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The Detained Fast Track

MA in Understanding and Securing Human Rights

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Abstract


The thesis is concerned with accelerated procedures to determine asylum claims in the UK. It applies UK Home Office policy and legislation, along with EU law and legislation read in conjunction with the treaties outlining the UK's international obligations to the realities that detainees experience when routed onto the procedure. The study finds that the signing of the Treaty of Lisbon in 2009 reignites the debate concerning the meaning and scope of EU principles. It suggests that the resulting strengthened principle of proportionality and necessity renders unnecessary detention allowed currently by the UK procedure a violation of article 5(1)(f)ECHR. A similar conclusion is reached concerning the EU right to an effective remedy, highlighting the short time-limit set by the Government particularly in terms of the appeals procedure, and arguing that it is contrary to the basic principles of EU law. The thesis also highlights other shortcomings within the procedure, pointing to insufficient screening and safeguarding, as well as incorrect use of the set accelerated criteria. The study concludes by noting the general inefficiency of the Home Office to remove failed applicants once the procedure is ended, suggesting that the applicants are often held for a period which is longer than necessary.

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Thank you to my interviewees who gave up their time to aid my research

Declaration Form

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work, has been identified and acknowledged. No materials are included for which a degree has been previously incurred upon me.

Signed.....
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1 Introduction

The UK is one of the only countries in Europe that indefinitely detains asylum seekers in detention centres across the country in conditions at times akin to a category B prison. What's more, for 14 years the UK Government has further developed a system in addition to general detention entitled 'The Detained Fast Track' (DFT), which allows detention using broader criteria for administrative convenience. This has the affect that almost any asylum applicant is eligible for detention if their claim can be decided quickly. The DFT process started on one site, and now operates across at least four. The use of the DFT is also rising, and has done dramatically in the last year: between 2012 and 2013, the numbers on the DFT almost doubled, increasing by 73% (see Appendix 1). With the expansion of the system, the conditions and criteria have also developed, moving from a 7-day maximum detention stay, to an average of a month to complete just the first stage. This thesis will examine the DFT as it is in 2014, identifying areas where it is failing and suggesting implicated areas of illegality and article breaches.

The essay will first discuss the background context to this area, it will then describe the approach taken when researching the topic. Chapter 4 will focus on the background to the DFT and its justification. The study will then move on to specific examples arising from the application of policy to the DFT: Chapter 5 discusses the issues surrounding entry and entry criteria to the DFT; Chapter 6 explains the issues affecting legal advice; Chapter 7 outlines the problems related to the fast track appeals process; Chapter 8 identifies the scheme's ability to be flexible where appropriate to avoid wrongful routing onto the DFT; Chapter 9 explains the conditions detainees are held at the present time, and Chapter 10 discusses the issues facing asylum applicants in continued detention once the DFT procedure has finished. The study then concludes by suggesting recommendations for improvement to the procedure.

2 Analytical Framework

The thesis concerns both well established and emerging areas relating to the fast track system operated in the UK. It examines the inconsistencies that may be found between Home Office policy, and its applications in practice.

EU legislation in the context of asylum issues has been built up with a view to standardise European Member States' handling of asylum seekers. The Common European Asylum System (or CEAS) consists of legislation detailing minimum standards of conduct to this end. The legal basis for the standardisation can be found in article 78 of the Treaty on Functioning of Europe (TFEU). The UK has opted in to some of this legislation, though it has been accused of cherry-picking the legislation (Costello and Hancox, 2014). With a focus on accelerated procedures, the UK was criticised for taking too wide an interpretation of some articles within the legislation (European Commission, COM (2010) 456, COM (2007) 745). What's more, the legislation it has opted out of within the CEAS, mean that the UK may currently operating a system below the minimum standards accepted by the EU in some respects (Buckley, 2011).

The signing of the Treaty of Lisbon (ToL) by the UK in 2009 has strengthened the legal status of the EU Charter (Piris, 2010), and therefore encouraged debate concerning its impact regarding standardised minimum procedures within the EU. Whilst Member States remain autonomous, the articles within certain signed treaties may evolve to encompass wider (or

narrower) scope. This may ultimately impact on aspects of the UK's accelerated procedures. This is because the principles inherent within the Charter are visible in the articles. For example, the principles of proportionality and necessity, Moreno-Lax argues, therefore should be applied to accelerated procedures, which ultimately questions the very idea of deprivation of liberty for administrative gain (2011). The idea is explored whether, in light of this, these strengthened principles will ultimately mean standardisation within CEAS, even for the UK. Some remain clear that Member States will not be impacted in this way (Rhee, 2011). However, the rise in the importance proportionality and necessity may give rise to unlawful detention claims of those placed on accelerated procedures.

The derived principles have also sparked debate concerning the balance between fairness and speed and what constitutes a minimum standards with regards to this is also being debated. The principle of effectiveness and the EU right to an effective remedy could well have an impact on the UK-run accelerated procedure in the future (Reneman, 2014). The JCHR highlight that procedures should not be operated that restrict the essence of the rights in question (JCHR, 2007). This could impact on time-limits that have been set in the procedure, as well as access to legal aid.

Finally, there is much literature from UK-based NGOs, independent reports and national case law criticising the way the Home Office applies its accelerated policy to the UK (Detention Action, 2011). With a recently opened parliamentary inquiry into the use of detention (Porticullus House, July 2014), the issue is becoming more mainstream within UK politics, due to the apparent similarities applied to asylum seekers and criminals serving time in the UK (*Oral evidence*, [Chakrabarti] 2014). The deficiencies have also attracted international criticism (UNHCR, 2012), (UNCAT, 2013).

Within this context, it is not yet likely that the Government will change its accelerated policies that fall in part arguably below EU minimum standards. This thesis seeks to link practical knowledge of the system operating on the ground to emerging and accepted principles of EU law, as well as studying the application of the Home Office's own policy with a view to argue that it should.

3 Methodology

The approach chosen to carry out this research has primarily been inductive (Bryman, 2004: 10), with the observations and findings gathered which influenced the final conclusions drawn. However, as is accepted by Bryman (Bryman, 2004: 9), my research also employs an element of deduction. This is because, although a possible general theory was known before gathering data (that the study would result in recommendations to the Home Office to improve the DFT in the UK), the exact recommendations (and impact the study would have on the findings) were not known at the beginning of research.

Qualitative data, in the form of interviews with legal practitioners, was a key approach in the research. In addition, analysis of quantitative data in the form of official Home Office statistics and Freedom of Information requests were used. Furthermore, research of the latest case law and emerging academic ideas aided understanding in an ever developing field. These approaches were taken together as both theoretical and practical knowledge were needed to give a rounded view of the true state in which the UK immigration system finds itself in 2014.

In light of this, elements of grounded theory have been used in order to analyse the data. As is characteristic of grounded theory, analysis and data collection developed simultaneously (Hodkinson, 2008: 84). Despite the general conception before research began that the Home Office would need to make improvements in this area, this was not the starting point to research, rather, as research started, it was important that methods were flexible so that the knowledge gained informed the next step in research, allowing analysis to be ongoing and affecting the specific questions being asked, with no predetermining agenda. There was therefore a constant shift between focussed data collection and further data analysis.

However, most importantly, the use of coding was used throughout the project in order to be in a position to effectively compare the different challenges facing the immigration system as it is now. Conceptual labels such as “flexibility” and “screening” were placed on transcripts, quantitative data and academic research in order to build a platform of integration capable of comparing different elements of the system. This eventually formed the basis of the structure of this thesis, in a process of selective coding. Although there are drawbacks to the grounded approach; coding can detract from the bigger picture, too much order in the research method can result in limiting a holistic and creative approach to analysis, and, as is clear, it was not possible to completely nullify bias (Hodkinson, 2008). However, these drawbacks have been minimised due to the fact that elements of grounded theory have been applied to both qualitative and quantitative data, and cross referenced with the academic literature in order to draw conclusions and recommendations, triangulating the findings in a mixed method approach (Alexander *et al.*, 2008: 128).

Concerns relating to the collection of quantitative data published by the Home Office, such as reliability and validity of the data (Bryman, 2004: 211) and misinterpretation were considered throughout the research. The statistics were not taken at face value, although the study was aimed to capture a snapshot of how the system was working in 2014; the up-to-date figures which, importantly, the Home Office agreed with, proved vital to the process of triangulation and added to the argument throughout. What’s more, the unobtrusive nature of the data (Webb *et al.*, 1966), eliminating any Home Office reactivity which may manipulate the findings, strengthened this case. Rhetoric (Bryman, 2004: 490) was employed in a responsible way as a means to decide which parts of the data to show, and how to display it (e.g. bar chart, line graph, table).

The qualitative research conducted is an essential part of the research conducted. Concurring with Miller and Glassner, it is convincing that this type of research would have the capability to ‘provide a mirror reflection’ (1997: 100) of the field in question, as it is impossible to depart from the artificial situation of an interview, though this is still an invaluable opportunity to gain unique knowledge. Within the research itself, it was vital to talk and listen to those on the frontline working with clients experiencing the research area in order to apply the laws and policies to what was realistically happening in everyday life.

Three interviews were conducted: two solicitors and one barrister (see appendix 2-4 for transcripts). One interview took place in a venue chosen by the interviewee, two other interviews took place over the phone, on the interviewees’ requests. In addition, a fourth informal telephone conversation was conducted with a prominent academic in the field. The interviews were conducted as per the six stages set out by Legard *et al* (2003: 145). In the very beginning a consent form was discussed and signed/consent was given to the interviewer under a strict basis of anonymity, confidentiality, and the unpublished nature of the thesis (see appendix 5-7 for consent forms). A reassurance was given to the interviewee that they

could decide not to answer a question or to stop the interview all together if they so wished. All interviews were recorded on two different devices and typed up.

Questions were chosen carefully in line with the inductive theory to be open-ended and unbiased, though still focussed on the area of research. As such, a variety of content mapping questions coupled with content mining questions (prompts and probes) were used (Legard *et al.*, 2003). At times, clarification techniques were used on technical points of law.

Finally, a request for an interview with Home Secretary Theresa May, Immigration Minister Damian Green or one of their associates was turned down by the Home Office (see Appendix 8 for email exchange). Parliament held an oral evidence session as part of an Inquiry into the use of Immigration Detention on 17th July which I attended, and obtained the official transcript. This is useful when referring in the thesis to the practical realities of the research focus.

4 Background: UK Accelerated Procedures

4.1 The Detained Fast Track (DFT)

For more than a decade the UK Government have been detaining asylum seekers whilst their claim is decided, and then (in the event of a negative decision) to carry out their removal from the UK. This procedure is called the Detained Fast Track (DFT), and applicants are accepted onto the scheme if their claim is likely to be one which can be decided quickly. The UK Government therefore detains DFT-routed asylum seekers in this way at the initial stage of applying for asylum. If the claim is deemed to be more complicated, the applicant is allowed to wait for a decision in the community, with the Government supporting the applicants with financial and accommodation support.

The DFT programme has expanded quickly over the last decade, and there is much dispute over the lawfulness of the procedure due to its changing operation policies and expansion. This section of research identifies the justification for the DFT and the areas within the DFT which may make the operation unlawful.

4.2 History: Justification for DFT

UK statutory law does not prohibit detention in order to process accelerated procedures, or detention for administrative ease. EU legislation allows for accelerated procedures, though with some limitations.

Under UK law, the power to detain for the purposes of the accelerated DFT procedure (although this provision also allows detention outside the DFT under other criteria) is granted under paragraph 16 of Schedule 2 to the Nationality, Immigration and Asylum Act 1971:

"(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter

(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under

any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions."

This legislation does not bar the Government from operating accelerated timescales for deciding claims, although it is silent on guidance on what detention is proportionate and allowed.

The Human Rights Act 1998 (HRA) came into force in the UK in October 2000, writing the European Convention of Human Rights (ECHR) into UK legislation. Article 5(1)(f)ECHR (identical to article 5 of HRA) permits ‘the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition’, with article 5(2) ordering the reasons of detention to be made known promptly, and article 5(4) outlines the right to speedily challenge the lawfulness of detention.

Before the introduction of the DFT, detention by the Government was considered something that should be limited to the ‘shortest possible time’ (Home Office, 1998: 49), and general criteria to detain was identified as: imminent removal, absconding risk or initially to establish basis of a claim or identity (Home Office, 1998: 48). The “last resort nature” of these criteria was upheld by *ex parte B* ([1997] EWHC Admin 1148), highlighting the need for diligent reappraisal by the Home Office with regards to detention criteria at that time.

