of State for the Home Office, House of Lords, 23 January 2013, col. WA 209

being sent elsewhere.<sup>57</sup> Additionally, there is a presumption that human rights claims against removal to it of non-nationals are unfounded.<sup>58</sup>

## Appeal

### Indicators:

- Does the law provide for an appeal against the decision in the admissibility procedure:  
 Yes       No

There is no appeal on *asylum grounds* against a safe third country decision. However, an , appeal may be made on the grounds that the person would be sent by that third country to another country in breach of their rights under the European Convention on Human Rights (ECHR) (e.g. indirect refoulement on human rights grounds) or that their ECHR rights would be breached in the receiving country. These human rights appeals may only be brought in the UK if the UK Border Agency (UKBA) does not certify that they are clearly unfounded. In the case of the 'second list' there is an obligation to certify human rights claims as clearly unfounded unless the decision maker is satisfied that they are not unfounded.<sup>59</sup> Where an appeal is available an out of country appeal must be brought within 28 calendar days; an in-country appeal must be brought within 10 working days.

The result is that the only suspensive appeal against a third country removal would be where a human rights claim is not certified as clearly unfounded. When a decision is made that the person can be returned to a safe third country, a certificate is issued to that effect, and this can only be challenged by judicial review. The certificate that the case is unfounded can also only be challenged by judicial review. The scope of judicial review is described above in relation to the regular procedure, but in the case of a judicial review based on human rights, the court looks more closely at the substance of the decision.<sup>60</sup>

The main distinction between the legal provisions governing appeals in these safe third country cases and Dublin cases is that in Dublin cases there is no appeal from outside the UK on the basis of indirect refoulement in breach of ECHR rights.

Presently no countries are listed in the Second List, and non-Dublin safe third country returns take place on a case by case basis. They have been carried out to e.g. the US and Canada.

## Personal Interview

### Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in the admissibility procedure?       Yes       No

As stated above in relation to the Dublin procedure, there is no provision for a personal interview in safe third country cases.

<sup>57</sup> AITOCA 2004 Schedule 3 Parts 3 and 4.

<sup>58</sup> AITOCA 2004 Schedule 3 Part 3.

<sup>59</sup> AITOCA 2004 Schedule 3, Parts 3 and 4.

<sup>60</sup> *R v Secretary of State for the Home Department ex p Daly* [2001] UKHL 26.

## Legal assistance

### Indicators:

- Do asylum seekers have access to free legal assistance at first instance in the admissibility procedure in practice?  Yes  not always/with difficulty  No
- Do asylum seekers have access to free legal assistance in the appeal procedure against an admissibility decision?  Yes  not always/with difficulty  No

There are no special rules or restrictions applying to legal assistance in the safe third country procedure. As with applicants who are subject to the Dublin procedure, in principle an asylum seeker subject to a third country decision has the same opportunity as any other asylum seeker to obtain access to free legal representation. However, for both Dublin and other third country procedures, once the decision to use a third country procedure has been made, the person is likely to be detained. If they already have a legal representative that person may continue to represent them. If not, they may, again subject to resources, obtain access to representation in detention (see below concerning advice in detention). Judicial review is funded by legal aid, subject to the means of the asylum seeker and the merits of the case.

## 5. Border procedure (border and transit zones)

### General (scope, time-limits)

### Indicators:

- Do border authorities receive written instructions on the referral of asylum seekers to the competent authorities?  Yes  No
- Are there any substantiated reports of refoulement at the border (based on NGO reports, media, testimonies, etc)?  Yes  No
- Can an application made at the border be examined in substance during a border procedure?  Yes  No

In the UK there is no provision for asylum decisions to be taken at the border. An application for asylum may be made at the port of arrival, and immigration officers may carry out the screening interview, but then refer the claim to UKBA. The substance of the claim is not examined at the border.

Immigration officers are accountable to the UK Border Force, which separated from the UK Border Agency in March 2012. Thus from this date the management of asylum claims at the border has become an inter-agency matter rather than all being handled within UKBA. If a person claims asylum immigration officers grant temporary admission to enable the claim to be made. Temporary admission is not an immigration status and has no rights attached. It is analogous to release from detention on licence. Detention in an airport is limited to relatively short periods (less than 24 hours). Short-term holding facilities in airports are not subject to the usual rules which govern immigration detention.

The Equality Act 2010 permits immigration officers to discriminate on grounds of nationality if they do so in accordance with the authorisation of a minister.<sup>61</sup> This discrimination may include subjecting certain groups of passengers to a more rigorous examination. Ministerial authorisations are made on the basis of statistical information of a higher number of breaches of immigration law or of adverse decisions in relation to people of that nationality. The statistical basis is not published. Immigration officers have the power to refuse entry at the border unless the passenger has a valid entry clearance or claims asylum.

<sup>61</sup> Equality Act 2010 s.29 and schedule 3 part 4.

It is not known whether and if so how many people sent back from the border wished to claim asylum but did not say so to immigration officers or were de facto not given an opportunity to do so. In 2012, 9,285 people were refused entry at the UK port and subsequently left the country.<sup>62</sup>

The UK also operates juxtaposed controls in France and Belgium. In the control zones in France and Belgium, no asylum claim can be made to UK authorities<sup>63</sup>. Of the 4,244<sup>64</sup> people turned back in control zones in 2012, it is not known how many wished to claim asylum. There is little or no information about any attempted claims, and whether those who attempt to claim are referred to the authorities of the state of departure, as the regulations require. During an investigation by the Children's Commissioner for England, UKBA officials disclosed the 'Gentleman's Agreement'.<sup>65</sup> This operates in relation to people intercepted on landing in the UK who are considered to have made an illegal entry and who do not say that they wish to claim asylum. The agreement is between the UK and France and obliges France to accept the return of such passengers if this can be effected within 24 hours. Following the Commissioner's discovery that this was being applied to young people, the practice was stopped in relation to acknowledged children. In 2012/13 the Independent Chief Inspector of Borders and Immigration is carrying out an inspection of juxtaposed controls which may shed light on whether this practice continues in relation to those whose age is disputed. Returns under the Gentleman's Agreement are effected without a formal refusal of leave to enter.

The ministerial authorisation to discriminate in refusing leave to enter takes effect also in control zones.<sup>66</sup> Field research by the Refugee Council, though not about juxtaposed controls, found that 'outposted immigration officials fail to differentiate between different types of unauthorised travellers attempting to enter the UK'.<sup>67</sup>

Therefore although there is little or no substantiated evidence of refoulement taking place at the border, current UK policy and practice creates a risk of this occurring. However, further research would be required in order to accurately assess this.

## Appeal

### Indicators:

- Does the law provide for an appeal against a decision taken in a border procedure?  
 Yes  No

There is no substantive border procedure and thus the question of appeal does not arise. The decision to detain or to grant temporary admission or release is not appealable. If a person claims asylum at the port after a refusal or cancellation of immigration leave to enter, the claim must be recorded and referred to the UK Border Agency.

<sup>62</sup> Home Office Research and Statistics Directorate, *Immigration Statistics: Removals, Q42 2012*.

<sup>63</sup> In the case of France, this is stated in Article 4 of the Additional Protocol CM 5015 to the Protocol between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance relating to the Channel Fixed Link, Cm 2366, signed at Sangatte on 25 November 1991. It is not explicit in the Belgian agreement.

<sup>64</sup> Home Office Research and Statistics Directorate, *Immigration Statistics: Removals, Q42 2012*.

<sup>65</sup> Adrian Matthews, *Landing in Dover: The Immigration process undergone by unaccompanied children arriving in Kent, 2012*, Children's Commissioner.

<sup>66</sup> Equality Act 2010 Schedule 3, Part 4, Paragraph 17 (4) (A) Ministerial Authorisation para 4.

<sup>67</sup> Sile Reynolds, Helen Muggeridge, *Remote Controls: how UK border controls are endangering the lives of refugees*, Refugee Council, 2008.

## Personal Interview

### Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in a border procedure?  Yes  No

No substantive interview should take place at the port. However, it may be that matters relevant to an asylum claim are disclosed during an immigration interview dealing with leave to enter. This will be placed in the same file as any later asylum claim, and may in practice be taken into account in an asylum decision. Sensitivity to gender or trauma issues is not anticipated in an immigration interview as it is in an asylum interview.

## Legal assistance

### Indicators:

- Do asylum seekers have access to free legal assistance at first instance in the border procedure in practice?  Yes  not always/with difficulty  No

There are no schemes for legal assistance at the ports, and so no regular presence of legal advisers. There is no provision of legal assistance at a screening interview which takes place at a port, and no opportunity for prior advice.

## 6. Accelerated procedures

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

There are two kinds of accelerated procedures. Firstly where the claim is certified by the UK Border Agency (UKBA) as clearly unfounded, there is no in-country appeal. These are called NSA cases ('non-suspensive appeal'). 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 UKBA decision makers refers to the procedure as 'DNSA' - detained non-suspensive appeal. About 10% of claims were certified clearly unfounded in 2012. The second accelerated procedure is a detained fast track procedure (DFT) where UKBA consider that the claim is capable of being decided quickly. The whole DFT process is conducted in detention. 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 (70% of certified unfounded claims in 2012)<sup>68</sup> 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 (See section F on the safe country concept below). There is no time limit for a decision to be made in such a case, although UKBA guidance states that the aim is to decide within 14 calendar days. UKBA is responsible for making the decision. The policy is that all decisions on a potential NSA case must be made by a UKBA 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>69</sup> Guidance to decision makers advises that where the claim is for asylum and human rights protection,

<sup>68</sup> Home Office Research and Statistics Directorate, *Immigration Statistics: Asylum Table 13 Q4 2012*.

<sup>69</sup> UKBA, *Asylum Process Guidance, Special Cases: Certification under s.94*, para. 8.3.

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 be based on the credibility of the individual applicant but on objective country material.<sup>70</sup> This is general practice and is unlike the regular procedure where no such guidance is given.

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 (700 cases were individually certified in 2012).<sup>71</sup> This should only be done where the caseworker considers that the claim is incapable of succeeding before an independent tribunal.<sup>72</sup>

The defining characteristics of the detained fast-track procedure (DFT) are speed and detention throughout the process. The criteria for being routed into the DFT are wide: it only requires 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. The following groups of people are excluded from the DFT:

- women who are 24 weeks pregnant or over;
- applicants with health conditions needing 24 hour medical care;
- applicants with physical disabilities, except the most manageable;
- applicants with infectious and/or contagious diseases
- applicants with severe mental health problems
- where there is evidence that applicants have been tortured
- those under 18 and adults with dependent children
- victims or potential victims of trafficking.

Decision makers are advised to apply a general presumption that the majority of asylum applications are ones on which a quick decision may be made.<sup>73</sup> The guidance says that a case will not be suitable for the DFT where it appears that further enquiries will be needed, or complex legal advice or corroborative evidence, or translation of documents. 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>74</sup> Studies of the DFT have shown that people with complex cases and from the excluded groups are in fact placed in the DFT.<sup>75</sup> Lawyers and NGOs say that it appears that available space in the detention centre and whether the asylum seeker can easily be removed (e.g. because they have travel documents) are a major influence on the decision to detain.<sup>76</sup> UKBA guidance advises that ease of removal should be taken into account.

All initial asylum claims are referred to a separate team of UKBA officers - the National Asylum Intake Unit (NAIU), 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 NAIU office re-opens.<sup>77</sup>

A very tight timescale is laid down for the DFT which requires that decisions should be taken within 3 days of detention. In practice this time limit is very often not observed. For example, the Independent Chief Inspector of Borders and Immigration reported that only four out of 114 detainees received a

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<sup>70</sup> UKBA, *Asylum Process Guidance, Special Cases: Certification under s.94* para 8.4.1.

<sup>71</sup> Home Office Research and Statistics Directorate, *Immigration Statistics: Asylum Table 13 Q4 2012*.

<sup>72</sup> *NA (Iran ) v SSHD* [2011] EWCA Civ 1172.

<sup>73</sup> UKBA, *Asylum Process Guidance, Detained Fast Track Processes*, para.2.2.

<sup>74</sup> Independent Chief Inspector of Borders and Immigration, *Asylum: A Thematic Inspection of the Detained Fast Track*, ICIBI, 2012.

<sup>75</sup> 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.

<sup>76</sup> Human Rights Watch, *Fast Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK*, 2010.

<sup>77</sup> UKBA, *Asylum Process Guidance, Detained Fast Track Processes* par 3.1.1.