The change in this policy apparently came with the decision to detain in order to accelerate the process, considered by ministers in 1999 as a last resort in the circumstances of an unprecedented 7,000 asylum applicants a month. The DFT therefore initially began in 2000, on a single site called Oakington. Applicants routed through the DFT were brought to Oakington and held on the site whilst their claims were speedily decided. There were solicitors on site every day of the week and applicants were held in the estate for an average of 7-10 days as their claim was decided. If (as was usual) a negative decision was given, applicants were released into the community for the next stage in their appeals process, or whilst the Government took steps with a view to their removal. This was hailed as a more effective and time efficient way to deal with the unprecedented number of asylum applications coming in (Detention Action, 2011). In 2000, the change to the detention criteria was described by the government:

‘in addition to the existing detention criteria, applicants will be detained at Oakington where it appears that their application can be decided quickly, including those which may be certified as manifestly unfounded...Detention will initially be for a period of about seven days to enable applicants to be interviewed and an initial decision to be made’ (Hansard, HC 16 March 2000, col 263W).

The new policy, although (through silence of the legislation) not strictly prohibited by relevant UK legislation, added an administrative (speedy) dimension to detention criteria in order to solve backlog of claims. The absence of necessity in the decision to detain was new.

The DFT policy was challenged at the High Court in 2001 in *R (Saadi and others) v Secretary of State for the Home Department (SSHD)* ([2001] EWHC Admin 670), and found to be unlawful; it was found that the true reasons behind detention at Oakington breached article 5(1)(f)ECHR, concluding that detention in absence of necessity was unlawful' (para 45), deciding that the Government were not attempting to prevent unauthorised entry, but intending only to reach a speedy decision.

This ruling was overturned at the House of Lords in *S (Saadi) v SSHD* ([2002] UKHL 41), with the court holding that 1 week of detention for a claim to be processed quickly, in the circumstances of an unprecedented number of asylum claims to the UK, did not need to be "necessary" to be compatible with the first part of article 5(1)(f); the short period of detention was found to be reasonable. One year later, *Nadarajah v SSHD* ([2003] EWCA Civ 1768) confirmed that published UK policy to detain immigrants dictated what detention was lawful. In the same year, an extension of the DFT process was announced by Beverly Hughes, confirming it would include an appeals process (Hansard HC, Col 42WS, 18 March 2003). Following this announcement, the fast track appeals process was introduced¹, which permitted a 2 day time limit to appeal a refusal, amended for the last time in 2005 (Rules SI 2005 No. 560) to apply to those detained on the DFT in Colnbrook Immigration Removal Centre (IRC), Harmondsworth IRC, Campsfield IRC and Yarl's Wood IRC. The attachment of the appeals process lengthened the time period in detention to about a month. The timetable of the new DFT procedure, published by the Home Office, projects a 22-day stay in detention whilst the process is completed (see Appendix 9).

Once these changes had been made, The European Court of Human Rights (ECtHR) examined the legality of detaining for accelerated procedures and administrative convenience in *Saadi v UK* (GC, 13229/03)² in 2008 in the Grand Chamber, holding that accelerated procedures were lawful as it was in the interests of both parties and was proportionate to the problem of a back log of claims, and therefore compatible with article 5(1)(f)ECHR. The judges examined the procedure not as it was operated at the time (2008) but as it was operated in 2001 in Oakington. Conclusions were drawn on this basis, such as: a 'short period of detention is not an unreasonable price to pay in order to ensure the speedy resolution of the claims of a substantial proportion of this influx' (para. 17).

However, this decision was extremely controversial, resulting in a majority vote of only 11 to 6 finding no violation of article 5(1)(f). The 6 judges disagreeing with this decision, explained that it was a dangerous stance to take that detention of any kind was of benefit to an applicant. In their dissenting opinion, they also expressed concern that if the DFT was upheld as carrying no violation, it would be more difficult to detect unlawful detention in the future: 'if a seven-day period of detention is not considered excessive, where and how do we draw the line for what is unacceptable?'. It emerged from the case that the principles that could be applied to the decision to detain on the DFT should meet the following principles: detention must be in good faith, it must be closely connected to unlawful entry, the place and conditions of detention were appropriate and detention did not exceed that which was reasonably required.

¹ Initially applying to those detained in Harmondsworth IRC in 2003, then expanding to include Colnbrook IRC and Campsfield IRC with emergency legislation following a disturbance at Harmondsworth in 2004, and eventually including Yarl's Wood IRC in 2005

² Hereafter: *Saadi*

Indeed, this pertinent question of the dissenting judges underpinned the issues alluded to in the Grand Chamber: the wider implications of the decision are important. With such a controversial history, the operation of the DFT splits experts in terms of the legality of its operation in 2014. The Home Office maintains currently that its policy is in the interests of both the detainees and the Government as the claims are to be decided quickly. This view is echoed by Justice Ouseley in *Detention Action v SSHD*³ ([2014] EWHC 2245)⁴, as one important reason why the principle is lawful. However, many still agree with the original dissenting decision. O’Nions notes the *Saadi* decision to render the DFT legal is problematic; by allowing techniques involving short-term detention for administrative convenience rules out “necessity” as a requirement which arguably allows for the procedure to expand and introduce arbitrary detention of asylum seekers (O’Nions, 2008).

4.3 International concerns

The DFT seems also to run contrary to the standards set in international law, relevant to the treaties ratified by the UK. UNHCR Guidelines on detention detail principles that should be adhered to when taking the decision to detain. Guideline 4 confirms that the power to detain should only be used ‘as an exceptional measure’ (UNHCR, 2012: 16). The guidelines accept that accelerated procedures are needed in some cases, but their criteria to accept applicants onto these processes are much higher than those of the UK:

‘Any detention in connection with accelerated procedures should only be applied to cases that are determined to be “manifestly unfounded” or “clearly abusive”; and those detained are entitled to the protections outlined in these Guidelines’ (UNHCR, 2012: 17).

Indeed there are many guidelines issued by the UNHCR contrary to the UK’s actions, though ‘States do not always regard these as sufficient authority’ (Lambert, 2012: 328). There are also other international obligations for the UK that are contrary to the DFT procedure. Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) protects against ‘arbitrary detention’, while article 31(1) of the 1951 Refugee Convention prohibits imposing penalties on account of their illegal entry, as well as only permitting that which is ‘necessary’ (article 31(2)). Article 14(2) of the UDHR prohibits the right to asylum to be invoked ‘contrary to the purposes and principles of the United Nations’. It is clear that the precedent set by *Saadi* is below this threshold, which clearly requires the principle of necessity. Moreno-Lax questions whether ‘it is permissible today for the European Convention on human Rights to provide a lower level of protection than that which is recognised and accepted in other organisations’ (2011: 187).

Although the ECHR provides the most comprehensive guidelines as to how accelerated procedures should be organised, and therefore the *Saadi* decision and ECHR interpretation is the more important and relevant to inform UK operations, it still must be remembered that the

³ Hereafter: *DA*

⁴ This recent judgment found that the DFT as it was operating currently was so unfair that it was unlawful, and set out several ways in which this unfairness could be eradicated, making the process fairer; these broadly included the detention of vulnerable applicants on the DFT and the safeguarding procedures against it, the access to legal advice, and the initial interview between the applicant and the Home Office (called the screening interview). The judge ruled that an improvement in one of these aspects would render the process to be operating lawful again.

principles of EU law arise from international documents, taking inspiration from the intentions of common themes recognised in international agreements such as international treaties. From reading the international articles relevant to restriction of freedom in the case of asylum, necessity emerges clearly, raising questions regarding the ever-growing DFT procedures.

4.4 EU law and legislation

It is arguable that the entering into force of the Treaty of Lisbon (ToL) brings greater clarity to the principles of necessity and proportionality, which would undermine decision taken in *Saadi*.

The UK signed the Treaty in 2009, making the European Charter of Fundamental Rights and Freedoms ([EU] Charter) legally binding on the UK in article 6(1)⁵. Article 6 of the Charter reaffirms that ‘everyone has the right to liberty’, and Title VII emphasises the need for proportionality and necessity read in conjunction with the relevant conventions: ‘subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest’ (article 52(1)). Article 53 further instructs on how EU law may be interpreted: ‘nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms’. The Lisbon Treaty reiterates this principle of limitations on interpretation, reaffirming: ‘The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter’ (article 6(1)).

Applying this principle, as per article 6(1)ToL, read together with the relevant internationally ratified documents, as well as the EU provisions on asylum, article 52(1) of the Charter requires a binding principle of necessity to be applied to the reasons for detention. Further, article 53 of the Charter affirms a principle binding on states which restricts interpretations that adversely affects human rights. Indeed, looking back to the point made by the dissenting judges in *Saadi*, this principle adds weight to their opinion that although a speedy decision is in the interests of both parties, detention cannot be in the interests of asylum seekers. With the binding force of the Charter, detention in order to acquire a speedy decision could be adversely affecting human rights and fundamental freedoms, contrary to the rights protected in article 5ECHR.

Moreno-Lax also maintains that the *Saadi* decision threatens the principles of necessity and proportionality gained when reading the EU Charter and Lisbon Treaty in conjunction with the ECHR (Moreno-Lax, 2011). This casts doubt on the hugely expanded DFT procedures, which have arguably moved too far away from that accepted in *Saadi*, meaning that the now

⁵ The UK also drafted what was initially a ‘self-proclaimed opt-out’ (O’Neill, 2011) called Protocol 30, to try to minimise the impact that the now binding EU Charter would have on national law. The Protocol was also signed by Poland. There is dispute as to whether the Protocol in effect works as an opt-out; article 1(1) merely states that the EU Charter should not allow EU courts to find domestic legislation incompatible with the Charter. However, the Charter’s scope only falls within the scope of EU law, and so this particular legislation should already be in line with that required by the UK’s binding EU legislation. This was confirmed in *NS v SSHD* (C-411/10) when it was ruled that the Protocol did not prevent the Charter applying to the UK, but instead explained its effect (para. 8). Article 1(2) of the Charter may still act as a partial opt-out with concern to Title IV Charter rights, but these articles do not broadly concern asylum issues. It is therefore concluded that this Protocol would not likely not significantly affect the way in which the Charter is applied to the UK.

much prolonged detention of applicants on the DFT could possibly be unlawful on necessity and proportionality grounds. It is suggested that this essentially requires member states to comply with EU detention rules with proportionality and necessity as strict principles to any decision to detain, rendering unnecessary detention for the purposes of the DFT unlawful. The discussion in subsequent chapters will explore what this principle of proportionality and necessity means when applied to certain operations within the DFT.

The Common European Asylum System (CEAS) is a series of EU initiatives to help Member States improve and/or standardise minimum procedures relating to issues arising when receiving asylum seekers across the EU. The Directives have recently been recast, though the UK have opted out of the improved legislation. The recast Directives would force the UK to change the way in which the DFT is operated in a number of ways. However, it traditionally remains the UK's choice as to whether it wishes to opt-in to the enhanced protections offered in order for international standardisation to occur with respect to asylum issues.

The legal basis for the CEAS can be found in article 78 of the Treaty of the Functioning of Europe (TFEU), stating the aspects under which a common framework can be worked towards. The CEAS comprises of 5 main components. Those most relevant here are the Procedures (concerning the decision-making process), and Reception (concerning the conditions asylum seekers are held in) Directives⁶, but not their improved recast versions⁷.

Controversy has arisen since it was apparent that the UK was planning not to opt in to the recast Directives. One reason for this was that the enhanced Directives set out further improve minimum standards required to satisfy Member State obligations, and corrected some 'inconsistencies' (Hailbronner, 2010: 1258). It was even debated whether, after the introduction of the recast Directives, the original ones would still apply to the UK; the UK Government position was initially not in favour of this point. However, it was eventually decided in 2012 that the original Directives would still apply (Costello and Hancox, 2014), as was in line with the European Commission position (though with a warning that cherry-picking EU legislation was not suitable). However, there were some that still felt that the system had to be adopted as a whole to achieve its stated goal (Buckley, 2011).