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>78</sup> There is no automatic sanction if initial interviews are not arranged or initial decisions are not taken by UKBA within the specified time. The courts have held that the process is not inherently unfair, provided there is some flexibility to respond to circumstances, and that a claim can be taken out of the DFT where it is shown to be not suitable.<sup>79</sup> Applications to take the claim out of the DFT must be made to UKBA. There is no appeal against refusal to do so, but refusal can be challenged by judicial review (see section on regular procedure for description of judicial review). In practice 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.

The asylum decision in the DFT is taken by UKBA caseworkers based in the detention centre. For instance, in Harmondsworth, the largest detention centre in the UK, there are separate teams of UKBA officers whose work is to operate the DFT.<sup>80</sup>

In practice those cases channelled into the DFT are nearly all refused (a 95-99% refusal rate is given in published figures)<sup>81</sup>. Although the criterion is that the decision can be made quickly, the very low number of grants of leave in the DFT gives an impression which is shared by lawyers, NGOs and refugees that claims routed into the DFT are treated as unfounded. The countries of origin of people in the DFT also contribute to this impression. Up to 2007 the Home Office issued lists of countries whose nationals were deemed suitable for the DFT. The list was withdrawn in 2008, but nationals of countries that were on the list are still among those most commonly put into the DFT, and there is concern that an informal presumption is in operation. The main examples are Afghanistan, Bangladesh, China, India, Nigeria and Pakistan.<sup>82</sup> There is some overlap between countries of origin with the highest numbers in the NSA route and DFT (notably India and Nigeria)<sup>83</sup>. However, not all applicants in the DFT come from countries which have been regarded as 'safe'. The DFT is also used for nationals of for instance Afghanistan and Iraq, countries in relation to which there are wide-ranging and complex protection issues, as set out in UNHCR's eligibility guidelines.<sup>84</sup>

There is an increase in use of the DFT. On December 31 2012, 547 men and 74 women were detained in the fast track as compared with 407 men and 65 women in January 2011.<sup>85</sup>

The Chief Inspector has recommended that UKBA study the DFT policy which links complexity of a claim with outcome.

## Appeal

### Indicators:

- Does the law provide for an appeal against a decision taken in an accelerated procedure?
  - Yes       No
  - o if yes, is the appeal:       judicial       administrative
  - o If yes, is it suspensive?       Yes       No

<sup>78</sup> Tamsin Alger and Jerome Phelps, *Fast Track to Despair*, Detention Action, 2011.

<sup>79</sup> *R (on the application of the Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481.

<sup>80</sup> Independent Monitoring Board, Harmondsworth IRC, *Annual Report 2011*.

<sup>81</sup> Home Office Research and Statistics Directorate, *Immigration Statistics: Outcomes of main applicants accepted onto the Detained Fast Track Process*, Vol 4 Table 12 Q4 2012.

<sup>82</sup> Home Office Research and Statistics Directorate, *Immigration Statistics: Asylum Table 11 Q4 2012 and UKBA Detained Fast Track Processes Suitability List Annexe 2 2006*.

<sup>83</sup> Home Office Research and Statistics Directorate, *Immigration Statistics: Asylum Tables 11 and 13 Q4 2012*.

<sup>84</sup> UNHCR, *Eligibility Guidelines For Assessing The International Protection Needs Of Asylum-Seekers From Afghanistan 2010*; UNHCR, *Eligibility Guidelines For Assessing The International Protection Needs Of Asylum-Seekers From Iraq*, 2012.

<sup>85</sup> FOI request 25597.

Appeals against refusals in accelerated procedures can be both suspensive and non-suspensive because there are two different systems. In the NSA the appeal is non-suspensive; in the DFT no removal will take place until the appeal is decided, but the appeal takes place in a building adjoining the detention centre, and detention is maintained until the case is concluded or removed from the DFT.

Appeals against refusals that are certified as clearly unfounded, i.e. in the NSA track, may not be made from within the UK. They must be made within 28 calendar days of leaving the UK.<sup>86</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

Appeals in the DFT must be made within two working days of receiving the decision.<sup>87</sup> The hearing is required to take place two days after the appeal has been lodged,<sup>88</sup> and the decision should be given two days after the hearing. In practice, the time of fixing the hearing is not observed. The Chief Inspector reported that the average time taken for the appeal to be heard was nine days after it was lodged. Appeals are made to a special sitting of the Immigration and Asylum Chamber of the First Tier Tribunal which happens in the detention centre.

Asylum seekers are not guaranteed legal representation before the tribunal. Research has revealed that 63% of asylum seekers were unrepresented at their DFT appeal.<sup>89</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. Only one day is allowed for this in the procedure, and in the practice any consultation is very short and inadequate to take full instructions on an asylum claim. After refusal only one day is allowed for preparation of the appeal, during which the representative must advise on the merits of an appeal, draft it and represent. It is almost a certainty that the client will not get the quality of representation that is needed, and, given the refusal rate in DFT appeals, lawyers are likely to advise that the chances of success are less than 50%, which means that public funding for representation at an appeal will be refused.<sup>90</sup>

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum seeker systematically conducted in practice in an accelerated procedure?       Yes       No
- If so, are interpreters available in practice, for interviews?       Yes       No
- Are personal interviews ever conducted through video conferencing?       Yes       No

There are no grounds in the accelerated procedure to omit a personal interview. The same immigration rules apply to the interview as in the regular procedure, but they must be conducted by NSA ('non-suspensive appeal' cases) trained caseworkers in the NSA procedure. In the detained fast track procedure (DFT) the interview is required to take place on the day after arrival. In practice asylum seekers in the DFT may wait on average 11 days for an interview.<sup>91</sup> The interview is conducted by a UKBA 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 say that the quality of

<sup>86</sup> Asylum and Immigration Tribunal (Procedure) Rules 2005 rule 7.

<sup>87</sup> Consolidated Asylum and Immigration Fast Track Procedure Rules 2005, amended 2010, rule 8.

<sup>88</sup> Consolidated Asylum and Immigration Fast Track Procedure Rules 2005, amended 2010, rule 11.

<sup>89</sup> Tamsin Alger and Jerome Phelps, *Fast Track to Despair*, Detention Action, 2011.

<sup>90</sup> Tamsin Alger and Jerome Phelps, *Fast Track to Despair*, Detention Action, 2011.

<sup>91</sup> Independent Chief Inspector of Borders and Immigration, *Asylum: A Thematic Inspection of the Detained Fast Track*, ICIBI, 2012.



interviewing in the DFT is less skilful, tending to focus extensively on detail and not on the major issues in the claim.

As described above, the screening process is not suited to identifying the complex protection issues that may arise in women asylum seekers' claims. UNHCR<sup>92</sup> and Human Rights Watch<sup>93</sup> have observed that the inadequate screening process followed by an interview under time pressure in detention are not conducive to disclosure of the atrocities that in particular women may have suffered.

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

### Legal assistance

#### Indicators:

- Do asylum seekers have access to free legal assistance at first instance in accelerated procedures in practice?  Yes  not always/with difficulty  No
- Do asylum seekers have access to free legal assistance in the appeal procedure against a decision taken under an accelerated procedure?  Yes  not always/with difficulty  No

Unlike in the regular procedure, fast track detainees are entitled to have a publicly funded legal adviser present at their initial interview. However, as discussed above, there may have been no opportunity for the client and lawyer to meet before the interview, and the relationship with the lawyer and quality of advice are adversely affected. If the detainee or their representative are able to show that the DFT (detained fast track procedure) is inappropriate, the detainee can apply to be taken from the DFT before or after an asylum decision is made. But, as discussed above, the compressed timescale of the DFT makes it difficult for a lawyer to get a full view of the case. Legal aid for representation at the DFT appeal is based on the merits of the case, and for the reasons described above a lawyer may be inadequately informed to be able to obtain a view of the merits so as to grant or refuse legal aid. As described above in relation to the effect on appealing, both asylum seekers and lawyers say that it is almost impossible to have effective legal representation in the DFT.

UKBA does not keep figures of how many asylum seekers appear unrepresented at their DFT appeal.

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.

<sup>92</sup> UNHCR Quality Initiative Project, Fifth Report to the Minister, 2008; UNHCR Quality Integration Project First Report to the Minister, 2010.

<sup>93</sup> Human Rights Watch, *Fast Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK*, 2010.

### C. Information for asylum seekers and access to NGOs and UNHCR

#### Indicators:

- Is sufficient information provided to asylum seekers on the procedures in practice?  Yes  not always/with difficulty  No
- Is sufficient information provided to asylum seekers on their rights and obligations in practice?  Yes  not always/with difficulty  No
- Do asylum seekers located at the border have effective access to NGOs and UNHCR if they wish so in practice?  Yes  not always/with difficulty  No
- Do asylum seekers in detention centres have effective access to NGOs and UNHCR if they wish so in practice?  Yes  not always/with difficulty  No
- Do asylum seekers accommodated in remote locations on the territory (excluding borders) have effective access to NGOs and UNHCR if they wish so in practice?  Yes  not always/with difficulty  No

The immigration rules provide that asylum applicants should be informed 'in a language they may reasonably be supposed to understand and within a reasonable time after their claim for asylum has been recorded of the procedure to be followed, their rights and obligations during the procedure, and the possible consequences of non-compliance and non-co-operation. They shall be informed of the likely timeframe for consideration of the application and the means at their disposal for submitting all relevant information.'<sup>94</sup>

Further, they shall be informed in writing and in a language they may reasonably be supposed to understand 'within a reasonable time not exceeding fifteen days after their claim for asylum has been recorded of the benefits and services that they may be eligible to receive and of the rules and procedures with which they must comply relating to them. UKBA is also required to provide information on non-governmental organisations and persons that provide legal assistance to asylum applicants and which may be able to help or provide information on available benefits and services.'<sup>95</sup> Advice on welfare, the asylum process and life in the UK is delivered through the One Stop Services<sup>96</sup> (OSS) run by charitable organisations and funded by UKBA. In April 2011, UKBA reduced funding to the OSS by 62%. This resulted in the closure of three OSS offices and staffing levels in others being cut by up to two thirds. There are now 'advice deserts' around the country where advice on the asylum process and support is either not available or in very short supply.

Asylum seekers receive information about the DFT (detained fast track procedure) once they are in it, but the information is geared to the fixed timetable of the DFT, and not to the reality of what the person might encounter. It is also geared towards what will happen on refusal of the claim, and not what will happen if asylum is granted.<sup>97</sup> At the asylum screening unit a Point of Claim leaflet is provided, which explains the next steps if the case is put into the regular procedure, and what it means to be granted or refused asylum. A letter prior to the screening appointment also gives information and the UKBA website explains what documents the asylum seeker needs to bring to the screening interview, and rights and responsibilities throughout the asylum process in English only.<sup>98</sup> At the screening stage the different outcomes and their implications are not explained sufficiently for asylum seekers to understand that they may be moved to a different part of the country, or, if they are detained, what the reasons for that would be and how long detention might last.

<sup>94</sup> Immigration rules para 357A.

<sup>95</sup> Immigration rules para 358.

<sup>96</sup> Information on the OSS available [here](#).

<sup>97</sup> Independent Chief Inspector of Borders and Immigration, *Asylum: A Thematic Inspection of the Detained Fast Track*, ICIBI, 2012.

<sup>98</sup> UKBA, [How to claim asylum](#).

A notice giving the contact details of the Asylum Screening Unit and the requirement to claim there for a person already in the UK is linked to UKBA's website in 16 languages.

There is no provision in the rules for information to be given at later stages. Asylum seekers are not systematically informed about the Dublin procedure and its implications until they are detained for transfer to the responsible EU Member State or Schengen Associated State.

Most asylum seekers are provided with initial accommodation for two or three weeks, and then further accommodation which is in the same region of the country as administratively defined by Home Office but this may still be at a considerable distance from where they made their initial claim. There is no provision in the rules for information on local NGOs and access to UNHCR to be provided after dispersal. In practice, the level of information depends on local effort between local authorities, and NGOs in the region in question. In Liverpool, the charity Refugee Action delivers a briefing to asylum applicants in Initial Accommodation who have not yet attended their substantive interview, which explains the asylum process, clarifies the expectations on the applicant and on their UKBA caseworker and describes the possible outcomes of the claim.

Access to information is affected by the award in 2012 to private companies of the contracts for accommodation and transport. Local sub-contractors may not have a track record of experience in the asylum field. Accommodation providers are required to provide a 'move in' and 'briefing' service which should cover registration with a local general doctor, registration of children at a local school, making contact with local NGOs, National Health Services, social services, police, legal advisers and leisure services.<sup>99</sup>

This obligation is interpreted differently by each of the contracted accommodation providers who provide information at varying degrees of quality.

UNHCR works with UKBA on its decision processes and supports its Quality Initiative. In some instances UKBA is required to involve UNHCR, for instance if considering cessation of refugee status.<sup>100</sup> Individuals contact UNHCR through its website, and there are no reports of access being frustrated.