Indeed, this becomes more apparent when looking at the reasons why the recast Directives were written; in order to improve the original ones. The European Commission reported widespread differences in interpretations of the Directives in different Member States, which it felt needed to be clarified and eliminated in order to ensure a respectful and fair level playing field (European Commission, COM (2010) 456, COM (2007) 745). The evaluation of the original Procedures Directive in particular highlighted the differences in interpretation concerning accelerated procedures: 'legal assistance and access to an effective remedy...[is potentially hindering full cooperation] to ensure full respect for the principle of *non-refoulement* and other rights enshrined in the EU' (European Commission, COM (2010) 456: 15). The UK was mentioned in these reports as a Member State that was, in its view, taking too wide an interpretation of the articles that allowed it to do so.

For the UK, in one respect, the opt-out of the resulting recast (improved) Directives confirm the motives behind the wide interpretation taken by the Government of some of the articles highlighted by the European Commission in the original directives, in order to operate the

⁶ Procedures Directive (2005/85/EC) (PD), Reception Directive (2003/9/EC) (RD)

⁷ recast Procedures Directive (2013/32/EU) (RCD), recast Reception Directive (2013/33/EU) (RCD)

DFT procedure. Those articles relevant to this study of accelerated procedures include: improved judicial review access after 72 hours (article 9(2) RCD), limits on the use of accelerated procedures (article 31 RPD), more rights in relation to legal assistance (article 22 RPD), and article 46 RPD governing the right of appeal (Buckley, 2011), including a time frame of ‘at least one week’ to gather evidence (article 46(7)(a)), as well as enhanced legal representation in general. Indeed, the UK Government accepts that opting into the recast Procedures Directive will restrict their ability to operate the fast-track system (Green, 2011) and eliminate their ability to operate ‘with discretion’ (Hillier, 2010: 3) in relation to cases routed onto the DFT. It follows, then, that UK government’s decision to opt out of these remedies may ‘diminish migrants’ and refugees’ rights’ (Costello and Hancox, 2014: 7). It is partly due to this basis that it seems the UK is at odds with the minimum standards set by the EU.

It is because of this discrepancy that the signing of the Treaty of Lisbon, recognising equal ‘primary law or treaty law [status] to the EU Charter’ (Piris, 2010: 149) (and thus strengthening legislation) is important in order to urge the UK to use internationally agreed minimum standards when receiving asylum seekers. The question remains whether the enhanced powers of the Charter could encourage standardisation within CEAS, which would result in the much improved UK operations regarding the DFT. The articles of the Charter of interest in this case include the guaranteed right to asylum in article 18 of the Charter as well as article 52(1), which if applied to the DFT operations may enhance the protection for asylum seekers possibly tailored to the way in which they are treated whilst their claim is being processed.

The rights in the Charter, like similar rules for the ECHR (regarding EU legislation), only apply in situations where EU law is being implemented (Peers et al, 2012), though until recently there has been little dialogue between the two treaties. However, this has begun to change after Lisbon as was seen in *MMS v Belgium and Greece* (30696/09) where ‘EU law [was used] to enhance the concept of degrading treatment [article 3 ECHR rights]’ (Lambert, 2012: 27) in Strasbourg, which leads to the suggestion that even if the UK has opted out of the recast Directives, ‘it will be bound through the higher standard developed by the ECtHR’ (Lambert, 2012: 336) as it continues to develop. It therefore sets a precedent for the approach to article 3 cases and potentially beyond.

However, although a potentially strong case for the future of European standardisation, it seems that at present it is not a realistic argument, with some reiterating that ‘neither the general principles of law nor the charter can extend in any way the competences of the union as defined in the treaties’ (Rhee, 2011: 1). While it may be easier to present overall positions as contrary to the principles of EU law, it unsurprisingly seems more difficult to argue to implement smaller enhanced operational detail regarding the DFT; ultimately, Member States must retain their sovereignty. Therefore, at present it is still to be seen if EU case law develops in a manner consistent enough to encourage the UK to adhere to higher minimum asylum standards, which would certainly limit the use of accelerated procedures in the UK.

5 The DFT Process

5.1 Screening

The asylum process starts with a screening interview, which is a brief collection of the facts. A more in-depth substantive interview happens at a later date. The screening process for the

purposes of the DFT has been subject to much criticism. This is because the decision to detain the applicant on the DFT is taken before the substantive interview, and therefore before all the facts are known.

Article 3 of the Convention Against Torture protects the notion of ‘*non-refoulement*’, restricting States to return an applicant to their home country where there is ‘substantial’ evidence of torture. This is a recognised notion of customary international law. Article 3(2) of the treaty explains that the receiving State should ‘take into account all relevant considerations’ when deciding whether returning an asylum seeker would be in breach of this recognised norm. Article 12 of the Procedures Directive does allow for limited circumstances where the personal interview can be omitted (article 12(2/3)) and this does not prevent the authorities to make a final decision (article 12(4)), although it also explains that: ‘before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview’ (article 12(1)). Article 18(1)PD permits: ‘Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum’. UK Home Office policy allows for the decision to fast track an application to be made before the substantive interview, subject to suitability criteria (Home Office 2013b). The Fast Track procedure has a 99% initial refusal rate (Phelps, 2014: 3), compared to a 70% refusal rate for non-DFT applicants.

Home Office policy agrees that more detail is required in the second interview. The policy assumes all claims are suitable for the DFT; it therefore allows entry to the fast track due to lack of evidence weighing against a decision to admit an applicant (Home Office, 2012: 8).

The policy ensures that the decision to detain borderline cases on the fast track is not made by the screening officer, but is made remotely by a senior caseworker at the National Asylum Intake Unit (NAIU) after an email or telephone referral by the screening officer (Home Office, 2013b: 3.1.1). The decision to detain the applicant on the DFT would require a formal referral, which consists of a scanned copy of the screening interview transcript⁸. This hierarchical system implies that some officers are better equipped at making decisions than others. In addition, the Home Office Guidelines also state that screening officers can decide to detain in all cases that are out of ‘NAIU during opening hours’ (Home Office, 2013b: 3.1.1) without consultation.

The quality of this decision-making has been criticised by experts. Detention Action explain: ‘the screening interview typically lasts a few minutes and usually takes place in a non-confidential environment’ (Detention Action, 2011: 30), adding that it ‘is not appropriate to ask more in-depth questions before an asylum-seeker has had access to legal advice’ (Detention Action, 2013: 2). The UNHCR have criticised the screening process as inadequate: ‘front-end screening and routing procedures are still not sufficient to adequately assess whether a case is complex or an applicant is vulnerable’ (UNHCR, 2010: 4). In addition, the JCHR explains that the DFT carries a risk of arbitrary detention as the screening process encourages assumptions about the individual case before the facts are known (JCHR, 2007: 74). NGOs working to abolish the DFT agree, explaining the screening process as being a ‘mystery’ (BID, 2006: 15), (Detention Action, 2011: 28), (Aida, 2014: 34). The ILPS emphasise the low threshold of certainty when routing an applicant into the DFT: ‘the policy requires that a case can only ‘appear’ to be one that can be decided quickly after screening’

⁸ Along with any other documents given in the interview, the presence of which are rare

(ILPA, 2008: 14), hence the brevity of the interview. It seems the Government, though, does not agree, and has not yet changed the policy (Harvey, 2013: 104).

The brief approach to the intake decision may make the initial procedure a potential breach of article 18(1)PD, wrongfully detaining applicants on the DFT who do not meet the criteria specified by UK policy, and are therefore arbitrarily holding them because they have claimed asylum. Indeed, the decision-making at this stage is fairly inaccurate; between 16% and 22% of those accepted onto the fast track were wrongfully placed on it (see appendix 10), subsequently taken out of the fast track before an initial decision was made about their claim between 2008 and 2013⁹.

R (JB) Jamaica v SSHD, ([2013] EWCA Civ 666), raises these screening interview procedural flaws, providing a recent example, resulting in the interviewing officers not going into the essential detail of a claim in question. Lord Justice Moore-Blick concludes that the screening is not tailored to the DFT, resulting in a likely unfair and unsustainable decision (para. 28), claiming that in this case the Home Office did not comply with her own policy of asking supplementary questions. This is a common complaint from those that experience the interview: ‘the screening process makes it impossible for there to be any meaningful decision-making on suitability’ (Cutler, 2007: 17).

The conclusion of the Parliamentary Select Committee’s 7th report on asylum confirms these problems of the screening process, which suggests improvements such as more privacy, and better trained officers (Home Affairs Committee, 2013: Q 32). It was also suggested that the figure wrongly allocated to the DFT was more like a third (Home Affairs Committee, 2013: 29). More recently in *DA*, however, Justice Ouseley disputed these figures, branding them misleading (para. 102), blaming the sample size used to arrive at that conclusion. He upholds, however, the inadequacy of the screening process as something that the Home Office must improve (para. 105).

Grave concerns linger, therefore, regarding the basic structure of the DFT and the likelihood of being wrongly routed onto the DFT; with a minimum of around a quarter of DFT applicants subsequently taken off the scheme, it is likely that this mistake is routinely occurring. This breaches the Home Office’s policy (as was found in *JB*), and therefore threatens to routinely detain applicants arbitrarily to breach article 18(1)PD. It is also clear that any decision to detain (and subsequent second interview with a 99% refusal rate) is referred to somebody more competent to make it; it seems it would be more in line with article 12(1)PD if the decision to detain and route onto the DFT was made by the expert officer to which the case is referred. Ultimately, if an applicant is wrongly routed onto the DFT and is not detected, the subsequent 99% refusal rate puts the UK at great risk of breaching the principle of *non-refoulement*.

5.2 DFT Detention Criteria

The Home Office’s policy concerning what constitutes a quick decision (and subsequent entry onto the DFT) within UK Law therefore has an element which is based on assumption.

⁹ (although the actual figure is likely to be higher than this (Solicitor A, Solicitor B, August 2014)), which is discussed in due course

The criteria given can be applied to a wide range of cases, opening the argument regarding what constitutes a quick decision.

The Procedures Directive permits accelerated procedures at article 23(3), subject to the basic procedures of Chapter II (articles 6-22). In article 8(2)(b), a decision must follow an ‘appropriate examination’, and member states should ensure that: ‘precise and up-to-date information is obtained from various sources...as to the general situation prevailing in the countries of origin of applicants for asylum’ is used by decision makers. It is also inherent in the policy that the applicant should not be disadvantaged on account of the speed of the process.

Home Office Policy position detailing who to route through the DFT currently has ‘no requirements as to nationality or country of origin and no other bases of detention policy need apply’ (Home Office, 2013b: 2.1). Home Office DFT suitability criteria are where it appears likely that: no further enquiries are needed to gather evidence, or where those enquiries can be completed within the DFT timescale; it will be possible to consider the claim within the set timescale; no translations will be required, or where these can be obtained within the timescale; the case is “clearly unfounded” under S. 94 of the Nationality, Immigration and Asylum Act 2002 (Home Office, 2013b: 2.2)¹⁰.

For a claim to be a quick decision, the criteria focus only on speed and simplicity, although for the claim to be “clearly unfounded” is new dimension, ‘now explicitly a criterion for inclusion in the DFT’ (aida, 2014: 34). In *R(L) v SSHD* ([2003] EWCA Civ 25), the term was interpreted as an objective decision, which ‘should not depend on the Home Secretary’s view, ...[but] upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had’ (para. 56). Given the 99% refusal rate after the substantive interview, it seems many are routed into the DFT on the basis of a clearly unfounded claim. However, given the definition above, it seems unfair to make this decision without knowing the facts full circumstances or seeing the evidence in its entirety.

Published country information was available to aid officers in understanding which nationalities were suitable for the DFT in *Saadi*. This list was withdrawn in 2008 (Detention Action 2014: 6). However, there continues to be an unexplainable rise in certain nationalities being put onto the fast track in disproportionate numbers (see appendix 12 for graph). If nationality was no longer a factor these statistics would not show such a steep increase. For example, there was a 93% increase in applicants of Pakistani origin accepted onto the DFT in the year 2013 compared to 2012. This increasing pattern can be seen in other nationalities as well (see appendix 13). As can be seen from Appendix 13, this increase is not reflected in the overall asylum applications received over the same period.