## D. Subsequent applications

### Indicators:

- Does the legislation provide for a specific procedure for subsequent applications?  
 Yes       No
- Is a removal order suspended during the examination of a first subsequent application?  
 Yes       No
- Is a removal order suspended during the examination of a second, third, subsequent application?  
 Yes       No

Provision for a subsequent claim is made in the immigration rules (HC 395 para 353). Where an asylum seeker makes further representations that are sufficiently different from previous submissions in that the content has not previously been considered, and which, taken together with previously submitted material create a realistic prospect of success, these submissions can be treated as a "fresh claim". If they are treated as a fresh claim then a refusal attracts a right of appeal to the First Tier Tribunal, and all provisions are the same as for an appeal regarding a first asylum application. Case law provides that the threshold to be passed for submissions to be treated as a fresh claim is a 'relatively modest' one.<sup>101</sup> In practice, lawyers and NGOs say that the threshold employed is very high, and that in the majority of

<sup>99</sup> COMPASS Project, Schedule 2: accommodation and transport – statement of requirements.

<sup>100</sup> UKBA, *Asylum Policy Instruction, Cancellation, Cessation and Revocation of Refugee Status*, para 2.4.

<sup>101</sup> *WM (DRC) v SSHD* [2006] EWCA Civ 1495.

cases it is necessary to proceed to judicial review in order for the claim to be treated as a fresh claim and given a right of appeal. Lawyers and NGOs have experience of clearly new circumstances being rejected as not new, and of new evidence which supports the asylum seeker's credibility being disregarded, often by reasserting the earlier, adverse findings, without reference to the strength, cogency or objectivity of either the old or new evidence.

A small percentage of further submissions are treated as fresh claims by the UK Border Agency (UKBA). National information is not presently available, but figures obtained by an NGO from one regional office show that 86% of further submissions were refused outright. Judicial review is the only means to challenge refusal to treat submissions as a fresh claim, and it is only available with the permission of the tribunal. In such a challenge the Court must consider whether the UK Border Agency considered the right question, namely, not whether the caseworker thinks it is a strong case, but whether there is a realistic prospect of an immigration judge, applying 'anxious scrutiny', thinking that the applicant will be exposed to a real risk of persecution or serious harm on return. In so doing, the UKBA caseworker themselves must also use 'anxious scrutiny'. Whether this has been done is a question the court can consider for itself on the basis of the evidence that the UKBA caseworker had.<sup>102</sup>

In practice, the shortage of publicly funded legal advice and the limitations of judicial review as a remedy mean that poorly based refusals may go unchallenged, with the asylum seeker resorting instead to making another set of further submissions.

Where the original claim was made after March 2007, a designated reporting centre at a regional office of the UK Border Agency is responsible for deciding whether further representations amount to a fresh claim, and the outcome. Further representations in older cases are made to the Case Assurance and Audit Unit of UKBA in Liverpool. There is no fixed limit to the number of further submissions that can be made. The response to further submissions is decided on the basis of written submissions and without an interview, but the submissions must be delivered in person at an appointment. There are recorded attempts of up to 200 calls by legal representatives attempting to make an appointment at the Liverpool office.<sup>103</sup>

Once they have an appointment (usually 3 to 10 days after it is arranged), applicants need to have the means to travel to lodge their further submissions. For those who are required to lodge the submissions when they regularly report this is relatively unproblematic as UKBA will pay travel expenses to report where the distance is over 3 miles. For those who are required to attend more distant regional offices, or to travel to Liverpool, UKBA will not pay travel expenses. Although the applicant, if destitute, should be eligible for section 4 support as soon as s/he has alerted UKBA to the existence of further submissions,<sup>104</sup> in practice, it can be extremely difficult to access support while waiting for an appointment, and while waiting for a decision on whether those further submissions constitute a fresh claim.<sup>105</sup> In effect, this means that people with further submissions may be left destitute.

A person may not be removed before a decision is taken on any submissions they have outstanding,<sup>106</sup> Removal directions (the order to a carrier to take the person on a particular flight or crossing) may remain in place while further submissions are being considered, only to be cancelled if the claimant is successful or if the UKBA decides they need more time to decide. Further submissions may be allowed or refused at any time until the asylum seeker is actually removed. A last-minute refusal may leave no time for any further legal challenge, and there is no obligation for UKBA to respond in time for the asylum seeker to take advice or challenge a refusal.

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<sup>102</sup> *R (on the application of YH) v SSHD* [2010] EWCA Civ 116.

<sup>103</sup> Written submissions of the intervener (Refugee Action) in *MK and AH v SSHD* [2012] EWHC 1896 (Admin).

<sup>104</sup> *MK and AH v SSHD* [2012] EWHC 1896 (Admin).

<sup>105</sup> Asylum Support Appeals Project, [Further submissions and access to asylum support](#), 30 July 2010.

<sup>106</sup> Immigration rules para 353A.

Preparation of further submissions is funded under a limited form of legal aid (Legal Help). Unless practitioners can argue that the case is exceptional the remuneration available will not fund substantial advice, drafting or collection of evidence.

The procedure for further submissions is different for unaccompanied children who have been granted discretionary leave. When this is due to expire they may apply for further leave. This triggers an 'active review'<sup>107</sup> which means that there must either be a grant of further leave or an interview.

## E. Guarantees for vulnerable groups of asylum seekers (children, traumatised persons, survivors of torture)

### 1. Special Procedural guarantees

#### Indicators:

- Is there a specific identification mechanism in place to systematically identify vulnerable asylum seekers?  Yes  No  Yes, but only for some categories (specify )
- Are there special procedural arrangements/guarantees for vulnerable people?  Yes  No  Yes, but only for some categories (people for whom detention is accepted to be damaging and unaccompanied minors)

There is no specific mechanism to identify adult asylum seekers who need specific procedural guarantees. The inadequacy of the screening interview to identify such vulnerabilities is discussed above in the section on registration of the asylum application. The standard questionnaire used asks only basic questions about health. Reports on the detained fast track procedure (DFT) agree that torture survivors are placed in the DFT, against policy, because there is no effective mechanism to identify them.<sup>108</sup>

Adult asylum seekers who are already in the UK and who have access to accommodation can submit a written request to register an asylum application if they either have a disability or severe illness (proved by written evidence) and are physically unable to travel, or are imprisoned and unable to make their application in person.<sup>109</sup>

People with mental illness may have a publicly funded representative at their asylum interview.

There are no other procedural guarantees in law for vulnerable adult applicants relating to decision-making or application process, except that they should not, according to policy, be detained. Rule 35 of the Detention Centre Rules provides that where there is evidence that a detainee has been tortured, or for any other reason their health would be injuriously affected by detention, a report should be made to the caseworker for release to be considered. Independent evidence of torture or severe mental illness is also a ground for removal from the DFT. However, rule 35 does not compel release, and in practice rule 35 reports which substantiate torture have often not brought about release. A Parliamentary question revealed that of 983 rule 35 reports made in 2012, only 74 had resulted in the detainee being released.<sup>110</sup>

After UKBA conducted its own audit, new guidance was issued in January 2013 on the operation of rule 35. This guidance advises UKBA caseworkers how to evaluate a rule 35 medical report to determine

<sup>107</sup> UKBA, *Asylum Policy Instruction, Active Review* Section 2.

<sup>108</sup> 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.

<sup>109</sup> UKBA *Asylum process guidance: registering asylum claims* para 7.

<sup>110</sup> House of Commons Hansard 24 Jan 2013 : Column 431W.

whether it constitutes independent evidence of torture so as to warrant release. It remains to be seen how and whether practice will be affected.<sup>111</sup>

Guidance to UKBA officers making a decision after the screening interview also advises that where a person through illness has a need for care and attention over and above destitution, they should be referred to a Local Authority for a needs assessment.<sup>112</sup>

## 2. Use of medical reports

### *Indicators:*

- Does the legislation provide for the possibility of a medical report in support of the applicant's statements regarding past persecution or serious harm?  
 Yes       Yes, but not in all cases       No
- Are medical reports taken into account when assessing the credibility of the applicant's statements?       Yes       No

Medical evidence may be submitted but the initiative for obtaining a report comes from the applicant or their lawyer. There is no legal provision which requires the provision of a report for the purposes of the asylum claim.

Asylum Policy Guidance on medical evidence provides for the possibility of delaying an asylum decision pending receipt of a medical report. The UK Border Agency (UKBA) caseworkers make this decision and should act reasonably. They are required to take into account whether the applicant declared a medical condition at the screening interview, whether there is written evidence of an appointment with a medical professional, and the length of time the applicant has been in the country and so had the opportunity to consult a medical practitioner. The guidance advises that postponements should be fixed, and preferably only for five to ten days, and that the asylum interview should not be postponed in order to obtain a medical report.

Where a solicitor is funded by legal aid they can request authority from the Legal Aid Agency for payment for medical reports, and this may be granted depending on the relevance and importance of the report to the claim. The solicitor has authority to spend £400 on an expert report without involving the Legal Aid Agency, but this is often not adequate to fund a full expert report.

Where the asylum seeker has an appointment with the NGO Freedom from Torture (FFT) the effect is different as the decision must be deferred until the report is available.<sup>113</sup> Freedom from Torture is the largest and most established organisation which prepares medico-legal reports, and its work is widely respected. Referral to obtain an appointment for a Medico-Legal report from FFT can normally only be made by a lawyer, and referrals may be accepted if FFT considers that a medico-legal report has the potential to make a material difference to the outcome of the claim.<sup>114</sup> If a report from FFT is received after a refusal of asylum the case must be reviewed.

The Detention Centre rules require that a medical examination should be conducted within 24 hours of arrival in a detention centre, but this must not be used in determining the asylum claim; its purpose is to ascertain fitness for detention.

Case law requires that medical reports are taken into account in deciding the applicant's credibility. The courts have also cautioned against tribunal judges reaching their own diagnoses which depart from the

<sup>111</sup> See further below.

<sup>112</sup> UKBA *Asylum process guidance: routing asylum applications* para 3.2 and *Processing an Asylum Application from a Child*, Section 5.

<sup>113</sup> UKBA *Asylum process guidance: medical evidence – Medical Foundation cases*.

<sup>114</sup> Freedom from Torture, [Medico-Legal Report Referrals](#).

medical evidence, and discounting psychological evidence on the basis that it is founded in part on what the asylum seeker says.<sup>115</sup> Recommendations from Freedom from Torture state best practice, which includes that evidence should be considered as a whole, including expert medical evidence, and a conclusion on the overall credibility of a claim not reached before consideration of an expert medical report. FFT also recommends that due consideration must be given to the medical expert's opinion on the degree of consistency between the clinical findings and the account of torture.<sup>116</sup> Despite the availability of best practice guidance and the judgments of the higher courts, this guidance is not consistently followed. Practitioners report that, although these problems are seen less frequently, there continue to be cases where medical evidence has been downgraded or discounted by a tribunal judge on the basis that they do not believe the applicant, rather than using the report as evidence which contributes to assessing the applicant's case.

Medical reports may be prepared based on the Istanbul Protocol, and this is regarded as best practice and is standard for experienced practitioners.

### 3. Age assessment and legal representation of unaccompanied children

*Indicators:*

- Does the law provide for an identification mechanism for unaccompanied children?  
 Yes       No
- Does the law provide for the appointment of a representative to all unaccompanied children?  
 Yes       No

The procedure for identifying unaccompanied children is governed by guidance and case law. At the screening stage, where a person appears to an immigration officer or UK Border Agency (UKBA) caseworker to be under 18, policy guidance is that they are to be treated as a child. In case of doubt, the person should be treated as though they are under 18 until there is sufficient evidence to the contrary.<sup>117</sup> Where their appearance strongly suggests to the officer that they are significantly over 18, a second opinion must be sought from a senior officer. If they are agreed that the person is over 18, the asylum seeker is treated as an adult. In this case, an age assessment can be triggered by the young person or any third party referring to the local authority for an age assessment.

Those who are given the benefit of the doubt and those who are accepted as being under 18 are referred to a local authority social services department which becomes responsible for their care. They should be looked after according to the same standards as other young people in the care of local authorities. In practice the experience of these children varies; some make good relationships with their carers and feel fully supported. Some are very confused and frightened, are not treated well, and do not have a named social worker responsible for them. The named social worker is responsible for the implementation of the care plan which details how the child should be looked after through the process. This includes helping them to find a legal representative.

Once appeal rights have been exhausted the care of young people over 18 is often limited to that which will avoid a breach of their human rights. This tends to be a more minimal standard than the duty of care which applies to people under 18.

<sup>115</sup> E.g. *Mibanga v SSHD* [2005] EWCA Civ 367.

<sup>116</sup> Jo Pettit, *Body of Evidence – Treatment of Medico-Legal Reports for Survivors of Torture in the UK Asylum Tribunal*, 2011, Freedom from Torture.

<sup>117</sup> UKBA *Asylum process guidance: processing an asylum application from a child*.

UKBA requests an age assessment from the local authority where there is any doubt as to age. This may entail that some who are initially accepted as under 18 may have their age disputed later by UKBA and be subjected to an age assessment.

Where there is no conclusive documentary proof of age, UKBA policy is to rely on the age assessment conducted by local authorities. A protocol developed by local authorities and endorsed by the courts<sup>118</sup> provides the approved method for assessing age (Merton guidelines). According to the Merton guidelines the assessment can only be conducted by two appropriately qualified social workers. The guidelines take a holistic approach to age determination, taking into account the child's demeanour, social, cultural and family background, life experiences and educational history. Medical evidence of age is treated as relevant, not determinative; local authorities are not entitled to ignore it. They may take into account the views of other adults with whom the child has had contact, and the child's answers to questions about their particular history.

In practice, there are numerous problems about the conduct of age assessments. NGOs report that the quality of assessments can be poor, and not based on evidence.<sup>119</sup> As there is no specific legislation or guidance on age assessment, individual agencies must keep up to date with the many judgments made by courts and amend their policies accordingly. Some local authorities do not abide by the judgments. Sharing complete contents of social work age assessment reports with immigration officials has resulted in the information collected as part of the assessment being used in the decision on the asylum claim, usually in a refusal of asylum. Social workers conducting assessments are not often trained, other than by colleagues, resulting in widespread poor practice, although some take advantage of training offered by the Refugee Council.<sup>120</sup> In Scotland the Scottish Refugee Council and Glasgow City Council have collaborated to produce a good practice guide as an aid to achieving consistency of practice.<sup>121</sup>

Where the child disputes the local authority assessment, the only legal challenge is by judicial review. Since Supreme Court decisions in 2009, the court in judicial review may make a finding of fact as to age, not only decide whether the Merton guidelines were correctly applied.<sup>122</sup> Following these rulings, in the context of an age dispute, a court can resolve a dispute about age by making a finding which is then binding on UKBA and the local authority.<sup>123</sup>

A tribunal is also entitled to decide a person's age as a question of fact in the context of an asylum claim, where age is relevant to the claim, for instance because it has a bearing on other findings such as the credibility of the asylum seeker, but the age found is not binding outside that context, and does not bind a local authority. Since the Supreme Court decisions, the child is now able to obtain a binding finding of fact from the court. This is important because previously a young person could be in the position where the tribunal, and thus UKBA, accepted that they were under 18, but the local authority did not. UKBA has no power to support a child, and the local authority in that situation would not do so, yet the child had no power to obtain a resolution.<sup>124</sup> This judicial review power is one of those which is now transferred to the Upper Tribunal.<sup>125</sup> A report by the Children's Commissioner suggests that judges

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<sup>118</sup> *R (B) v London Borough of Merton* [2003] 4 All ER 280.

<sup>119</sup> E.g. see the UK section in Maria Antonia Di Maio, *Review of current laws, policies and practices relating to age assessment in sixteen European Countries*, Separated Children in Europe Programme, Thematic Group on Age Assessment, 2011.

<sup>120</sup> Maria Antonia Di Maio, *Review of current laws, policies and practices relating to age assessment in sixteen European Countries*, Separated Children in Europe Programme, Thematic Group on Age Assessment, 2011

<sup>121</sup> Karen Dyball, Graham McPhie, Clare Tudor, *Age Assessment Practice Guidance: An Age Assessment Pathway for Social Workers in Scotland* Scottish Refugee Council and Glasgow City Council 2012.

<sup>122</sup> *R (on the application of A) v London Borough of Croydon and R (on the application of M) v London Borough of Lambeth* [2009] UKSC 8.

<sup>123</sup> Laura Brownlees and Zubier Yazdani, *The Fact of Age*, 2012, Children's Commissioner.

<sup>124</sup> Laura Brownlees and Zubier Yazdani, *The Fact of Age*, 2012, Children's Commissioner.

<sup>125</sup> First Tier Tribunal and Upper Tribunal (Chambers) Order 2010.



have tended to continue to defer to social workers' judgments on age, and not to embrace fully the new fact-finding power that they have.<sup>126</sup>

In addition to the social work duty, the immigration rules require that the UKBA caseworker takes steps to ensure that an unaccompanied child has a legal representative.<sup>127</sup> This refers to a person who is under 18 or who is being given the benefit of the doubt for the time being. There is no stated exception, and the duty accrues as soon as an asylum application has been made, which therefore includes a child who is subject to a Dublin procedure. As a possible exception in age-disputed cases, see the section on border procedures in relation to the 'Gentleman's Agreement'. Unlike the case of adults, the representative is entitled to be present in the asylum interview, and the asylum interview of a child may not take place without a responsible adult present who is not representing UKBA.

The UKBA has a statutory duty to safeguard and promote the welfare of children in the UK who are subject to its procedures.<sup>128</sup> The duty of a representative of a child includes to ensure that this duty is complied with at all stages of the asylum process and to challenge where it is not. The code of practice for implementing section 55 of the Borders Citizenship and Immigration Act 2009, 'Every Child Matters', which is binding on UKBA officers, requires that the voice of the child is heard in the proceedings, and this was reiterated by the Supreme Court, affirming that the wishes and feelings of the child must be taken properly into account by decision makers.<sup>129</sup> The representative accordingly has a duty to ensure that they take the child's own independent instructions and that these form the basis of their representations.

A report produced by the Refugee Council recommended specialist training and accreditation for refugee children's legal advisers.<sup>130</sup> Specialist training has since been given by the Immigration Law Practitioners Association (ILPA)<sup>131</sup> but attending this is not a requirement to advise refugee children. ILPA has also produced a good practice guide,<sup>132</sup> but use of the guide is not mandatory. In order to receive public funding for representing a refugee child, a solicitor must be accredited at Level 2 of the Immigration and Asylum Accreditation Scheme. The Legal Services Commission Standard Civil Contract Scheme 2010, which is the framework for authorising legal aid payment, requires that work with refugee children is carried out by a senior caseworker at level 2 or above, who has had an Enhanced Criminal Records Bureau check in the previous two years. A publicly funded immigration adviser of an asylum-seeking child is under an obligation to refer the child for public law advice where the child has difficulties with the local authority carrying out its duties towards them under the Children Act 1989.<sup>133</sup> At present a child is entitled to have a publicly funded legal representative at their initial asylum interview. After April 2013, this will only be the case where UKBA do not dispute that the claimant is a child.<sup>134</sup>

Difficulties in practice arise through inconsistent levels of provision in different places, and the difficulty that a child challenging an age assessment is in the position of challenging the authority which is caring for them. Independent legal advice is essential, but does not overcome this difficulty. The Refugee Council provides advice and support through its Children's Panel of Advisers, but the Refugee Council's

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<sup>126</sup> Laura Brownlees and Zubier Yazdani, *The Fact of Age*, 2012, Children's Commissioner.

<sup>127</sup> Immigration rules para 352ZA.

<sup>128</sup> Borders, Citizenship and Immigration Act 2009, s.55.

<sup>129</sup> *ZH (Tanzania) v SSHD* [2011] UKSC 4.

<sup>130</sup> Laura Brownlees and Terry Smith, *Lives in the Balance*, Refugee Council, 2011.

<sup>131</sup> ILPA is a voluntary association of practising lawyers, academics and others. Its activities include promoting and developing good practice.

<sup>132</sup> Heaven Crawley, *Working with Children and Young People Subject to Immigration Control, Guidelines for Best Practice*, 2nd edition 2012.

<sup>133</sup> The Civil Specification 2010, section 8, Immigration, paragraph 8.

<sup>134</sup> Solange Valdez, *Separated Children and Legal Aid Provision*, ILPA, 2012.

funding has been reduced. This has limited the work they are able to do in supporting a child through an age dispute, and children are not guaranteed to see an adviser<sup>135</sup>.

## F. The safe country concepts (if applicable)

### Indicators:

- Does national legislation allow for the use of safe country of origin concept in the asylum procedure?  Yes  No
- Does national legislation allow for the use of safe third country concept in the asylum procedure?  Yes  No
- Does national legislation allow for the use of first country of asylum concept in the asylum procedure?  Yes  No
- Is there a list of safe countries of origin?  Yes  No
- Is the safe country of origin concept used in practice?  Yes  No
- Is the safe third country concept used in practice?  Yes  No

Legislation allows for a safe country of origin concept.<sup>136</sup> States are designated safe by order of the Secretary of State for the Home Office. In making the order, the statute requires the Home Secretary to have regard to information 'from any appropriate source (including other member states and international organisations'<sup>137</sup> Orders are in force in relation to: Albania, Jamaica, Macedonia, Moldova, Bolivia, Brazil, Ecuador, South Africa, Ukraine, India, Mongolia, Bosnia-Herzegovina, Mauritius, Montenegro, Peru, Serbia, Kosovo, South Korea. The section also allows partial designation, and currently designated as safe for men are: Ghana, Nigeria, Gambia, Kenya, Liberia, Malawi, Mali and Sierra Leone. There is no appeal against designations. Designation may be challenged by judicial review. The only successful challenge under the 2002 Act regime has been to the inclusion of Bangladesh.<sup>138</sup>

Where an asylum claimant comes from a designated country, the UK Border Agency caseworker is obliged to certify the case as clearly unfounded unless satisfied that the individual case is not clearly unfounded. The consequence of the certificate is that an appeal against refusal may only be made from outside the UK (See accelerated non suspensive appeal procedures above).

The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 provides for the use of a safe third country concept. All EU Member states (except Bulgaria and Romania) as well as Norway, Iceland and Switzerland are listed in the statute.. There is a power to add further countries by order of the Secretary of State. The only one to have been added is Switzerland. There is no obligation to review the lists, and there is no appeal against the inclusion of a country on the list. Safe third country removals take place on an individual basis to other countries.

Where it is certified by the Third Country Unit within the UK Border Agency that an asylum claimant comes from a safe third country, their asylum claim will not be decided in the UK. For different kinds of safe third country decisions, see admissibility procedures above.

Both these concepts are widely used in practice.

The use of both concepts has been the subject of repeated legal challenges by judicial review. Removal to 'safe' third countries is challenged on the basis of that country's treatment of asylum seekers both as regards the conditions in that country and in relation to the risk of refoulement. These cases rarely

<sup>135</sup> Kamena Dorling and Anita Hurrell, *Navigating the System: Advice Provision for Young Refugees and Migrants*, 2012, Coram Children's Legal Centre.

<sup>136</sup> Nationality Immigration and Asylum Act 2002 s.94.

<sup>137</sup> Nationality Immigration and Asylum Act 2002 s.94 (5C).

<sup>138</sup> *R (on the application of Zakir Husain) v SSHD* [2005] EWHC 189 (Admin).

succeed on a case by case basis, and in order to avoid a safe third country removal it is necessary to show a systemic failure.

Challenges by judicial review to safe country of origin decisions are also difficult to establish on a case by case basis, but some do succeed. For instance in a case in which the Court of Appeal held that it was not irrational to treat Gambia as safe in general, the court still held that the applicant's asylum claim was not bound to fail. He had already been ill-treated in detention because of his politics, and faced a possible trial for sedition.<sup>139</sup> The general designation as safe is often perceived to be very risky for particular groups who have not been taken into account in the assessment of the country as safe. In particular, the safety of women has been shown to have been left out of account. Lesbians, trafficked women, single women who are outside the accepted family structure may all be at risk in some countries designated as safe. Designation is also not reviewed routinely and there is no automatic review in response to changes in country conditions.

## G. Treatment of specific nationalities

From time to time the UK Border Agency (UKBA) announces that removals of refused asylum seekers to particular countries are suspended. This is rare and there are no such concessions currently in force. The only one in the last ten years was in relation to Zimbabwe. When there is such a concession in force, refused asylum seekers from that country become eligible to apply for a specific form of support (known as section 4 support and which covers accommodation and non-cash support - see the next section).

Uniquely at the time of the invasion of Iraq by the UK and USA, appeals of Iraqi refused asylum seekers were suspended in the Tribunal at the request of the government. The freeze was lifted after a short period when it became apparent that the conflict would not be short-lived.

The response to a political/humanitarian crisis can also be through immigration routes. Currently there is an immigration concession for Syrians who have immigration leave to be in the UK. This allows them to extend their leave for a further temporary period in specified ways, but does not in itself permit them to claim asylum. The policy is to manage the situation through temporary immigration measures rather than through inviting asylum claims.