Out of this list of countries, only one is listed under s 94 of the 2002 Act (Nigeria). It is concerning that the percentage increases are so high, while a similar pattern is not seen in the overall figures for asylum applications. It is feared that ‘an informal presumption is in operation which associates those countries of origin with unmeritorious claims, but without even the rudimentary safeguard of a list which can be challenged’ (aida, 2014: 34). What’s more, if this is the case, then the test identified in *R(L)* is almost certainly not being applied

¹⁰ See appendix 11 for limitations to clearly unfounded claims, including a country list

correctly. Indeed, Harvey describes screening ‘like little more than a feeder for the detained fast-track’ (2013: 104).

The Home Office hold that fast track decision makers have an “operational tool” named the RAG (Red Amber Green) list, which is not published as it is fluid. The list, as detailed in *DA* (para. 63-65), permits officials to admit applicants from “Green” countries onto the DFT without further consultation. This very system gives another possible insight on the disproportionate nationality increase in DFT entrants, and suggests that the thought given to whether a claim can be decided quickly is secondary at times to the nationality which presents at screening. Not publishing the list or “operational tool” means that it is not subject to public scrutiny.

Many in the field are of the opinion that the concept of a quick decision does not work and is unnecessary. Solicitor A doubts if any claim could be classed as simple, pointing out that a quick decision does not really exist (unless you are not believed): ‘no one’s stories are easy’ (Aug 2014). Harvey notes: ‘designation is ultimately an attempt to find a short cut and short cut ways always run the risk that one is not determining each claim on its merits’ (Harvey, 2012: 9). Solicitor A adds: ‘it strikes me that people that they just choose to be put on the system, they can’t all be false...it doesn’t make any statistical sense’ (August 2014). Indeed this view is gathering speed: ‘the speed of the procedure may also undermine the carefulness of the procedure’ (Reneman, 2014: 718), and this speedy process must only be in the interests of applicant ‘if it doesn’t come at the cost of fairness’ (Rooney, 2004: online). With a view to making the system fair, the precarious link shown by the data between a quick decision and nationality must be expanded on by the Home Office; currently it is unexplained in published policy.

In *Suckrajh v AIT & SSHD (2011)*, the applicant’s admission to the DFT was addressed, as it seemed that his admission to the DFT was both because his claim could be decided quickly, but also because it was decided that he was a risk to the public. It raises the question whether the DFT is being used for other purposes, due to the seemingly relaxed nature/low threshold of the decision-making. The UNHCR, intervening in the case, put forward that ‘a review of the operation of the DFT procedures showed that significant and repeated errors were made’ (para 29). However, Lord Justice Thomas upheld the decision to detain on the DFT in this case as lawful, explaining his case could be decided quickly (para. 53).

Although not accepted by the Home Office, a more accurate interpretation of a “quick decision” is one which has no merits, and can therefore be decided quickly. In addition, it may also be plausible that the lower threshold in accepting DFT entrants gives rise to a culture of normalisation, with the idea that detention for a quick decision is the easiest and most convenient solution for the Home Office, while it can exercise its non-exhaustive criteria with ‘discretion’ (Hillier, 2010: 3). If so, these applicants would be increasingly detained unnecessarily.

Furthermore, it is clear that the apparent policy to disproportionately detain higher numbers of certain nationalities on the DFT is in direct contrast to the Home Office official position that a “quick decision” is not concerned with nationality. In addition, the unpublished RAG list, along with confirmation that officers can detain those from “green” countries without expert referrals, does seem to be contrary to the intended meaning and purpose of article 8(2)PD, as the directive itself is designed to protect against wrongful use of detention. In any case, with a general assumption among critics that the power to detain on the DFT is very

often a claim which is assumed to be unfounded, there is confirmation that the DFT has evolved into something different to the system upheld in *Saadi*.

6 Quality of Decision Making

6.1 Access to Legal Aid

Once admitted onto the DFT, access to a lawyer is always granted, though usually without sufficient time to prepare the claim fully before the substantive interview.

Articles 15 and 16 of the Procedures Directive are concerned with legal representation. Article 15(1) provides that the member state should ‘allow applicants for asylum the opportunity, at their own cost, to consult in an effective manner a legal adviser’, allowing the Member State to write their policy into national law with some limitations (Article 15(3)). Those accepted onto the DFT are automatically given a legal aid lawyer if they qualify for one, and have not already got one.

The Home Office consider that the high refusal rate for asylum claims on the DFT that ‘this proof that their selection of cases for fast track is impeccable’ (Yeo, 2013: online). However, one major issue is the amount of time allocated for the solicitor to prepare the case before the substantive interview, in many cases limiting the amount of evidence that can be prepared. The published timeline (see Appendix 9) for the DFT timetables stipulates that the solicitor is given access to the client on the same day as the interview, and often with less than an hour to spare. Solicitor B explains: ‘it’s really just enough time to introduce yourself... You would be hearing the details of their claim for the first time during the interview’ (Solicitor B, Aug 2014). The 2014 *DA* judgement identified this shortcoming as being one of the most crucial problems within the DFT. However, the court refused to suspend the DFT on these grounds despite the findings, which is currently in the court of appeal at the time of writing.

Given the small amount of time given before the interview, some critics believe that this renders the process unfair, as there is no time to gather the evidence needed. Critics of the DFT therefore put emphasis on ‘frontloading’; a term that describes how ‘resources are implemented at the beginning of the asylum process in order to ensure high quality initial decision-making’ (Westaby, 2014: online). This is a recognised technique, which has been proven to improve the quality of the initial decision where there is evidence to gather¹¹. Although some are in disagreement over how frontloading should be carried out (Barrister A, August 2014), there is evidence that a similar approach leads to better safeguarding for vulnerable applicants on the DFT. Giving evidence in *DA*, Ms Mckinney explains that ‘The process works better at Yarl’s Wood than at Harmondsworth because they have longer notice of interviews’ (para. 173). Indeed, this is reflected in the figures; double the amount of those detained on the DFT in Yarl’s Wood are released before the initial decision, compared to DFT applicants in Harmondsworth (See appendix 10). This adds weight to the suggestion that frontloading aids safeguarding, and an unfair amount of time is given with lawyers.

¹¹ The Project, commissioned by the Home Office in 2009, concluded that there was no substantial impact on asylum decisions compared to the usual system, reporting that it increases the number of refusals and the cost per case. However, it evaluated that the system reduces the number of refusals, that there was an increase in granting Discretionary Leave, and the project reported improved decision-making for complex cases ‘early provision of evidence and witness statements’ (Home Office Science, May 2013)

As a remedy, Justice Ouseley stated that 4 clear working days with a lawyer before the substantive interview would increase the chances of the process being fair ([2014] EWHC 2525 (Admin)). Although this would be a big improvement on what has previously been a completely unworkable situation until now (Solicitor B, Aug 2014), some feel that this still not sufficient (Solicitor A, Aug 2014).

It does seem, therefore, that an asylum seeker routed onto the DFT is routinely denied their right to consult a solicitor in an 'effective manner', written into article 15(1)PD.

There are also suggestions that the way the duty solicitor rota is organised by the Home Office results in the legal aid offered to those on the DFT being less competitive, leading to ineffectiveness.

Home Office policy runs a duty solicitor scheme (informally entitled 'The Legal Surgeries') which it deal with any representation issues or legal advice. This agreement has in recent years been governed by an exclusivity contract which details that detainees in detention and more specifically on the DFT are only entitled to legal representation from only certain firms. This is set out in section 8.46 of the Standard Civil Criteria, and specifies a fixed fee.

This type of in-house immigration advice was put in place to '[improve] a detained individual's access to prompt quality legal advice' (IAC, 2008: 18). However, express concern due to inconsistency: 'some of the firms are good, whilst others are dreadful' (Medical Justice, 2013), (HM Chief Inspectorate of Prisons, 2013: 31)¹². Further, it only allows 30 minutes of free legal advice, and on a second visit to the scheme there is no guarantee that the same solicitor will be given again. In addition, many fear that the exclusivity of the system (and the fixed fee culture) creates a lack of competitiveness, as well as overstretches these firms in terms of resources: 'the contracts were offered to a very small number of firms which means there is a lack of competition for the provision of these services and this impacts on the quality of the representation' (Solicitor B, Aug 2014). Solicitor A reveals that the negative outcome of this allocation is that detainees become abandoned, waiting for their representative to have time to push their case forward: 'You end up having other detainees doing the representation for them,...filling in bail applications etc' (Aug 2014).

Indeed, this view was confirmed in a recent unannounced inspection of Harmondsworth IRC, referring to a peer mentoring role as a "buddy scheme": 'the number of advice surgeries had increased but too many detainees did not have a lawyer. Unaccredited and untrained buddies attempted to compensate for unmet need by assisting with form filling' (HM Chief Inspector of Prisons, 2013: 31). This insight demonstrates the inadequacy of access to legal advice, resulting in relying on untrained fellow detainees to help progress their case forward. The legal Surgeries currently run 4 days a week in Harmondsworth, and 3 a week in Yarl's Wood, which also created delays. In a recent survey led by BID, 60% of their sample waited one week for an appointment with a solicitor, 26% waited for 2 weeks or 2 weeks to date, 17% waited 3 weeks or longer in July 2014¹³ (BIDUK, 2014).

Despite this discussion implicating the ineffective nature of lawyer consultation for those on the DFT (and therefore again undermining article 15(1)PD), this also has impacts on the

¹² Staff of Harmondsworth IRC informed the inspectorate that 'some firms had a better reputation than others'

¹³ A total of 125 detainees were interviewed between 19th May and 13th June 2014.

effectiveness of the DFT. Given that administrative detention was upheld as lawful against ECHR article 5(1)(f) in *Saadi* on the basis of speed, this clearly has implications on the DFT as it is currently run (in particular relation to the appeals process once the substantive interview has been conducted). The 2014 *DA* judgement recognises this, but did not consider that this aspect of the DFT could be rendered unlawful on the basis of lack of evidence (para 85). However, Barrister A explains that this inefficiency alludes to unlawful detention, but that ‘the judge avoided that issue’ throughout the judgment, ruling only on the unfairness (leading to unlawfulness) aspect of Detention Action’s complaints. She added, though, that although inexcusable, the inefficiency would be unlikely to be ruled unlawful due to its case specific nature (September 2014).

Nevertheless, the oversubscribed nature of the duty solicitor scheme is sufficient to demonstrate that ‘legal visits arrangements were inefficient and disorganised’ (HM Chief Inspector of Prisons, 2011: 13). The effects of this extend to applicants being held for a period which is longer than necessary, contrary to the purpose of the DFT, which is speed. Although it is true that this problem cannot be given a specific remedy in general policy, in the absence of a time limit put of detention stays, efforts should be taken to ensure the applicant’s detention is necessary and proportionate at all times.

7 Fast Track Appeals Process

The inclusion of appeals to the DFT procedure controversially lengthened the average time in detention for the scheme. What’s more, critics believe that the time given to prepare for the appeals is insufficient for a fair trial.

The Immigration and Asylum Appeals (Fast Track Procedure) 2003 No. 801 (L. 21) puts a time limit of 2 days to appeal a decision, written into Rule 8(1) of the legislation. Rule 8(2) does allow for occasional out of time decisions, though only if it was considered ‘not practicable’ to submit the appeal within the time limit. This legislation applied initially to those residing in Harmondsworth IRC. It then extended to Yarl’s Wood, Colnbrook and Campsfield. The current governing legislation is The Immigration and Asylum Appeals (Fast Track Procedure) 2005 No. 560 (L.12). Rule 8 remains the same throughout the amended legislation. In addition, Article 39PD, provides the right to an effective remedy before a court tribunal (article 39(1)), with the freedom to lay down time limits connected to this right in national law (article 39(2) and (4)). Article 6 ECHR and article 14 ICCPR both define rights connected to a fair trial. In addition, article 6 of the Lisbon treaty allows article 47 of the charter to become binding on the UK; the right to an effective remedy and fair trial.

In the year 2013, 92% of fast-track appeals were upheld, not changing significantly from recent previous years (Home Office Statistics, Q2 2014: table as_12). Critics use this figure to prove that the DFT appeals system is inadequate. The Home Office, however, use this figure as a measure to show that the DFT is working well; the refusal rate in their opinion ‘showing cases suitable for fast determination were being selected with a higher proportion lacking merit than outside the DFT’ (*DA*, para 181).

However, the 2 day time limit to register the appeal from the refusal date means that there is often not enough preparation for the case because gathering evidence in order to support the grounds on which the detainee will appeal is difficult (Oakley, 2007: 17). As a result, weaker cases are put forward. This affects the outcome of the appeal, compromising the fairness of the trial.