The Upper Tribunal Immigration and Asylum Chamber has the power to make findings of fact which constitute binding 'country guidance' for other cases. Depending on whether these issues are brought before the tribunal in a particular case, there may from time to time be binding country guidance about the impact of a crisis. Currently there is a country guidance case which says that, due to the high levels of repression in Syria, any forced returnee from the UK including refused asylum seekers would face a real risk of arrest and detention and of serious mistreatment during that detention.<sup>140</sup> This does not result in a proactive grant of status from the asylum authorities but can be relied on by asylum seekers and refused asylum seekers in making representations to UKBA.

From time to time UKBA may accept that as a matter of fact there is no safe route of return for certain refused asylum seekers. This may be as a result of country guidance from the Tribunal or as a result of UKBA's own factual findings. This qualifies the asylum seekers for a specific form of support (section 4 support but does not in itself entail a grant of status.

The UK Border Agency uses charter flights to effect the return of large numbers of refused asylum seekers to one country. Sometimes charter flights are stopped by the courts when a group of those who

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<sup>139</sup> *R on the application of MD (Gambia) v SSHD* [2011] EWCA Civ 121.

<sup>140</sup> *KB (Syria) v SSHD* [2012] UKUT 00426.

were due to be removed are shown to be potentially at risk. In February 2013 for example the High Court held that Tamil refused asylum seekers would be at risk of persecution or serious harm, and the planned charter flight was stopped. The impact of decisions which stop flights depends upon the terms of the decision. In this case, the terms of the decision mean that, until any further order in the case, any Tamil refused asylum seeker would be able to successfully argue that they would be at risk, and prevent their own removal. This does not have any effect on other removals to Sri Lanka – e.g. of Sinhalese passengers.<sup>141</sup>

When considering the treatment of particular caseloads at first instance, it is worth noting that the countries with some of the highest success rates at appeal in 2012 were:

- Syria: 52% (102 successful appeals)
- Eritrea: 45% (48 successful appeals)
- Sudan: 43% (33 successful appeals)
- Sri Lanka: 41% (405 successful appeals)<sup>142</sup>

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<sup>141</sup> Channel 4 News, [Sri Lanka: high court blocks Tamil deportations](#), 27 February 2013.

<sup>142</sup> Home Office Research and Statistics Directorate *Immigration Statistics* Q 4 2012, digest by Still Human Still Here.

## Reception Conditions

### A. Access and forms of reception conditions

#### 1. Criteria and restrictions to access reception conditions

##### Indicators:

- Are asylum seekers entitled to material reception conditions according to national legislation :
  - o During the accelerated procedure?  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During admissibility procedures:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During the regular procedure:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o during the Dublin procedure:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During the appeal procedure (first appeal and onward appeal):  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o In case of a subsequent application:  
 Yes                       Yes, but limited to reduced material conditions                       No
- Is there a requirement in the law that only asylum seekers who lack resources are entitled to material reception conditions?  Yes                       No

In all procedures for determining a first claim, where asylum seekers are not detained, if they are destitute they are entitled to accommodation and/or a weekly sum of money. While the assessment of their eligibility for support is going on, they may be paid a temporary sum (section 98 support).<sup>143</sup> Once the assessment is complete, they paid what is commonly referred as section 95 support. They are considered destitute if they do not have adequate accommodation or any means of obtaining it, or else they do have adequate accommodation but no means of meeting their other essential needs, or else they will be in this position within 14 calendar days.<sup>144</sup> This entitlement continues until 28 calendar days after a form of leave is granted or, if the claim is refused, until 21 calendar days after a non-appealable decision or the expiry of the time allowed to appeal the most recent decision (this is called Appeal Rights Exhausted: ARE).

In practice asylum seekers are required to prove that they are destitute and this is strictly enforced. All assets which are available to them are taken into account, whether in the UK or elsewhere, if they consist of cash, savings, investments, land, cars or other vehicles, and goods held for the purpose of a trade or other business.<sup>145</sup> If relevant assets come to light which were not declared, support can be stopped and payments made can be recovered, although it appears that recovery happens infrequently in practice.<sup>146</sup>

Obstacles to claiming support include that the application form is 24 pages long, has 20 annexes, is in English only and is only available online or at advice agencies. Advice services have been cut significantly in recent years, and in some parts of the country there are no advisers available. Where asylum claimants have been in the UK for some time without government assistance, it may be difficult for them, especially without advice, to gather the right evidence for support claims. They may need to get letters from friends/acquaintances they have lost touch with for example, to show what support they have and why this is no longer available to them. Requests for evidence often include items such as friends' bank statements or payslips, the details of empty bank accounts or evidence of homelessness.

<sup>143</sup> Immigration, Asylum and Nationality Act 1999 s.98.

<sup>144</sup> Immigration, Asylum and Nationality Act 1999 s.95.

<sup>145</sup> Asylum Support Regulations 2000 SI 704 reg.6.

<sup>146</sup> Asylum Support Regulations 2000 SI 704 reg. 20 as amended.

These requests delay the support decision which results in prolonged destitution for asylum seekers. Quality of decision making on support applications is also a significant obstacle, particularly in relation to the destitution test. A study showed that in 82% of appeals against refusal of section 4 support (see below) the applicant was found to be destitute after all.<sup>147</sup>

The policy of dispersing asylum seekers round the UK and usually away from the south east may also provide a disincentive to claim support. Asylum seekers may decide to live in poor conditions with friends or relatives in London rather than move far away from them and perhaps their legal adviser.

If they meet one of the qualifying conditions set out below, a refused asylum seeker may be able to obtain accommodation and a form of non-cash support called an Azure card (also referred to as s.4 support). The card can only be used at a limited number of designated shops. This card has a weekly value of £35.39 per person but cannot be used to obtain cash or to pay any living expenses not incurred at the designated shops, e.g. not bus fares. This is so even if the designated shops are miles from their accommodation and they have small children. Users are also prohibited from purchasing petrol, diesel, gift cards, alcohol or cigarettes. This support is available only if they can show either that they are not fit to travel, that they have a pending judicial review, that there is no safe and viable route of return, that they are taking all reasonable steps to return to their home country, or that it would be a breach of their human rights not to give this support.<sup>148</sup> In practice this latter category is used mostly where the asylum seeker has further representations outstanding. The principle underlying this legal provision is that if a person does not meet one of the other conditions, and does not have further representations outstanding, it is not considered a breach of their human rights to leave them destitute, because they can return to their home country.

The absence of a safe and viable route of return is rarely accepted unless there is a UKBA policy of non-return in relation to the country in question. Attempting to prove that they have taken all reasonable steps to return is problematic for those who come from countries with which diplomatic relations are suspended, or whose embassies have complex requirements which are difficult to fulfil, or who belong to a group which is denied documents by their country of origin. There are also practical problems, given that they are destitute, in obtaining the fare to visit their embassy, the resources to send faxes, make phone calls, and so on. About 2,800 households live on s.4 support.<sup>149</sup>

For all refused asylum seekers who cannot fulfil the conditions for s.4 support, with the exception of families who have retained s.95 support, (see below) there is no support available on the basis that they are expected to leave the UK. If, for whatever reason, they are unable to return to their country of origin, these asylum seekers are left destitute and homeless.

There is a provision for support to be refused if asylum has not been claimed as soon as reasonably practicable, unless to do so would breach the person's human rights.<sup>150</sup> This is rarely used for claims made soon after arriving in the UK, but may be used where a person claims asylum after a period of residence in the UK. Human rights protection, following the House of Lords case of *Limbuella*, means that a person will not be made street homeless as a result of this provision, but may be denied cash support if they have somewhere to stay.

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<sup>147</sup> Marie-Anne Fishwick, *No credibility: UKBA decision making and section 4 support*, Asylum Support Appeals Project 2011.

<sup>148</sup> Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005.

<sup>149</sup> Chief Executive of UKBA to Chair, Home Affairs Select Committee, 6 December 2012.

<sup>150</sup> NIAA 2002 s.55 and *Limbuella v SSHD* [2005] UKHL 66.

## 2. Forms and levels of material reception conditions

### *Indicators:*

- Amount of the financial allowance/vouchers granted to asylum seekers on 31/12/2012 (per month, in original currency and in euros):

Section 95 Cash support: Couple: £314.25, E 373.91; Lone parent aged 18 or over: £190.41, E 226.56; Single person aged 18 or over: £158.69, E 188.81; Person aged at least 16 but under 18 (except a member of a qualifying couple): £172.47, 205.21; Person aged under 16 £229.49, E 273.05; Section 4 Azure card support: £153.36, E 182.47 per person

The legislation allows section 95 support (for asylum seekers with a pending case, who are not detained and are destitute) to be provided in the form of accommodation and cash or vouchers, but section 4 support (available in the situations described above) cannot be provided in cash as it constitutes 'facilities for the accommodation' of supported persons in primary legislation<sup>151</sup>. Section 4 vouchers have been replaced with an Azure card as describe above. Accommodation and cash under section 95 are provided in the conditions described in previous section. Initial accommodation is provided while the claim for support is being determined. This is in initial accommodation centres. Asylum seekers are dispersed from initial accommodation centres to accommodation if they are assessed as qualifying for support. This accommodation may be in a shared house or flat, self-contained, or a hostel. Most of it is privately owned and privately managed. In practice asylum seekers have rarely been allowed to stay in accommodation a short time after the ending of their financial support. To the extent that this happened it was informal and ad hoc. In some instances this enabled the asylum seeker to find shelter through friends or a charity rather than going onto the streets. NGOs consider that this informal practice has either ceased or will do so since accommodation contracts were transferred to private companies.<sup>152</sup>

Section 95 Cash support amounts to £314.25 (373.91€) per calendar month for a couple:, £190.41 (€226.56) for a lone parent aged 18 or over; £158.69 (188.81€) for a single person aged 18 or over; £172.47 (205.21€) for a person aged at least 16 but under 18 (except a member of a qualifying couple); and £229.49, 273.05€ for a person aged under 16.

The amounts of section 95 support are set by regulations, while section 4 rates are a matter of policy.<sup>153</sup> Small additional payments are available for pregnant women (£3 per week) if they claim this. They may also claim a maternity allowance of £250 (s.4) or £300 (s.95). Parents on Azure card support may claim an additional £5 on the card per week for children under 12 months, £3 per week for children between 1 and 3 years, and a clothing allowance for children under 16. None of these payments are made automatically, and if the asylum seeker is not aware of them or has difficulties in applying, the payments are not made. Section 4 support is paid at a flat rate of £35.39 per person per week. This is lower than asylum support under s.95.

In practice, families who have dependent children before they have exhausted all appeal rights normally stay on cash support (s.95) after their claim has been refused for as long as they remain in the UK or until the youngest child turns 18, although this can be removed if they do not abide by conditions.<sup>154</sup> UKBA has adopted an 'interim position' that they will not withdraw Azure card support from families with children where they no longer meet the qualifying conditions for s.4 support, providing they are still destitute and have not breached the conditions of support.<sup>155</sup>

<sup>151</sup> NIAA 2002 s.49.

<sup>152</sup> Scottish Refugee Council, *Briefing: New Provider of Support Services for People Seeking Asylum in Scotland* April 2012.

<sup>153</sup> Currently Asylum Support (Amendment) Regulations 2010 SI 784.

<sup>154</sup> Melanie Gower, *Asylum: Financial Support for Asylum Seekers*, House of Commons note SN/HA/1909, 2013.

<sup>155</sup> Asylum Support Appeals Project, Factsheet 15.

UKBA guidance provides that asylum seekers may stay in initial accommodation for a short time after their initial support under s.98 has been ended. Where further support has been refused this can be up to 7 days; where leave has been granted, up to 28 days; where leave has been refused, 21 days. If there are children, support can continue.<sup>156</sup>

The amount of support is not adequate to meet basic living needs. Section 95 support for a single adult was originally set at 70% of the social welfare payment for nationals which is calculated to meet only basic living needs. It was reduced from 90% because asylum seekers' fuel bills are met by the government, whereas those of nationals on benefits are not. However in 2010/2011 the link with benefits for nationals was broken and asylum support rates have not increased since then. Asylum support for a single adult over 25 is now 52% of the rate for a UK national. For an asylum-seeking lone parent it is 50%. People on section 4 support receive even less, and the requirement to use their Azure card at designated shops devalues their support further, since many could obtain cheaper and more suitable goods at local shops.<sup>157</sup> Only for children under 16 is asylum support more than 70% of the rate for nationals. A Parliamentary Inquiry has called for this to be remedied because of the children who are living in poverty.<sup>158</sup> The inquiry also called for the end of cashless support (Azure cards).