In addition, the LSC-run duty solicitors are contracted to work on a merits basis; only if a case is likely to win (60% chance and above), or if a case is borderline (between 50% and 60% chance of success) will the solicitor be able to take on the case. Many LSC contracted solicitors strictly adhere to this policy, not just because the firms' resources are overstretched, but because 'representing a case that does not merit public funds can result in severe penalties for legal representatives and their firms. Under new rules soon to come into force, they could lose their contract to do asylum work if they do not win at least 40% of the asylum appeals they grant public funding to' (Oakley, 2007: 18). This is problematic because gaining evidence to prove the claim will not be solved (given the 2 day time-limit), and therefore may influence the merits test judgement. This undoubtedly contributes towards a large proportion of fast-track detainees unrepresented for appeal. In 2010 63% of those at appeals were unrepresented (Detention Action, 2011: 30), 59% were unrepresented in 2013 (Detention Action, 2013: 3). Not surprisingly, this impacts on the appeal outcomes as a whole. 'Only 1% of them won their appeals, compared to 20% of those with a representative' in January to September 2012 (Detention Action, 2014: 7)¹⁴. The Home Office has representation at every hearing. This set up suggests that the system is not well-suited to creating consistent conditions which ensure a fair trial.

Whether this is a breach of the relevant legislation is unclear. As stated, freedom written into the Procedures directive for Member States to create their own rules with regard to time limits and legal aid remain a national decision. It is also worth noting "inherent procedural safeguards"...cannot be found directly on article 6 itself' (Mole, 2000: 25)¹⁵, a degree of fairness can be derived from article 6 when defining the implementation of the appeals process.

Indeed, the ECtHR has already judged acknowledged the difficulty with accelerated time limits for asylum decision appeals. 'The courts have decided that where the State establishes the right to appeal, it must ensure that people can enjoy the fundamental guarantees of that right and that, in the way that it regulates the right, it does not restrict it so that "the very essence of the right is impaired"'¹⁶ (JCHR, 2007: 21). Therefore, although time limits to appeal are accepted as necessary by the Court of Justice, these time scales should not hinder the right to a fair trial so much that it makes it impossible for the applicant. This was referring to the principle of effectiveness considered in *Rewe* (120/78, para. 19) where the Court ruled that although Member States should uphold autonomy in their decisions, this principle restricts procedural rules so that they do not become "practically impossible" or "excessively difficult"¹⁷. Article 14 of the ICCPR emphasises this in upholding the right to a fair hearing, which is an absolute right 'very much comparable to those offered by Article 6 ECHR' (Reneman, 2008). It is therefore suggested that interpretations of the relevant articles

¹⁴ This figure is not much different from data during January to September 2010: '14% of appeals were allowed where the asylum-seeker was represented, as opposed to 2% where they were unrepresented' (Detention Action, 2011: 29)

¹⁵ Article 6 ECHR does not govern the decision to remove an applicant for asylum (*Maaouia v France* (2001) 33 EHRR 42)

¹⁶ *Saleem v SSHD* ([2001] 1 WLR 443), para. 458.

¹⁷ This conclusion was drawn in other cases; *Bahaddar v The Netherlands* noted the difficulty/impossibility of supplying evidence in a short time (para. 45); in *Jabari v Turkey* the automatic 5 day time limit 'must be considered at variance with the protection of the fundamental value embodied in Article 3 ECHR' (para. 40) (2000); in *I.M. v France* (2012) Strasbourg warns of the severe difficulty in gathering evidence within a 5 day time limit

39(2) and (4) are ‘limited by the EU right to an effective remedy and the principle of effectiveness’ (Reneman, 2014: 725).

From this platform, it is useful to explore the principles that arise from international and relevant EU legislation that may inform best practice within the area of an effective remedy in relation to asylum matters, and any further implications on the DFT. With the entering into force of the Lisbon Treaty and with is the strengthening of the EU Charter as binding, the weight of article 47 adds to this principle a right to an effective remedy, applying the rights laid out in article 6 ECHR to a fair trial, but taking away the requirement that the case must be one of civil rights or criminal charges, therefore applying to all trials, including asylum cases. It is therefore recognised for some EU Charter articles, including article 47 that: ‘the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider’ (OJEU, 2007: 19). This is suggested to encroach on the UK’s freedom to make decisions entirely autonomously, with many arguing that the EU case law concerning the right to a fair trial ‘explicitly includes the right to legal aid... whenever it is necessary to ensure the effective enforcement of rights derived from the EU legal order’ (Peers *et al.*, 2012: 46). Indeed, given the power handed to the Court of Justice to interpret the application of treaties in article 19(1) of the Lisbon Treaty, these aspects are developing. This further observation would impact on the number of detainees unrepresented at appeals.

The case law demonstrates an emerging picture limiting the use of autonomous national decisions if they are jeopardising the Right to an effective remedy and the principle of effectiveness. In the case law, limits ranging from 4 months to 5 days are considered to be potentially in breach of these principles. As stated, the UK has given a 2 day time limit to appeal, laid down in national law despite calls from many institutions and practitioners that it is not workable and unfair. In my view, it is incompatible with the UK’s European obligations where the rules do not render a procedure which is practically impossible to succeed in.

This extends to the way in which the LSC contracts have been made exclusive to the removal centres in question, stretching the resources and creating a culture of non-competitiveness, as well as the sanctions imposed on those contracting lawyers in applying the merits test incorrectly, resulting in those unrepresented at appeal outweighing those who are.

7.1 Fast Track Criteria: Appeals

Importantly, however, it is unclear in the first place why applicants are still detained under fast track criteria when appealing, and not general detention criteria (briefly: abscond risks or with a view to removal).

Considering the procedure at Oakington did not include the appeals process, it is unclear in UK policy at what stage this became part of the fast track procedure. In *DA*, the judge explained that there was a change, and it became policy to detain applicants under fast track criteria until they were appeal-rights exhausted. However, ‘there is no evidence of this change’ (Barrister A, August 2014). Further, the Secretary of State in 2008 alleged that it was the policy all the way through to detain on fast track criteria, contrary to the judge’s position (para. 59). Indeed, the policy change is confused and the explanation for it has never been properly explained, with the judge also not explaining the justification for applicants to remain under fast track criteria, only concluding that the justification would be the same as the pre-decision fast track justification; to aid a speedy outcome (para. 59).

As Barrister A explains *Saadi* detention was allowed on the basis of speed, in relation to the administration efficiencies such as timetabling, ‘but for an appeal, none of that applies. The only thing that person has to turn up for is the appeal hearing. And if they don’t turn up for the appeal hearing, then it can be... it can go ahead without them’ (August 2014). It is not necessary to be on site in order to detain carry out the appeal.

This issue is currently in the Court of Appeal awaiting judgment. The important underlying issue is general detention criteria of those that are abscond risks and to effect removal, though fast track criteria has a lower threshold, allowing those to be detained who are not abscond risks. It therefore seems likely that this part of the DFT is detaining those unlawfully, as they may otherwise not meet the normal general criteria for detention. If this is true, this would breach rights laid out in article 5(1)(f) ECHR, and amount to unlawful detention.

8 Flexibility

The ability for the DFT process to be flexible impacts greatly on whether is operating lawfully. Many feel the safeguards to screen and detect vulnerable clients are not strong enough.

As a result of the *RLC v SSHD* case brought in 2004, the Home Office were obliged to put a flexibility policy into writing (Home Office, Sept 2012). This sets out procedures which must be taken to ensure vulnerable applicants are not detained. The reason for this flexibility is to identify those who are vulnerable and unfit for detention. The Home Office DFT policy (Home Office, June 2013b) lists those exempt from the DFT, including, among others, mentally ill applicants, trafficked applicants and torture victims. Under Home Office policy, safeguarding procedures are laid out: Rule 34 which says that detainees are entitled to a medical examination within 24 hours of being in detention, and Rule 35 which is a report conducted in the detention centre documenting evidence of torture. Articles 20 and 17 of the Receptions Directive protect the right to adequate treatment for vulnerable applicants. Article 3 of the ECHR which prevents ‘inhuman or degrading treatment or punishment’ is also relevant.

Procedures to screen torture, trafficking and mentally ill patients at screening are, as seen earlier, conducted in a relaxed manner. The screening questions are brief, and the acceptance criteria low. In contrast, the exclusion criteria require a high degree of certainty with regards to the credibility of each claim. For example, those excluded on the grounds of mental health must ‘clearly lack the mental capacity or coherence to sufficiently understand the asylum process’ (Home Office, 2013b: 2.3). It explains that this decision should be made on medical evidence (although does not specify which medical conditions should be accepted), though it permits the screening officer to ‘apply their judgement as to an individual’s apparent capacity’.

On arrival to the centre, Rule 34 (applied by staff untrained in psychiatric care (Medical Justice, 2013: 4)) assists little; the criteria evaluating mental illness in terms of fitness for detention is still general: ‘suffering from a serious mental illness that cannot be satisfactorily managed in detention’ (Home Office, 2014: 55.10). The terms “serious” and “that cannot...in detention” were added after 2010, prompting a challenge by ILPA. In reply, the UKBA stated that the inclusion of “satisfactorily managed” is not defined, but rather a

measure to reflect the broad range of conditions (Cooke, 2013: 53)¹⁸. Most recently, in the case of *Das v SSHD* ([2013] EWHC 682), an appeal overturned a High Court Judgment that “serious” amounted to the condition needing hospitalisation, on the basis that this protection policy was inappropriate, as well as recognising that “satisfactory management” should not mean that the treatment offered in detention prevented only that the detainee could not cope with life, rather a lower threshold should be given to the interpretation to prevent only those needing hospitalisation falling under the exclusion criteria. The situation is concerning considering experts have warned that detention almost certainly increases the likelihood of mental illness: ‘this has produced evidence that the findings relate in part to pre-detention trauma experiences, in addition to detention itself having an independent adverse effect on mental health’ (Robjant et al., 2009: 310).

Indeed, this broad policy must lead to errors in applying the policy on a regular basis. In 2011 the court (for the first time) recognised a breach of article 3 ECHR for failing to recognise a serious mental illness in the case of *S v SSHD* ([2011] EWHC 2120), and then for a second time in *BA v SSHD* ([2011] EWHC 2748) due to ‘a deplorable failure, from the outset, by those responsible for *BA*’s detention to recognise the nature and extent of *BA*’s illness’ (para. 236). This finding is on the rise, with 5 cases in the last 2 years identifying a conditions akin to article 3 breaches (Medical Justice, 2014), with one more similar case settled out of court. At the detention inquiry in July, a key expert witness explained: ‘One of the six cases in many ways is the most important because there wasn’t an underlying mental illness, the whole of the mental illness which became so severe that the person’s article 3 rights were breached, all of that was caused, not just aggravated, caused by the detention’ (*Oral evidence*, [Katona] 2014). This is in line with Solicitor A’s warning of article 3 claims in relation to detention are on the rise (August 2014).

Similar issues are apparent when studying the Home Office flexibility to filter out torture and trafficking survivors. Torture survivors linked to the advocate group Survivors Speak Out reveal ‘the difficulty of disclosing torture, lack of effort from officials to find out what had happened to us’ (Home Affairs Committee, 2013: 116). The Rule 35 safeguard to identify those that have been tortured has been repeatedly found to be failing. Indeed, there is evidence this is happening systematically throughout the DFT operations, with a recent unannounced inspection of Harmondsworth finding: ‘Despite some releases in 2013, the Rule 35 process failed to provide an adequate safeguard for many vulnerable detainees’ (HMP Chief Inspectorate, 2013a: 14). Indeed, a test case representing those wrongly detained in this way has recently found that in all 5 cases tested, each was found to breach article 3 rights (*EO v SSHD* [2010] EWHC 3000). Jamie Beagent, of the law firm Leigh Day, noted that in each of the cases the Home Office had failed to follow its own rules, missing obvious signs such as scarring, not conducting the examination properly, or not affecting correct follow-up from the case worker due to the common position that the Home Office did not believe the applicant (Travis, 2013).

The Home Office guidelines (Home Office, 2013a: 3) acknowledge that Rule 35 examinations should be carried out with care, as those carrying out the examinations are not expertly trained, as is required in the Istanbul Protocol (a set of international guidelines detailing working with torture survivors), as IRC workers ‘are not expected...to be trained to the [Istanbul Protocol]’ (Home Office, 2013a: 2). The guidelines go on to state that the

¹⁸ This change was ruled to the policy was ruled unlawful in *HA v SSHD* in 2012 against Race and equality laws as they were introduced without consultation (para 208 (3))

examination is not a (more highly regarded) medico-legal report, and only constitutes independent evidence (and therefore qualifies for exclusion on the scheme) if ‘numerous scars’ are present and compatible with the applicant’s account of torture (Home Office, 2013a: 3). As a result, it seems Rule 35 reports are not fit for purpose and do not offer an adequate safeguard, indeed in evidence in *DA*, Ms Mckinney explained that none of her clients in her 8 year career have been released from the DFT on the basis of Rule 35 evidence (para. 173).

The flexibility policy written up by the Home office as a result of *RLC* identifies that if a request for more time in order to collect sufficient evidence to take a client out of the DFT is granted, the substantive interview should be rescheduled for ‘later that day or ‘no more than one working day’ (Home Office, 2012: 6). In reality, due to the timetable pressures, requests are made at the end of the interview, which are ‘generally refused’¹⁹, due to what the Home Office describe as ‘unsupported claims’ (*DA*, para. 173-7). Although this position has obvious arguments against it; Solicitor B noted that exercising flexibility was in order to gather evidence, as well as referring to the coordination of DFT staff with regard to their flexible approach in this as ‘very poor’ (August 2014).

As well as the negative court decisions, there has been national and international criticism of the Home Office position and execution of its policy. UNCAT in its last review of the UK described the lack of guidance and inadequate screening process disadvantaged torture victims and those suffering mental health conditions referring particularly to the ‘the fact that torture survivors need to produce ‘independent evidence of torture’ (UNCAT, 2013: 11) as bad practice.

Indeed, the reality gives rise to what some criticise as a culture of disbelief, with many believing that once the screening process has wrongly assessed a vulnerable applicant, the chances for the applicant to receive a positive decision are slim: ‘hasty decisions made at screening may in practice be irrevocable, whatever the jargon about ‘vulnerability filters operating throughout the process’ (Harvey, 2013: 104), suddenly the applicant’s story is doubted (Harvey, 2012: 10). The Home Office itself believe that in general the proof in a default negative decision would be a higher refusal rate, when commenting on the asylum statistics as a whole:

‘we suggest that if there was a culture of disbelief, meaning refusal is the default mode, there would be a lower initial grant rate and more decisions would be overturned at appeal. As noted above, we grant asylum in 30% of cases and of those we refuse and which are appealed, we are currently winning 70%’ (Home Office, December 2013c: 5).

This seemingly proves that the safeguarding system is failing dramatically.

The judge *DA* largely acknowledged these deficiencies, though indicated that a longer time with the solicitor would eliminate the safeguarding failure risk. In my opinion, although the shortcomings cannot be disaggregated (Barrister A, September 2014) this position still falls below the law; with the now regular finding that applicants are held in situations amounting to breaches of article 3, and the finding in *Das* that the policy on mental health has been unlawful shows the element of the DFT which is routinely contrary to article 3 of the ECHR,

¹⁹ Ms Mckinney had only had one 24 hour extension granted in her 8 year career.

and articles 17 and 20 of the Procedures Directive, is being routinely applied in the case of applicants routed onto the scheme.

9 Conditions of Detention

The conditions of detention for those on the DFT have become higher security than when the scheme was first started.

Article 14(8)RD permits Member States to provide the guidelines for the conditions of detention, so long as the period holding the applicant is ‘as short as possible’, with the only requirement that the conditions set must meet ‘basic needs’.

Although their liberty is restricted, applicants on the DFT are given more benefits than an applicant in prison, for example. The detainees have a mobile phone, access to fax and internet. The conditions are similar to a category B/C prison. Concerns have been raised about these conditions, declaring them unfit for holding people for administrative purposes (Shah, 2008: 291). The conditions were found in *DA* not to be affecting the fairness of the process (para 209).

However, the principle of the DFT, as it was tested in *Saadi*, was lawful under article 5(1) of the ECHR only if the four principles were satisfied. One of these principles being that the conditions the applicant remained in were appropriate, bearing in mind the trauma they may have faced in the past (para. 74). Indeed, mental health experts have long warned that there are many similarities between the current living conditions in detention for DFT applicants and the conditions they were likely held in if they were subject to ill-treatment in their own country, for example: ‘bars and uniform, keys jangling, screams of other prisoners, being in a cell’ (*Oral evidence* [Robjant], July 2014).

However, although the conditions are now far from what was established in *Saadi* to be acceptable, this still does not mean that the DFT procedure itself is then unlawful; Barrister A referred to the unacceptable conditions detainees are held in in France or Greece, where the standards are much lower compared to a UK-run IRC (September 2014).

Ultimately, the notion that stricter conditions are apparent in modern-day DFT criteria, does not seem to breach article 14(8)RD requirements to meet basic needs of the applicant, and would be unlikely to be a breach of article 5(1)ECHR, save in the event that there were not effective safeguards to prevent vulnerable applicants from being routed onto the DFT.

10 Detention after the Detained Fast Track

It is common for DFT applicants, after they have been refused asylum and have become appeal rights exhausted, to be continually held in detention under general criteria with a view to removal, or due to a risk of absconding.

The UK opted out of the Returns Directive (2008/115/EC) which provides for stricter rules on detention for removal; article 15(1) states efforts for removal must be in progress, and article 15(5) says the period allowed for detention for this purpose cannot exceed 6 months. This legislation therefore does not apply to the UK. For the UK, general detention criteria

apply, broadly set out in The Immigration and Asylum Act 1971. The Home Office Guidelines, however, are more specific, and detention on general grounds for those appeals exhausted on the DFT scheme is likely to be: due to an absconding risk, or to effect removal (Home Office, 2014: 55.1.1). The guidelines also note at 55.1.4.1 that the detention should be in accordance with article 5 ECHR, and the time period should be ‘reasonable’, though no upper time limit is given. In addition, article 14(8) of the Reception Directive notes the period should be as short as possible.

To consider what constitutes a reasonable time in detention to effect removal, is often to consider individual cases. However, the UK has been widely criticised for being almost unique in not adding an upper time limit to its detention legislation. Although the necessity for a compulsory upper time limit is now arguably becoming a possible requirement under article 5(1)(f)²⁰, with the ECHR beginning to recognise ‘the importance of setting a maximum duration for detention in domestic law’ (Lambert, 2012: 325).

What is clear is that the system in place at the moment is not cost effective and is in certain cases not necessary (Solicitor A, 2014), (Johnston, 2009). An FOI request made in the early stages of this project revealed that detention costs are on average £102 per detainee, per night. In contrast, section 4 costs per night are likely to be lower, though a second FOI request to confirm this was rejected by the Home Office²¹ (see Appendix 15 and 16).

However, it is true that all academics and policy makers believe that detention should be for the shortest period of time, even if a maximum time limit has not yet been set by the UK. But it should be remembered that the decision to detain after the DFT must be for a reason stated in the national guidelines. Taking the example of detaining for the purpose of being removed, Home Office Statistics reveal that only about half the detainees are actually removed, whereas the other half are released on Temporary Admission or bailed (See Appendix 17). What’s more, after 12 months of detention, the number of those removed compared to those released into section 4 accommodation are between a third and a quarter, with 2 thirds or more being released on bail (See Appendix 18), their detention serving very little purpose, if any at all. Therefore, the more they are detained, the less efficient detention becomes, and the less likely it is that they will be removed successfully. This conclusion was also drawn in a research study arguing for a time limit to be introduced (Detention Action, 2010).

Put in the context of the DFT specific statistics, much still seems the same: between 50% and 71% of DFT applicants were removed at the end of the process between 2008 and 2012²², despite the 99% refusal rate initially, and 93% of those appeals being “upheld”. It follows that the removal-bail/Temporary Admission ratio is very similar to the trend in general detention, further undermining the method of detaining for a quick decision, suggesting that a large proportion of applicants on the DFT do not have simple cases, possibly proving that the DFT is being misused, possibly leading to unlawful detention cases. It can also be argued from the data that officials are routinely detaining applicants without exercising due diligence to arrange removal. If this is the case, the detention system is potentially breaching article

²⁰ In *Mathloom v Greece* it was recognised that a lack of a maximum time limit pending deportation set in national law was a requirement of article 5(1)(f)

²¹ In reply, the Home Office explained that revealing this information would not be in the public interest to disclose the information as it needs to protect its commercial competitiveness (see appendix)

²² This evidence was divulged in Home Office evidence in *DA*, para. 73

5(1)(f) of the ECHR and article 14(8) of the reception directive on a more regular basis than is officially accepted, with regards to the DFT.

11 Conclusion

The research has highlighted that the UK Government should in part change the way in which Home Office policies are executed. With such a delicate balance between speed, fairness and unlawful detention, such basic failings in every part of the system should not be tolerated, and must be handled with more care, or abolished altogether. The DFT has evolved beyond recognition since *Saadi*'s controversial partly dissented decision that the principle was within the scope of article 5(1)(f) ECHR. Since then the signing of the Treaty of Lisbon has strengthened claims that this decision was allowing fundamentally a lower threshold than that which was allowed through collective reading of international treaties, therefore suggesting that unnecessary detention may be contrary to the EU principle of proportionality and necessity. This, in turn, highlighted the opting out of the recast directives, in terms of failing to adhere to minimum standards set by the EU, though it was concluded that this may be something that emerges in the years to come, depending on the way in which the ECtHR and the Court of Justice cooperate.

Indeed, many specific failings were found in the study of the practical application of Home Office policy on the DFT, finding violations of ECHR rights, and EU directive standards. The screening process was found to be correctly criticised due to its inadequacy to understand the full facts of a case before detaining it, possibly breaching article 18(1) of the Procedures directive preventing applicants being detained solely for being asylum applicants and, partly, article 12(1) PD relating to personal interviews due to the 99% refusal rate at the substantive interview. Ultimately, this failing can lead to the UK returning an applicant contrary to the principle of *non-refoulement*.

It was shown that the entry to the DFT for a quick decision seemed to heavily rely on the case being "clearly unfounded", which was linked to a quick decision, though not completely. Concern was expressed at the apparent informal arrangement surrounding certain nationalities and claims with no merit. This was proven by the sudden unexplainable spike in certain nationalities accepted onto the DFT which was not explained in overall asylum figures. This cast doubt on Home Office decision making, and criticised the lack of transparency.

Access to legal aid was shown to be ineffective in the sense that solicitors did not have enough time with clients in order to genuinely act in their best interests and prepare their claim. It was suggested that this breached article 15(1)PD which requires effective consultation with the solicitor. Justice Ouseley in *DA* has recently explained that more time was needed before the substantive interview to reduce the unfairness, though practitioners suggested that even this was not sufficient. Inefficiency was also apparent in the exclusivity contracts, with the effect of dampening competitiveness and not taking borderline merit cases on due to Home Office incentives.

The nature of the Fast Track criteria and its power to detain an applicant under the same justification of speed was challenged, concluding that this no longer applied to the detainees, and therefore they should either be released on bail to hear their appeals, or detained under new general criteria, ultimately violating article 5(1) ECHR. What's more, it was argued that article 39PD detailing the right to appeal and the right to effective remedy and the principle of effectiveness jeopardised the appeals process, in particular the 2 day time-limit.

The much documented vulnerable groups were discussed through the filter of the Home Office's flexibility policy. It was concluded that the case law had already begun to acknowledge the degrading treatment suffered at the hands of wrongfully placed torture survivors, mentally ill detainees and trafficking victims akin to article 3 breaches due to its vague policies on the subject. The routine nature of this breach is unacceptable.

The conditions of detention were examined and it was concluded that, although these were no doubt contrary to Saadi, they were not so bad as to trigger an article 5 ECHR claim, save in the context of the vulnerable groups discussed previously.

Finally, examination of the period once the DFT had finished and the general criteria were applied, found evidence that only 50%-70% of DFT applicants were removed from the UK, further to undermining the initial 99% refusal rate that comes with months of subsequent detention. It also concluded from the statistical data that detention only effected removal in around half of all cases, with the other half serving a period in detention before being bailed; their detention likely served no or little purpose.