There is no transparent mechanism for review of asylum support rates to ensure that they meet essential living needs, and the government's present position is that no increase can be expected.

Further problems come from faults in the operation of the system, particularly when changes occur, such as moving from section 95 to section 4, or getting refugee status. Families may be left for weeks without any form of support through administrative delays and mistakes.<sup>159</sup>

### 3. Types of accommodation

#### Indicators:

- Number of places in all the reception centres (both permanent and for first arrivals):      Around 1200 places in initial accommodation centres for new claimants
- Number of places in private accommodation: 17,594 asylum seekers are in dispersed accommodation at 31 December 2012
- Number of reception centres: 7
- Are there any problems of overcrowding in the reception centres?       Yes       No
- What is, if available, the average length of stay of asylum seekers in the reception centres? 2 or 3 weeks
- Are unaccompanied children ever accommodated with adults in practice?       Yes       No

Reception centres, called initial accommodation, each accommodate around 200 people – fewer in Glasgow and Northern Ireland. Asylum seekers usually stay in these centres for no more than 2 or 3 weeks. After this, if they qualify for support, they are moved into smaller units, mainly flats and shared houses, in the same region, but as regions are large this may not be within travelling distance of their solicitor if they have one. Accommodation is in the North and Midlands of England and in Wales and Scotland, not in the South or in London. Asylum seekers have no choice of location.

There are reports that some asylum seekers take only cash support and continue to 'sofa-hop' - i.e. move from one person to another, staying on floors and in shelters, because they do not want to leave London. The UK Border Agency (UKBA) may consider a request to be accommodated in London or the

<sup>156</sup> UKBA *Asylum Support Bulletin 73: Access to Support*.

<sup>157</sup> Sile Reynolds, *Your inflexible Friend: the cost of living without cash* Asylum Support Partnership 2010.

<sup>158</sup> Sarah Teather MP (chair) *Report of the Parliamentary Enquiry into Asylum Support for Children and Young People*, 2013.

<sup>159</sup> Asylum Support Partnership, *Response to the UKBA consultation Reforming Asylum Support: effective support for those with protection needs* 2010.



South East if the applicant is in receipt of therapeutic services from the Helen Bamber Foundation or the NGO Freedom from Torture.

Since the beginning of 2012, all accommodation for asylum seekers is managed by large private companies under contract to UKBA, and mainly sub-contracted to local companies.

The contract between UKBA and the private companies requires that families shall be housed in self-contained accommodation.<sup>160</sup> In practice there is some use of hostel-type accommodation for families with small children, and some lone parent families are housed with unrelated families.<sup>161</sup> Accommodation frequently fails to meet the needs of supported persons, particularly those with children or mobility and health needs.<sup>162</sup> Asylum accommodation has been repeatedly criticised for failing to provide security, respect for privacy and basic levels of hygiene and safety, particularly for women.<sup>163</sup>

Unaccompanied children are looked after by local authorities, sometimes before claiming asylum. If an unaccompanied child not already looked after claims asylum they will be referred to the care of a local authority. Many children aged 16 or 17 are housed in hostel or shared accommodation; most under 16s are in foster families.

Section 4 support can only be provided as accommodation, in a location determined by the Home Office, and 'facilities for accommodation' i.e. the Azure card. Consequently the recipient cannot choose to receive financial support only (as they can with section 95) and continue to live with family members who are not included in the support application. This means that the family will be split, possibly over some distance, the person on section 4 having no cash with which to travel to visit.

#### 4. Reduction or withdrawal of reception conditions

*Indicators:*

- Does the legislation provide for the possibility to reduce material reception conditions?  
 Yes       No
- Does the legislation provide for the possibility to withdraw material reception conditions?  
 Yes       No

The legislation does not permit the amount received to be reduced, but support can be withdrawn if the UK Border Agency (UKBA) has reasonable grounds to believe that the supported person or his dependant has committed

- (a) a serious breach of the rules of their collective accommodation;
- (b) an act of seriously violent behaviour whether at the accommodation provided or elsewhere;
- (c) an offence relating to obtaining support or has;
- (d) abandoned the authorised address without first informing UKBA;
- (e) not complied with requests for information relating to their eligibility for asylum support;
- (f) failed, without reasonable excuse, to attend an interview relating to their eligibility for asylum support;
- (g) not complied within a reasonable period, (no less than ten working days) with a request for information relating to their claim for asylum;

<sup>160</sup> UKBA *Compass Project: Schedule 2, Accommodation and Transport, Statement of Requirements*, B.8.

<sup>161</sup> Evidence given to the Parliamentary Enquiry on Asylum Support for Children and Young People.

<sup>162</sup> Evidence given to the Parliamentary Enquiry on Asylum Support for Children and Young People; Nina Lakhani, *Asylum seeker houses 'unfit for children'* The Independent 20 November 2012.

<sup>163</sup> Christel Querton, *I feel like as a woman I'm not welcome: a gender analysis of UK law, policy and practice*, Asylum Aid 2012.

- (h) concealed financial resources and therefore unduly benefited from the receipt of asylum support;
- (i) not complied with a reporting requirement;
- (j) made or sought to make a further different claim for asylum before their first claim is determined, in the same or a different name; or
- (k) failed without reasonable excuse to comply with a relevant condition of support.<sup>164</sup>

In the past UKBA relied on checks by a credit check agency, interviews with supported people, and investigations into the existence of bank accounts as a method of determining asylum support fraud. Of 200 cases in a pilot investigation conducted with the Identity and Passport Service, none had their support withdrawn as a result of fraudulent activity. Subsequent court action revealed that checks of bank accounts did not constitute sufficient evidence to justify withdrawing support.<sup>165</sup> It is not common for support to be withdrawn in practice

Asylum seekers can appeal to the First Tier Tribunal (Asylum Support) in London against a decision to withdraw their support.<sup>166</sup> UKBA may send travel tickets to attend the hearing.<sup>167</sup>

As described above, refused asylum seekers on cashless support (section 4) are in practice on lesser conditions than those pursuing a first claim who are on s.95 cash support. Users of the Azure card (excluding families and pregnant women) may only carry forward a weekly sum of £5. If there is more than £5 on their card at the end of the week, this is reclaimed by UKBA.

## 5. Access to reception centres by third parties

### Indicators:

- Do family members, legal advisers, UNHCR and/or NGOs have access to reception centres?
  - Yes
  - with limitations
  - No

Contract terms between the UK Border Agency (UKBA) and the private companies provide that there shall be access and facilities in initial accommodation for nominated third parties (including NGOs, UNHCR, legal advisers). Advice on welfare, the asylum process and life in the UK is delivered through the One Stop Services (OSS)<sup>168</sup> run by charitable organisations and funded by UKBA. OSS Wraparound Advice Services are provided in each of the Initial Accommodation centres around the UK. There is also usually access to an initial health screening, often provided by a local enhanced primary care service, homeless health service or GP (a general practitioner). In at least some regions the obligation to give access to legal advisers is met by an electronic appointments system in the initial accommodation centre. Through this, appointments are made with local solicitors who have the legal aid contract and facilities to be able to offer advice in an office that is close enough to the centre to be accessible, and the asylum seeker finds their own way there.

## 6. Addressing special reception needs of vulnerable persons

### Indicators:

- Is there an assessment of special reception needs of vulnerable persons in practice?  Yes  No

<sup>164</sup> Asylum Support Regulations 2000 reg. 20.

<sup>165</sup> Asylum Support Partnership, *Response to the UKBA consultation Reforming Asylum Support: effective support for those with protection needs* 2010.

<sup>166</sup> Immigration and Asylum Act 1999 s. 103.

<sup>167</sup> Asylum Appeals Support Project Factsheet 3.

<sup>168</sup> Information on the OSS available [here](#).

There is no mechanism laid down by law to identify vulnerable groups or persons with special reception needs. The arrangements for accommodation of children have been described above (see section 3, Types of accommodation). Aside from this the law provides no specific measures to address the reception needs of vulnerable groups.

Whether needs are addressed in fact is variable according to local practice. Initial accommodation centres are run by private companies under contract to the UK Border Agency. Staff at the initial accommodation are not required or trained to assess the asylum seeker's health needs on arrival. The obligations are on the contractors to respond to need when it is apparent by taking the person to a doctor, but they are not required to be pro-active in finding out about needs. Provision by the NGOs is described above.

UKBA has introduced a 'protected period' of eight weeks for women not to be moved for four weeks before and after giving birth. However, the accommodation allocated during this time is in initial accommodation centres, in which conditions are often not conducive to the care of a new baby.<sup>169</sup>

## **7. Provision of information**

Para 358 (see accelerated procedures above) of the immigration rules is the only provision in law on information concerning reception conditions. Para 344C requires a person who is granted asylum to be provided with access to information, as soon as possible, in a language that they may reasonably be supposed to understand which sets out the rights and obligations relating to refugee status.

This information is largely provided through the One Stop Service delivered by NGOs around the UK and funded by the UK Border Agency.<sup>170</sup> In this service, paid advisers and volunteers offer confidential advice and information concerning reception conditions, assist with applications for support, deal with any problems and delays, and update UKBA on any changes in circumstances. This service can be provided through an interpreter if required. See earlier note on the impact of a 62% cut to the OSS budget on access to advice and information for asylum seekers (see Section C on access to information).

Asylum seekers are asked at the screening interview if they wish to apply for support. Despite the difficulties in claiming, mentioned above (see section 1, criteria and restriction to access reception conditions), there are not significant reported problems in obtaining access to initial support including s.95. Initial information appears to be adequate.

There are widespread misperceptions about the conditions for s.4 support, and there is no specific contact point with UKBA at which this information is provided. It is provided by voluntary sector advisers.

## **8. Freedom of movement**

Movement is not restricted to defined areas, but temporary admission, which is the usual status of asylum seekers, is usually conditional on residence at a particular address, and there is a requirement to keep the UK Border Agency informed of any change of address.

Asylum seekers accommodated by UKBA are not permitted to stay away from their accommodation, and UKBA will cease providing accommodation in practice if an asylum seeker stays elsewhere for more than a few days. Refugee Council and Maternity Action research found an example of a woman in

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<sup>169</sup> Refugee Council and Maternity Action, *When Maternity Doesn't Count* 2013.

<sup>170</sup> UKBA, [One Stop Services](#).

hospital after giving birth who was contacted by UKBA and told that she must return to her accommodation or risk losing it. She left hospital against medical advice as a result.<sup>171</sup>

## B. Employment and education

### 1. Access to the labour market

*Indicators:*

- Does the legislation allow for access to the labour market for asylum seekers?  Yes  No
- If applicable, what is the time limit after which asylum seekers can access the labour market: 1 year
- Are there restrictions to access employment in practice ?  Yes  No

Asylum seekers are not generally allowed to do paid work. The limited exception is that they may apply to be given permission to enter employment when their claim has been outstanding for a year.<sup>172</sup> The same applies when further submissions have been outstanding for a year, whether or not they have been recognised as a fresh claim.<sup>173</sup> If permission is granted it is limited to applying for vacancies in listed shortage occupations. These are specialist trades and professions which are in short supply in the UK and are defined very specifically (e.g. consultant in neuro-physiology, electricity sub-station electrical engineer). Self-employment is prohibited.<sup>174</sup>

The main obstacle is that since these occupations are so narrowly defined, the chances that an asylum seeker will qualify are quite low.

### 2. Access to education

*Indicators:*

- Does the legislation provide for access to education for asylum seeking children?  Yes  No
- Are children able to access education in practice?  Yes  No

Education is compulsory for children from 5 to 16. This includes asylum-seeking children, who attend mainstream schools local to where they live under the same conditions, formally, as other children in their area. However, destitution may affect their access to education. For instance, children on s.4 support are not entitled to free school meals or other benefits and yet have no cash to pay for school meals. There are not generally preparatory classes to facilitate access.

In further education and higher education the UK maintains different provisions for 'home' students and 'overseas' students. Regulations permit universities to charge higher fees to overseas students than to home students.<sup>175</sup> The regulations do not compel universities to charge these higher fees, but government subsidy is only paid for home students, and so for economic reasons universities charge the higher fees. Asylum seekers are routinely classed as overseas students, and are thus liable to pay overseas student fees for university education of £8,500 to £29,000 per year. This is prohibitive generally for someone seeking asylum. In England, Wales and Northern Ireland some universities have agreed to treat asylum seekers (generally on a limited individual basis) as home students.

<sup>171</sup> Refugee Council and Maternity Action, *When Maternity Doesn't Count* 2013.

<sup>172</sup> Immigration rules para 360.

<sup>173</sup> *ZO (Somalia) v SSHD* [2009] EWCA Civ 442.

<sup>174</sup> Immigration rules para 360D.