The thesis has shown how far the DFT has evolved beyond recognition from the *Saadi* principles, possibly breaching article 5(1) ECHR in a few ways. However, it has also identified the areas in which it could be approved. Taken and applied together, the concluding recommendations would make for a much fairer accelerated system.

12 Recommendations

- **Opt-in to the Recast Procedure, Reception and Qualification directives, as well as the Returns directive** – adhering to minimum EU standards will mean UK practices with respect to accelerated procedures are in line with EU principles
- **Reform the screening process** – make the process more tailored to gaining information needed to correctly route an applicant onto the DFT
- **Increase access to Legal Aid** – ensure that the majority of applicants are represented at their first appeal
- **Stop applying the Fast Track detention criteria to the Fast Track Appeals process** – the justification for the accelerated procedures does not fit with this context
- **Apply a period longer than 2 days to appeal a negative decision**
- **Reform safeguarding process: Rule 35, Rule 34** – ensure that these examinations are delivered early on in the detention by expertly-trained and dedicated professionals.
- **Apply the decision to remove sensibly, taking more serious steps with a view to remove the applicant** – to avoid a period in detention which is longer than necessary
- **Apply an maximum time limit to detention in the UK**

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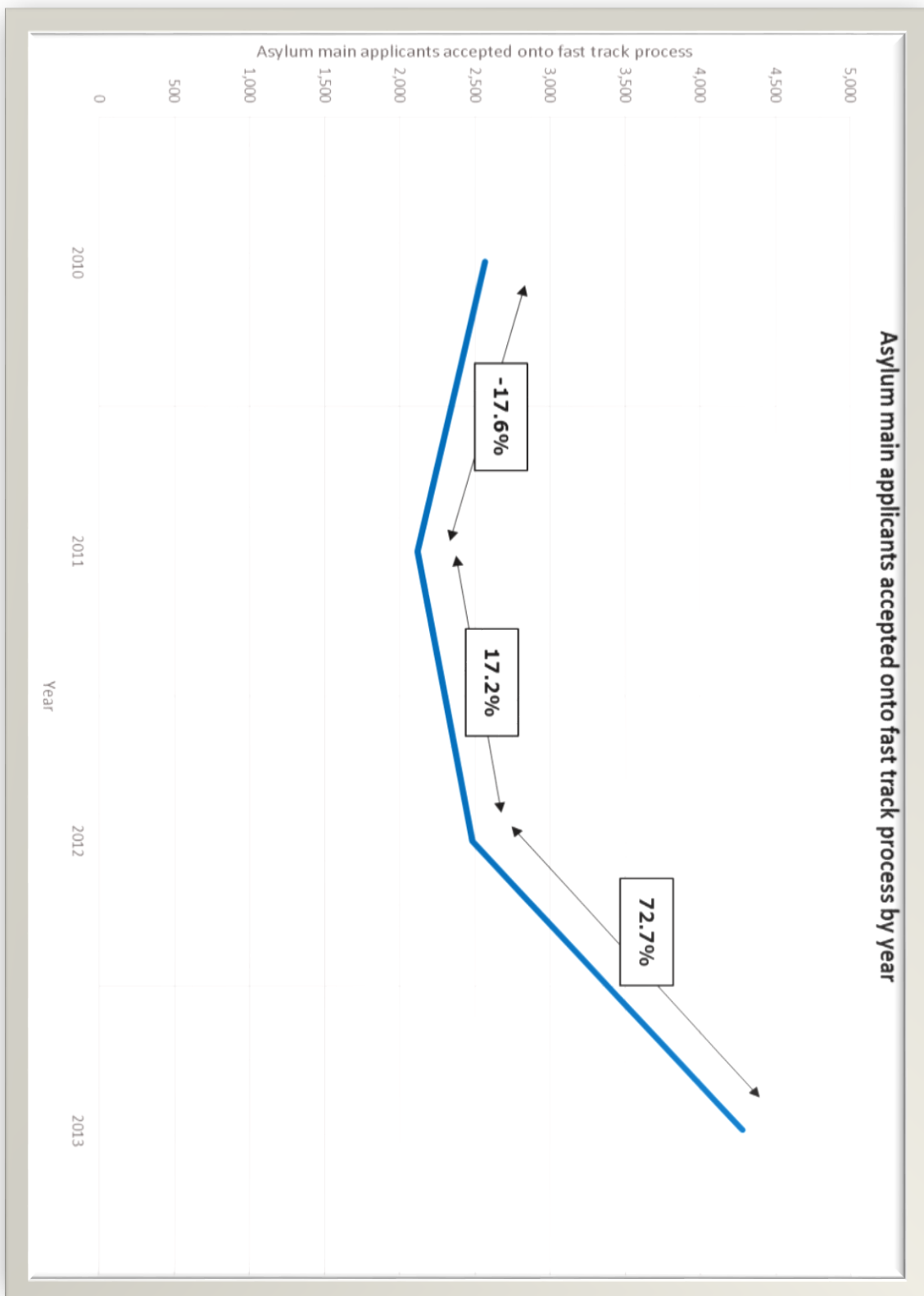
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Appendix 1¹



¹ (Home Office Statistics, (Q2, 2014) as_11)

Appendix 2

Eleanor Glass interview (Solicitor A)

1st August 2014, Holloway Road

1. What do you find the most frustrating thing about dealing with detainees on the fast track? I don't often deal with clients on fast track, and it's because of a problem with the fast track, that they basically are anonymous people that are in detention, and because they get put on fast track and because they qualify for legal aid usually means that often they just get allocated a lawyer and we never meet them until it's too late basically. We only come across them when a charity like Detention Action refers them to us after having coming across them. But you hear horror stories all the time of what happens to those clients.

2. When it is too late often what part of the system are they when it's too late?

Um normally it will be sort of working towards removal, after the decision. Normally, well not normally, it's supposed to move very quickly. So normally the negative decisions come very quickly. There are cases when people are just left on fast track, and it's not fast at all, but once they actually say OK we don't believe your asylum claim, they've gone through the whole appeals process very very quickly, and then they try and remove them. And then when it's circumstances like the don't have identity documents, to actually be removed with anyway and stuff like that, and then they can get stuck in the whole detention system out of fast track I mean the normal detention process.

3. Yes, often once the negative decision has been given, maybe when they still have appeals or when their appeals have been exhausted, they end up being treated like someone who hasn't been on the fast track who's been detained.

Yes, they become a normal detainee. They are a non-fast track detainee. They've completed that process, and they've been shoved onto the next general, people they are generally trying to remove. Now if they've never been outside of the detention centre, they are not going to be able to have formed any links with anybody and they have to rely on charities or somebody in the detention centre to help them, because you know a lot of them won't be able to speak English, they won't have any financial means you need to get in touch with people.

4. In terms of the law, they have to apply certain criteria in order to hold the detainees in the centre, and the detained fast track criteria to detain someone is slightly different to the people who are in normal detention, is that right?

Um, it's like, people in detained on the detained fast track are, well they are put there because it is believed that their asylum case can be decided quickly and mostly that's not true because when you're talking about someone's life and history it does get very complicated and you know there is hidden depth that you'll never be able to find. But once people are actually in detention to be removed, um, a decision has already been made that they can be removed.

Well, it should have been made, it's not always but it should have been. Um and they should only really be detained if removal is imminent. That is what is supposed to happen. Whereas detained fast track clients, they can just detain them. Um there's that criteria that isn't, you know, the decision may be imminent, but the actual removal could never be imminent, as you have to go through the process.

5. I always find it strange that have Short Term Holding Facilities that they put people in when removal is really imminent, and that fact that they are also allowed to detain people because removal is imminent for a longer period in detention centres. Does that ever come up?

It's not really something that becomes important within a case, it's just something that's interesting within the process and procedure. I mean SSHFs are often used when people are

being transferred to larger detention centres, because there is often not spaces sometimes. I've had a client that has been held in a short term holding facility for like a week, even though they are not supposed to be at all, it's supposed to be 2 days, because what they will do is they will try and confuse the system by actually saying OK we're going to take you somewhere else. And they take them somewhere else for like half a day and then bring them back. And it is part of (although I think we are quite cynical) but I think most people working in the sector would say that they do it on purpose to these people to try and encourage them to agree to removal. I mean there is some times when, even if they want to, they can't agree to removal, because they don't have the travel documents to do it.

6. On average, how many times is that the case that the travel documents are the barrier to removal?

Um, I've come across it a lot, a lot. Especially with long term detainees, that is the real problem. I mean once someone has been there for I mean even 3 months, but once someone's been there a year, 2, 3, 4 years which we see, um, you know clearly there's a problem. And removal is no longer possible. We had a client who now has status. But was held in um, it was true that he did frustrate the process he did fake his identity but they kept him in a high security prison for 5 years after his sentence after he was due for release, under the immigration act. But what they did at the time is that they would move him from different prisons, from prison to prison, and back and forth, back and forth, to try and unsettle him, and he had no idea where he'd be from one day to the next. But he still managed to be there for 5 years.

7. And was his crime particularly serious was that what it was?

Um he, I think they perceived it to be quite serious, but actually when you look at the circumstances surrounding what had happened they weren't anywhere near. You saying certain names of an offence that you know strikes a chord... I don't know if you say like robbery, then robbery can be many different things and there are many different levels, so, you know. They get treated at the highest level the whole time even if they have done everything that they can to reform and if they have completed their sentence, they've done rehabilitation during it means nothing, because they will always be an offender in the eyes of the home office.

8. Have you ever had a situation for example where you're representing a client, and the fact that they move from one IRC to the other disrupts the way that you can help them?

Yeah absolutely it's happened a number of times. One of the biggest problems is when they move them to Scottish detention centres, Dungavel, so suddenly you are not able to act anymore because the law and procedure up there is different and they are better served by somebody a Scottish lawyer who actually understands the systems up there, because you wouldn't be acting in the client's best interests if you carry on. And that can be really problematic. And also um I mean because we don't do legal aid it's not so much of a problem for us, but we see it all the time with legal aid solicitors. Suddenly they are unable to represent their clients anymore, um depending on the circumstances.

And what might also happen is, so we've got someone who has been detained at the moment, who is not, I'm not acting in his immigration case for him I'm doing something else for him but he has a legal aid solicitor. He's not getting on very well with them and um he doesn't necessarily what them to represent him in his asylum anymore but there is three firms only contracted at the detention centre he is in um one doesn't have a very good reputation, the other not so much, and then there's one good one. But the chances of him getting with that firm are really really very slim. And if he doesn't get any of those and he loses his current solicitor then he's stuck there. And we will have to work, do it pro bono or something has to happen. So I don't know but there is a lot of that. That's the problem of the new legal aid system – moving people around the detention estate.

9. So it's a new thing, moving people around?

Well the detention contracts, I'm not entirely sure when it started but I think it was like 3 years ago roughly like that. So before that anybody could represent anybody in a detention centre, it was just when they started limiting legal aid that that happened. And so now only certain firms go into those detention centres.

This guy for example who is in detention now, he was represented by them prior to going into detention, he is allowed to stay with that firm, when he was transferred to detention, it's just that if he loses them that it's hard so if you are instructed previously it's fine. But if you lose them that's a problem. But it's ridiculous because how can 3 firms represent a whole detention centre. It's not possible. It's impossible. Most of them don't and they just sit there. And they don't have anyone to represent them or do anything for them. You end up having other detainees doing the representation for them, you know, filling in bail applications and all those things. Which they don't know what they're, I mean, they might have some experience but they don't really know what they are doing, they try hard, but what can they do. So.

10. How often do you agree with the Home office decisions?

In a very generalised way I can understand their aim of the home office and what they are trying to achieve. The problem is that it doesn't work. I've known a clients now in a personal capacity but I met him in 2009 through Detention Action. He had section 4 accommodation for after detention and he lived in the same accommodation for the last 2 and a half years. He's just been moved to new accommodation nearer Heathrow, that way, and it's like um he says it's like an apartment blocks and he said it's so weird because he walked there and suddenly he saw all these faces he knew from detention, and it's all those people who are kept in detention for so long and they were all eventually released one after the other and back into the community and that's because it doesn't work. So they have just spent millions of pounds detaining all these people, they are probably most of them are getting compensation because they have been unlawfully detained I imagine um and now they are having to pay for their housing in the community as well. I mean it's just absolute evidence that it doesn't work. It's crazy. And the effect, it's completely underrated the impact on the people who are detained and because it has become so normalised now even the judges are fed up of it. All these judges who are deciding unlawful detention claims, but they don't actually, they think that 2 years actually is a fine amount of time now, whereas before that was scandalous. And the Home Office would have been punished.