<sup>175</sup> The Education (Fees and Awards) (England) Regulations 2007 SI 779 reg.4; The Education (Fees and Awards) (Wales) Regulations 2007 SI 2310 reg.4.

In Scotland, the child of an asylum seeker or a young asylum seeker (under 25) is treated as a home student if they meet a set of residence conditions including 3 years residence in Scotland.<sup>176</sup>

Being treated as a home student also opens up eligibility for student loans. Even where a university agrees to treat an asylum seeker as a home student, that person will still need finance to pay the fees.

As explained in the section on unaccompanied child asylum seekers, young people whose asylum claim has not been resolved are commonly given discretionary leave. They may renew this by applying before their 18<sup>th</sup> birthday, and so may be applying to higher education while still on discretionary leave. Young people in this position are also treated as overseas students. This can impose obstacles on young people who have sought asylum and are leaving local authority care.<sup>177</sup>

There is no explicit legal bar to asylum seekers entering into higher or further education, but the barriers are financial since in addition to the high fees and lack of access to loans they also have no access to mainstream benefits or work.

Under certain conditions asylum seekers are treated as home students for the purposes of further education. In England, this is so for those aged 16 to 18, or who have been waiting for a Home Office decision for more than six months, or who are on s.4 support or other statutory assistance. In Wales those on asylum support are treated as home students. In Northern Ireland asylum seekers and their families are treated as home students.<sup>178</sup> In Scotland, the conditions are as for higher education, and in addition full-time English courses for speakers of other languages and other part-time courses may be taken by asylum seekers as home students. One effect is that in England there is a six month wait for eligibility for free English classes.

In addition to financial difficulties, language, interrupted education due to experiences as a refugee, and incompatibility of educational systems and qualifications may all be barriers to access to further and higher education.

## C. Health care

### Indicators:

- Is access to emergency health care for asylum seekers guaranteed in national legislation?  
 Yes       No
- In practice, do asylum seekers have adequate access to health care?  
 Yes    with limitations       No
- Is specialised treatment for victims of torture or traumatised asylum seekers available in practice?  
 Yes       No

In England, there is free hospital treatment to asylum seekers with a current claim, those refused asylum seekers who are receiving s.95 or s.4 support and unaccompanied asylum seeking children.<sup>179</sup> Current asylum seekers are entitled to register with a general doctor.

Accident and emergency services (but not follow-up in-patient care) and treatment for listed diseases are free to all including refused asylum seekers. General doctors have the same discretion to register refused asylum seekers that they have for any person living in their area.<sup>180</sup>

<sup>176</sup> The Higher Education (Fees) (Scotland) Regulations 2011 SI 389 reg. 4 and schedule 1.

<sup>177</sup> STAR, *How to Campaign for Equal Access: a Guide*.

<sup>178</sup> Department of Employment and Learning Circular FE 15/12.

<sup>179</sup> National Health Service (Charges to Overseas Visitors) Regulations 2011 SI 1556 reg.11.

Hospital doctors should not refuse treatment that is urgently needed for refused asylum seekers, but the hospital is required to charge for it. The hospital also has discretion to write off the charges. Any course of treatment that is under way at the time when asylum is refused should be continued<sup>181</sup>

Access to mental health services is not guaranteed, and indeed is often lacking.

Specialised treatment for victims of torture and traumatised asylum seekers is available, but is in short supply. It is provided by a number of independent charities, the largest being Freedom from Torture, the Helen Bamber Foundation, and the Refugee Therapy Centre. Specialist trauma practitioners, including psychiatrists, psychologists and trauma counsellors and therapists, also work in health authorities and trusts around the country, but they are few and access is extremely limited. Language and cultural barriers also hinder appropriate referrals from workers with initial contact, and impede asylum seekers' own awareness of what is available. Smaller NGOs also specialise in counselling for refugees.

In practice inadequate levels of support, destitution and the charging regime impede and discourage access to healthcare. Mothers on asylum support who are moved between accommodation providers during pregnancy usually lose continuity of ante-natal care. Frequent moves during pregnancy may take place including at very late stages of pregnancy, even when doctors and midwives advise against a move, and are thought to contribute to the far higher infant and mother mortality rate which there is among asylum seekers.<sup>182</sup> Moves sometimes entail a break of several weeks in antenatal care including monitoring and treatment of conditions such as diabetes or hepatitis, which need to be sustained during pregnancy.<sup>183</sup>

A consultation on charging all overseas visitors for access to both primary and secondary healthcare is expected in the spring of 2013 and may propose increasing restrictions on asylum seekers' access to free healthcare.

In Scotland all asylum seekers are entitled to full free health care, including those refused asylum seekers not on s.4 support and including the spouse/civil partner and any dependent children of any of these people.<sup>184</sup>

In Wales, regulations which entailed charging refused asylum seekers were introduced, but after lobbying these charges were revoked.<sup>185</sup>

In Northern Ireland, a refused asylum seeker is not entitled to free secondary healthcare unless they can show that they are ordinarily or lawfully resident. This has not been tested before the courts.<sup>186</sup> A government proposal which is currently the subject of consultation in Northern Ireland would bring about a similar position to that in England except that refused asylum seekers would only be able to obtain free health care if they were receiving support *and* co-operating with government efforts for them to return to their country of origin.<sup>187</sup>

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<sup>180</sup> Access to health care for asylum seekers and refused asylum seekers – guidance for doctors, April 2012, British Medical Association.

<sup>181</sup> Department for Health Guidance on implementing the Hospital Charging Regulations, paras 361-365

<sup>182</sup> Refugee Council and Maternity Action, *When Maternity Doesn't Matter* 2013.

<sup>183</sup> Refugee Council and Maternity Action, *When Maternity Doesn't Matter* 2013.

<sup>184</sup> Scottish Government Healthcare Policy & Strategy Directorate (April 2010) CEL 9 (2010) Overseas Visitors' Liability to Pay Charges for NHS Care and Other Services.

<sup>185</sup> NHS (Charges to Overseas Visitors) (Amendment) (Wales)(Regulations 2009).

<sup>186</sup> Northern Ireland Law Centre, *Refused asylum seekers and access to free secondary healthcare*.

<sup>187</sup> Department Of Health, Social Services And Public Safety, Proposed Consolidation And Updating Of The Provision Of Health Services To Persons Not Ordinarily Resident Regulations (Northern Ireland) 2005, Including Amendments To Specific Provisions And Extension To Primary Care Services, 2013.

## Detention of Asylum Seekers

### A. General

#### Indicators:

- Number of asylum seekers who entered detention in the previous year: 13,161 in 2012
- Number of asylum seekers detained or an estimation at the end of the previous year (specify if it is an estimation): 2,685 estimated
- Number of detention centres: 14
- Total capacity: 3,397

The full capacity of the detention centres is used, with over 3,000 people in immigration detention at any one time, an estimated 60% of whom are asylum seekers. The centres consist of 10 Immigration Removal Centres, 3 short-term holding facilities, and Cedars, a pre-departure centre which is for families only.

### B. Grounds for detention

#### Indicators:

- In practice, are asylum seekers automatically detained
  - o on the territory:  Yes  No
  - o at the border:  Yes  No
- Are asylum seekers detained in practice during the Dublin procedure?  Yes  No
- Are asylum seekers ever detained during a regular procedure?  Yes  No
- Are unaccompanied asylum-seeking children ever detained?  
 Yes  Yes, but only in border/transit zones  No
- Are asylum seeking children in families ever detained?  
 Yes  Yes, but rarely  No
- What is the maximum detention period set in the legislation (inc extensions): None
- In practice, how long in average are asylum seekers detained? Not available.

There are no special grounds in legislation for the detention of asylum seekers. They may be detained on the same legal basis as others who are subject to immigration control. There is a power to detain pending a decision as to whether to grant leave to enter or remain; pending a decision as to whether to remove, and pending removal. This power may be exercised if there is a policy reason to detain this person, and if they have not already been detained for an unreasonable length of time. The policy reasons are:

- (a) that the person is likely to abscond if released;
- (b) There is currently insufficient reliable information to decide whether to release them (for instance their identity cannot be verified);
- (c) Removal from the United Kingdom is imminent;
- (d) The person needs to be detained whilst alternative arrangements are made for their care;
- (e) Release is not considered conducive to the public good;
- (f) The application may be decided quickly using the fast track procedures.<sup>188</sup>

If 'automatically' means 'without any reason other than that they are an asylum seeker', then strictly speaking asylum seekers are not automatically detained. However, see above for the operation of the Detained Fast Track (Asylum Procedures, section 6) for which an asylum seeker may be detained without regard to the merits of their case (because these are not obtained at the screening interview)

<sup>188</sup> UKBA *Enforcement Instructions and Guidance*, Detention 55.1.1.

and without any individual justification in terms of the policy reasons other than that the UK Border Agency (UKBA) has decided that their case can be decided quickly.

National legislation does not distinguish between different procedures in terms of detention. By definition during the accelerated procedure of the Detained Fast Track asylum seekers are detained. In practice asylum seekers are often detained in the accelerated procedure with non-suspensive appeal (NSA procedure) and very often in the Dublin procedure. In the regular procedure asylum seekers are not usually detained at the beginning of the procedure, but may be at later stages if removal is being considered.

Policy is that vulnerable people are unsuitable for detention, and that they should only be detained exceptionally, or when their care can be satisfactorily managed. Those who, according to policy guidance, should be treated as vulnerable are: the elderly; pregnant women, unless there is the clear prospect of early removal and medical advice suggests that there is no question of the baby arriving before this; people with serious disabilities; people with serious medical conditions or mentally ill; unaccompanied children and young people under 18; persons identified by the Competent Authorities as victims of trafficking; where there is independent evidence that they have been tortured. In practice some individuals in all of these groups are detained.<sup>189</sup> The High Court has found breaches of Article 3 in relation to the detention of severely mentally ill people four times since 2011.<sup>190</sup> Torture survivors continue to be detained even after rule 35 reports (see Asylum Procedures section E1 above).<sup>191</sup>

Where a person is treated after screening as under 18 they are not detained on arrival. However, there are instances of applicants detained as adults and found to be children: numbers identified and helped by the Refugee Council were 26 in 2010, 22 in 2011<sup>192</sup> and 22 in 2012. Children may be detained for short periods pending removal if other steps in the family removal procedure do not result in their leaving the UK.

Detention of people with serious medical conditions, serious mental illness or serious disability, is only considered unsuitable if the condition 'cannot be managed' in detention.<sup>193</sup> However, the centres are not equipped for elderly people and those with disabilities and few Immigration Removal Centres (IRCs) have 24 hour health care. The provision of health care in IRCs is not subject to publicly laid down standards, and is subcontracted by the commercial operators of the centres to private health care contractors, who are responsible for assessing and deciding on provision. As a result, staff and facilities for identifying and treating mental illness and distress varies greatly between IRCs.<sup>194</sup> UKBA does not collect data on the numbers of people with mental illness in immigration detention. NGOs regularly request the numbers of incidents of self-harm in immigration detention which required medical treatment. These were said to be 160 in the first three quarters of 2012. However, this data has now

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<sup>189</sup> HM Inspector of Prisons, *Report on an Unannounced Inspection of Yarlwood Immigration Removal Centre 4 – 8 July 2011*, 2011 found seven pregnant women detained.

<sup>190</sup> *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin) (5 August 2011); *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (26 October 2011); *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012); *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012). See Jed Pennington, *Deplorable Failure, Bureaucratic Inertia and Callous Indifference: The Immigration Detention of Mentally Ill People by the UK Border Agency* *Journal of Immigration Asylum and Nationality Law* (2013) Vol. 27 no.1 pp. 41 -46.

<sup>191</sup> Independent Chief Inspector of Borders and Immigration and Chief Inspector of Prisons, *The effectiveness and impact of immigration detention casework*, 2012 and Natasha Tsangarides, *The Second Torture: immigration detention of torture survivors*, *Medical Justice* 2012.

<sup>192</sup> Judith Dennis, *Not A Minor Offence; Unaccompanied Children Locked up as Part of the Asylum Process*, Refugee Council 2012.

<sup>193</sup> Enforcement Instructions and Guidance chapter 55.10.

<sup>194</sup> Ali McGinley and Adeline Trude, *Positive duty of care? The mental health crisis in immigration detention*, AVID and BID, 2012.



been recognised as inaccurate and UKBA is attempting to standardise it.<sup>195</sup> Some detention centres have a local group of approved visitors, who provide an external point of reference for detainees and the centre. Visitors increasingly report that detainees are experiencing high levels of anxiety and distress, are self-harming, have symptoms of depression or post-traumatic stress disorder (PTSD), or are suffering from severe and enduring mental illness.<sup>196</sup>

Alternatives to detention are permitted by legislation but not required. Permitted are: electronic tagging;<sup>197</sup> regular reporting;<sup>198</sup> bail with sureties;<sup>199</sup> residence restrictions.<sup>200</sup> Guidelines say that detention should only be used as a last resort. However, no proof is required that alternatives are not effective. Residence restrictions and regular reporting are routinely applied to all asylum seekers. Breach of these conditions may result in detention. Electronic tagging is in frequent use mainly for ex-offenders. Numbers of asylum seekers tagged are not available.

The UK Border Agency (UKBA) is responsible for ordering detention of asylum seekers. It is difficult to give meaningful data on the average length of detention of asylum seekers. There is no maximum period set in law, and the total detention period for individuals was not recorded until approximately two years ago, and so full information on the length of detention is only gradually becoming available. Another reason is that UKBA does not collect data on how long asylum seekers are detained. Around 45% of people in immigration detention have sought asylum at some stage. Periods of immigration detention including asylum seekers and other foreign nationals vary enormously from a few days to several years. The longest periods of detention are usually of people awaiting deportation after having served a criminal sentence.

### C. Detention conditions

#### Indicators:

- Does the law allow to detain asylum seekers in prisons for the purpose of the asylum procedure (i.e. not as a result of criminal charges)?  Yes  No
- If so, are asylum seekers ever detained in practice in prisons for the purpose of the asylum procedures?  Yes  No
- Do detainees have access to health care in practice?  Yes  No
- Is access to detention centres allowed to
  - o Lawyers:  Yes  Yes, but with some limitations  No
  - o NGOs:  Yes  Yes, but with some limitations  No
  - o UNHCR:  Yes  Yes, but with some limitations  No

Asylum seekers are normally detained in immigration removal centres (IRCs) together with other third country nationals who are there for immigration reasons. They are not detained in prisons purely in order to process an asylum claim or to remove them after they have been refused asylum.

If someone who is serving a prison sentence claims asylum, including if they do so in response to a decision to deport them, they may continue to be detained in prison while their asylum claim is processed. There is no data presently available on the extent of this. The practice is problematic, as detainees in prison experience much greater barriers to accessing legal advice and basic information

<sup>195</sup> Ali McGinley and Adeline Trude, Positive duty of care? The mental health crisis in immigration detention, AVID and BID, 2012.

<sup>196</sup> Ali McGinley and Adeline Trude, Positive duty of care? The mental health crisis in immigration detention, AVID and BID, 2012.

<sup>197</sup> AITOCA 2004 S.36.

<sup>198</sup> Immigration Act 1971 sched 2 para 21 (2).

<sup>199</sup> Immigration Act 1971 sched 2 paras 22 and 29 -34.

<sup>200</sup> Immigration Act 1971 sched 2 para 21(2).

about their rights, particularly in isolated local prisons. There is no regular advice surgery as there is in the IRCs, and detention of a person held under immigration powers in a prison is not governed by the Detention Centre Rules and Orders.

There is an agreement between the National Offender Management Service and UKBA as to the criteria for holding people in IRCs or in prisons, and an individual detainee can request a transfer to an IRC, though they may well not be aware of this possibility.

The new IRCs (Colnbrook, Brook House and the new wings at Harmondsworth) are built to Category B (high security) prison designs, and are run by private security companies. While some efforts are made by contractors to distinguish regimes from those in prisons, in practice the physical environment means that most detainees experience these centres as prisons.<sup>201</sup> Dover, Haslar and Morton Hall are also converted prisons, albeit lower security.

The Detention Centres Rules provide that there must be a medical team in each detention centre, and that each detainee must be medically examined within 24 hours of arrival. The only provision in the rules as to what access to the medical team a detainee can expect or request is that where a detainee asks a detention centre officer for medical attention, the officer must record the request and pass it to the medical team, and the medical practitioner must pay special attention to any detainee 'whose mental condition appears to require it. The charity Medical Justice has documented the denial of crucial medical care. The Independent Monitoring Board for Harmondsworth (the largest IRC) reported serious shortcomings in medical provision.<sup>202</sup>

Detainees can activate a rule 35 report by reporting to an officer that their health is injuriously affected by detention, but, as discussed above, rule 35 reports do not often result in release.

The rules require that each detainee should have the opportunity of at least one hour in the open air every day. This can be withdrawn in exceptional circumstances for safety or security.

Women and children are detained separately from men except where there are family units. There are units for families at the Cedars, which is a special pre-departure centre for detaining families, and at Tinsley House, which is a short-term holding facility. Some asylum-seeking families may be detained on arrival at Tinsley House, as well as before removal.

The Cedars pre-removal accommodation is designed for families,<sup>203</sup> and includes some facilities for children but these do not include education. 226 children were detained in 2012. 182 were detained for 3 days or less, 35 for 4 to 7 days. One child was detained for over 3 months.<sup>204</sup>

Other than the Cedars, there are not special facilities for vulnerable people. Medical facilities are as described above.

Detainees may have visits during visiting hours. All visits take place within the sight of a detention centre officer, but not within their hearing. There are no limits on the frequency of visits from NGOs, lawyers or UNCHR, but visits are required to take place during visiting hours. As long as visitors provide the requested forms of identification there is no obstacle to their visiting. Individual visitors may be prohibited for reasons of security but this cannot be applied to a legal adviser.

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<sup>201</sup> For instance as found by the Gatwick Detainees Welfare Group: *A Prison in the Mind: Mental health implications of detention in Brook House Immigration Removal Centre* GDWG, 2012.

<sup>202</sup> Independent Monitoring Board, Harmondsworth IRC, *Annual Report 2011*.

<sup>203</sup> Nick Hardwick, *Report on an announced inspection of Cedars Pre-Departure Accommodation 30 April – 25 May 2012* HM Chief Inspector of Prisons, 2012.

<sup>204</sup> Home Office Research and Statistics Directorate, *Immigration Statistics: Detention, Q4 2012*.

A study done by the NGO Bail for Immigration Detainees (BID) found, in relation to immigration detainees generally, that 69% of detainees had legal representatives. 25% of these were paying the solicitor privately. 14% had never had a legal representative while they were in detention.<sup>205</sup> There are concerns among NGOs about the movement of detainees between different centres, and the resulting disruption in their access to legal advice.

## D. Judicial Review of the detention order

### Indicators:

- Is there an automatic review of the lawfulness of detention?  Yes  No

A detainee can apply for bail at any time, although if they are detained while their application is being considered they must have been in the UK for seven calendar days. Application can be made to the Chief Immigration Officer (CIO), who is part of UKBA (the UK Border Agency) or to the First Tier Tribunal. Since the decision to detain was made by UKBA, it is not common for bail to be granted by the CIO: applications to the Chief Immigration Officer only account for about 10% of those released on bail.<sup>206</sup>

A bail application to the Tribunal involves a hearing before an immigration judge. UKBA is required to provide a summary before the hearing of the reasons for opposing bail. Studies of bail hearings show that in practice the summary may occasionally be late, or non-existent, but the most persistent problem is reliance on standard reasons without evidence that they apply to the particular applicant. The hearing may then focus on unsubstantiated risks of absconding or offending but fail to focus on how long the person has been detained and what prospect there is of UKBA being able to arrange their removal from the UK, matters which are critical to the lawfulness of detention.<sup>207</sup> Bail hearings do not have all the elements of formal procedure which are appropriate to decisions about lawfulness. For instance, there is no full reasoned decision given by the judge.

Bail hearing centres may be far removed from the detention centre, and the use of video conference systems has become routine. While this avoids long journeys for the detainee, the lack of personal contact with the judge, and problems in quality of sound and visual transmission are also experienced as obstacles to an effective hearing. Technical problems may compound the difficulty of speaking through an interpreter. In video conferencing cases the lawyer is only allowed 10 minutes to speak with their client before the hearing. This is insufficient.<sup>208</sup>

Bail hearings are timetabled so that several can be heard in one day, and this creates pressure on the proceedings, sometimes with the result that an interpreter is not given time to interpret everything that is said.<sup>209</sup>

Friends or family can stand as sureties for the applicant, which means that they undertake to ensure that the person reports again when they are required to, and they forfeit a sum of money if this does not happen. Sureties are not essential, but there is a tendency to require them and there is no concept of continuing surety so they are required to travel to each hearing, even if bail is refused many times, and

<sup>205</sup> Bail for Immigration Detainees, *Immigration Detainees' Experiences of Getting Legal Advice Across the UK Detention estate: summary results for surveys 1 – 4*, 2012.

<sup>206</sup> Damien Green MP. *Home Affairs Committee: Written evidence: The work of the UK Border Agency and Border Force* 6 June 2012.

<sup>207</sup> Adeline Trude, *The Liberty Deficit*, Bail for Immigration Detainees, 2012; Bail Observation Project, second report, 2013.

<sup>208</sup> Adeline Trude, *The Liberty Deficit*, Bail for Immigration Detainees, 2012; Bail Observation Project, second report, 2013.

<sup>209</sup> Adeline Trude, *The Liberty Deficit*, Bail for Immigration Detainees, 2012.

even if bail is granted and then applied for again after a further detention without any breach of conditions by the asylum seeker. Repeat detentions can occur for asylum seekers when further submissions are refused, and they are detained with a view to removal, but without giving time for them to challenge the refusal of further submissions, or else when they are detained while further submissions are being prepared but have not yet been made. Removal cannot take place while a challenge or consideration of submissions are pending, and good legal representation can mean that they are released while the challenge or consideration of new submissions takes place, only to be re-detained in the same circumstances if there is a further refusal.

There is no automatic independent judicial consideration of the lawfulness of detention. Bail must be applied for. However, UKBA is obliged to review the reasons for detention monthly. The Supreme Court has emphasised that this is a public law duty which should operate as an active safeguard against unlawful detention.<sup>210</sup> In practice this duty is often neglected and the reviews are carried out in a cursory way or even omitted. The Chief Inspector has also urged UKBA to address this by carrying out proper reviews of the basis for detention in accordance with the Detention Centre Rules, such that release can be granted where this is warranted.<sup>211</sup>

The lawfulness of detention may be subject to judicial review in the High Court, with the permission of that court. The criteria for lawfulness are, as mentioned above, that it is for a statutory purpose, and for approved policy reasons, and the length of detention must not be unreasonable. The lack of a statutory limit on the length of detention has consequences for the potential for effective challenge. Case law states that the length of detention must be reasonable to achieve the purpose for which the person is detained. The usual issue is whether UKBA can arrange the detainee's removal within a reasonable period. No clear and coherent case law on reasonable periods has emerged. However, UKBA's own guidance on whether removal is 'imminent' is that 'removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks.'<sup>212</sup> Guidance issued in 2012 to immigration judges for the conduct of bail hearings introduced the guidance that: 'detention for three months would be considered a substantial period of time and six months a long period.'<sup>213</sup>

It is also possible to challenge the lawfulness of detention in civil proceedings for unlawful imprisonment, when damages may be awarded.

The case law and the legal structure of challenge to immigration detention make no distinction between the detention of asylum seekers and the detention of other foreign nationals.

## E. Legal assistance

### Indicators:

- Does the law provide for access to free legal assistance for the review of detention?  
 Yes       No
- Do asylum seekers have effective access to free legal assistance in practice?       Yes       No

Access to legal assistance is means tested as with other legal aid. Detention centres have legal clinics run by legal firms with contracts with the Legal Services Commission to do this work. Detainees cannot obtain legal aid to instruct a lawyer other than the ones on the rota in the centre. In practice they may

<sup>210</sup> *Kambadzi v SSHD* [2011] UKSC 23.

<sup>211</sup> Independent Chief Inspector of Borders and Immigration and Chief Inspector of Prisons, *The effectiveness and impact of immigration detention casework*, 2012.

<sup>212</sup> UKBA Enforcement Instructions and Guidance, Ch55, para 55.3.2.4.

<sup>213</sup> Mr Clements, President of the First Tier Tribunal, Immigration and Asylum Chamber, *Bail Guidance for Immigration Judges* 2012, Ministry of Justice.

face removal before they can obtain an appointment, and there is time pressure on the clinic appointments. For instance the Independent Monitoring Board at Harmondsworth immigration removal centre records a wait of 3 weeks for a legal appointment,<sup>214</sup> and the Bail for Immigration Detainees' survey shows that 47% had to wait more than a week.<sup>215</sup> Notice of removal may be as short as 72 hours, and five days is common.

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<sup>214</sup> Independent Monitoring Board, Harmondsworth IRC, *Annual Report 2011*.

<sup>215</sup> Bail for Immigration Detainees, *Immigration Detainees' Experiences of Getting Legal Advice Across the UK Detention estate: summary results for surveys 1 – 4*, 2012.