11. So what changed do you think, do you think everyone just got used to it?

Yeah, it became normal. Just normalised it I think. And the judges got fed up, everyone gets fed up, it's just not a constructive system. I mean they do need to remove people, I don't like that, I don't believe in it in a sort of general philosophy but I understand that they do need to do it. But um the decision to detain needs to be taken very seriously. If that was a British citizen that was being detained um the reaction would be very different. If that was one of Theresa May's family members who was put in detention it would cause uproar. I think the problem is that people making decisions end up thinking about the applicants as if they're names, numbers, animals even. It's just they, they're not human.

12. In terms of bail applications, do you agree mostly with the home office's decision to refuse?

The Home Office decision for bail are absolutely rubbish. So request for Temporary Admission – those are never never granted ever – ever. I've never ever come across a request for temporary admission that's been granted. Um occasionally people if there is a really really strong case, and we've asked and we've submitted for example a rule 35 report asking for temporary admission then a little while later they will release them but they'll never put it into writing saying we've accepted your request for temporary admission. They might

eventually act on it, but mostly it's always a written refusal. And then when you make your bail application, the requirements now, or what you need to be able to be granted bail for an immigration judge to grant bail are mostly incredible sums of money, impossible requests, the judges who decide immigration bail generally are known to always refuse. Depending where you are, which court house you go to – Taylor House is known to be slightly better than Hatton Cross and different ones, but you will get refused unless you really really put in you know £1000, sureties – you've got 2 very credible sureties, you've got a good address to go to, you know you've got so many different things, um that's the only way.

The problem is that you can turn up for a bail hearing as well and you could get, the detainee could have travelled there 5 hours just to get to the hearing just to be immediately told no. But just because obviously one judge will say oh we need this bank statement and another judge would never have thought that and said oh we need something else, and even if you try and prepare fully, you'll never know exactly what's going to be in a judge's mind. And then now you're not going to be able to apply, you have to wait a month to reapply. And they're changing the law again for bail in the immigration act.

13. Does the new immigration act affect bail, or is it just affecting the appeal?

Er there is changes for bail and I'm not actually up to speed with it yet, but it's because they don't know what's going to be brought in definitely yet, when. But mostly everything is worrying in that act. And it's really scary how quickly the act went through. And the removal aspect is really really scary, the fact that they don't have to give notice of removal anymore. They can just basically say you're an overstayer, we are going to remove you later. Obviously you can Judicial Review it but it's not the same, so that's really scary isn't it, we'll see what happens.

14. How often do you think that the Home Office makes the wrong decision to detain someone on the DFT?

From the statistics that I've seen, the likelihood is that if you are put on DFT you will be refused. And that's no matter what your circumstances are. And it strikes me that people that they just choose to be put on the system, they can't all be false. Because how it doesn't make, even if you wanted to, well however you look at it doesn't make any statistical sense from what I hear from charities and other solicitors is that generally the decision will be flawed. And it's not surprising because people have got no time to actually prepare and they don't know that they are going to be put on Detained Fast Track before they come here. And they won't often have the documents, so if you can't prove a case because you don't have the documents, you don't have the language skills, you don't have a proper solicitor or any of those things, then the likelihood is you're going to get refused because you can't prove your case. So it follows that a lot of those decisions will be flawed.

15. Because this relates to the fact that the Home Office makes the decision a bit too early (after the screening interview) to put them on DFT, before they have enough information to make an informed decision.

Yeah they do it almost immediately. That is certainly a problem. They used to say that the white list was not what they used for this purpose, but actually it's quite clear I think that when you look at the type of people that they are detaining on the DFT that may not be so true. And more often than not it's single men of a certain age from certain countries um they will be on that list you know you, almost to a point that when you see asylum seekers who aren't on that list, I mean who aren't on the Detained Fast Track, you look at them and you think, why not? You know. Not that you want them to be but you just think oh that's funny because you just expect them to be now. Nigeria, I think Nigeria, I mean the political system now is slightly different now but I think generally it's been a nationality that you think yeah you're definitely going to be on the DFT. Once that decision has been made the decision has been made. It's very very difficult then to overturn it.

16. The Refugee Law Centre case in 2004 was lost to the Home Office, but out of that case the Home Office was ordered to be more flexible which they claimed to have done. In your experience, are they more flexible in terms of dealing with DFT cases?

In my experience and what I hear mostly is even if you're going to try and get them off the DFT you really need something strong, to take them off the DFT. It's very difficult, once they're in that mindset, and it happens across the board with the Home Office, I find that it's very difficult once you're in a certain department and have been put on a certain plan, just to get them to see something else and listen to representation. I mean knowledge representations are so so difficult, you really need to have a strong medical report for strong expert evidence whatever it is that you can get your hands on really to try and change it. But you know to be able to do it by writing a letter without having anything else to back it up it's not going to happen.

17. How many unlawful detention claims do you make?

We don't really do unlawful detention solely, we have had unlawful detention claims connected with some of our cases in the past, but I have tended to refer them to other firms to do unlawful detention. People I know have had unlawful detention claims and have won quite significant sums of money by doing so. Not that they can access it, but! Because they can't open a bank account so. It's a big issue for people who have never had a bank account before their detention then they actually can't open an account.

18. What are the strongest grounds for unlawful detention, it's not really length of time anymore is it?

Um no, it depends on the personal circumstances of that case, so a few that happened around the same time where the Somali cases where this European case of Subi and Elming came out hih basically said you can't be returned to Somalia Alshbab will get you! That's basically you will be in danger wherever you go so that was a case that made quite a big difference – once that came out any Somalis that were detained couldn't be returned automatically they sort of unlawfully detained them or it became unlawful to remove them, and I think it's the same with (over the years depending on the countries but) Zimbabwe and a few others. So there are situations like that where an actual country would qualify. Or maybe um for example er talking about Uganda – I mean they passed the anti-homosexuality law then and you could prove your client to be homosexual (although that's another point of contention about how the Home Office treat homosexuals), but it is situations like that where it is indisputably going to cause you serious harm on your return, and your detention therefore becomes unlawful. Now there's been cases where you think that people should qualify for unlawful detention but they don't and sometimes the reasons that are given for that are surprising. Quite often now more so than before is that we are using what the actions of the detainee have been and they sort of accept that the Home Office may be does struggle with the sort of capacity it has to make this decision – a huge decision. But it shouldn't be that way because the statutory rules and limitations and requirements on them to review detention and things should be in stone. But I think, like I said before about the immigration judges they get fed up and bored of hearing about it – it's normalised now. So it's literally like it's no big deal anymore. And as far as I understand it unlawful detention claims are generally weaker now than they ever have been. It's difficult for me to say though because I haven't had much interaction with them recently but there was a period of time I was quite involved with that and from what I hear it's not... and I've noticed some surprising decisions that I've thought now how could that be.

The other thing is article 3 we've had a spate of article 3 cases where their detention was found to be unlawful but that's like the highest level that you can make I mean that was even possibly in the balance you didn't know that case was going to win. I'm talking about people

who have extreme mental health problems and are known to have suffered serious torture or similar scenarios – there is a policy that says those people should never be detained so. The thing is is that the detention estate can never deal with the multitude of issues raised by having that many detainees with different experiences, whether they are Foreign National Prisoners, whether they are over stayers, and as a case worker having to deal with these people even if you were arguing with a specialist group I think it must be overwhelming. And I think anyone would struggle to be in their position. It doesn't make it OK but something needs to be changed, although it looks like they are getting worse.

19. As a consequence of the DA v SSHD case, the Home Office have agreed to let clients have 4 clear days with their solicitor to prepare for the case. The idea being that more time to prepare will iron out the problems highlighted by the claimant. Is 4 days enough in your opinion?

I mean when you're talking about a legal aid firm, and legal aid solicitor that is allocated to DFT, I mean they are obviously on the list but without warning you have to drop everything and all their other cases for 4 days to make the most of the tie for it to have any sort of impact. Because you are switching from case to case, you can only have a certain amount of time to fit people in. That type of deadline is very very difficult for people to work from. And actually it doesn't give you enough time to be able to obtain any of the connections that you would need. If you're lucky you might be able to get a doctor to come in to assess them, but you're not going to be able to get any documents from abroad, you're not going to be able to get any translation in that time, the likelihood is you're not going to be able to get the necessary appointments for people who need to assess that client in that time. In my opinion, you need at least 2 weeks, not that that would solve the problem but even to begin to try and think about having any redeeming features of it at all – at least 2 weeks minimum. Saying that though, it just does not work, however you look at it, it is never going to work but 4 days is certainly not enough.

20. In terms of Foreign National Prisoners, once they have been given a sentence of 12 months or more, they are automatically given removal directions.

Yes they automatically qualify, the secretary of state is required to deport them.

21. And that means that they can be held in prison indefinitely. (Sol: basically yeah) That would just never happen to a British citizen just ever, would it?

Normal procedure for immigration detainees in prison is that immigration detention begins from normally after half of the sentence has been served so you don't normally do a full sentence anyway. But in fact you would probably end up doing a full sentence because you will be held under immigration powers, if not longer. But yeah, you'd never be held longer than what is set by the judges and by law, if you did, again it's one of those situations where there would be public outcry; it doesn't matter if you're a foreigner.

22. The public opinion is quite in line with that as well isn't it?

Yeah I think that's probably right. I think it is generally thought you know the sort of daily mail type heading which says: if you have come to this country, then you can pay for it, whatever that may entail. And it doesn't matter if that client is very very vulnerable. And actually in some cases it takes very very little to get a 12 month sentence. They serve half the sentence and they assume that they would be due for parole. Because they get a due release date. We've had people who have never been told that they might be detained after, so they are expecting to be released and then they are not handing out any information and then suddenly, they continue to be held, and this is quite common. When I first started, when they started holding people in prison we were really shocked that immigration detainees would be in a prison after they had finished their sentence. They might have been moved to the slightly higher security part of Colnbrook but that was accepted – maybe slightly higher security but you are allowed to have a phone, your visiting system is more relaxed and flexible, there are

so many different advantages you know, as it's nearer to the freedom that you should get. It's easier to get in touch with your lawyer as well, which is one of the main things. We've had clients who have been in prison, they may have had for example a criminal solicitor but now also need an immigration solicitor, but they are not necessarily allowed to have both solicitors on their call list, but they might want to have a charity on there as well, they might want to have family but they are very limited – depending on which prison you are held in determines your rules governing your call list in terms of how much time you get and how long you get. And if you only have 5 seconds to speak to your solicitor then there is no way that you can take instructions. And you might need to take instructions from them because you suddenly get a letter from the home office, but you have to then write to them, they then don't get that letter for 3 days maybe and then how long does it take for them to get back to you, do they even have the means to write back to you if you haven't enclosed a stamped address envelope. By that time you might have had a week and a half go past, but the whole situation could have changed. You've not been able to take instructions, the Home Office has tried to issue some type of notice or intention or whatever but you can't even tell with them – it's crazy and frustrating. I had a client and there were certain things that he needed to prove about his case, but the only way he could do it was having more freedom because he needed to get to contact people because he had his documents and things at home, which only he would be able to go through – he had to prove who he was and what background he had and what schools he'd gone to and all this but there was no way he could do it. It was impossible. It was for us to make those investigations which a) is impractical because we just don't have the practical ability to do it and b) we aren't special investigators you know and there is not infinite money- you have limited time and limited money so there is only so much that you can do and we will do whatever we can. But a lot of that it can't be achieved without the actual help of the client.

23. What do you think of HMP The Verne that has recently opened?

It seems to be slightly coincidental seeing how many FNPs they have held in prisons currently. To be honest it's not actually that surprising, if that's what they are going to do, as soon as they introduced this temporary policy to detain FNPs in prison after their sentence it was obvious – once they make a decision like that they are never going to go back on it – they ever do. It can only become more restrictive, at least that has been our experience. So it's not really surprising that they want to open up a prison for FNPs solely where they can manage them in that way. Obviously I don't agree with that but I guess with enough campaigning potentially that could be beneficial for FNPs in detention because it might be easier to say that those people should get more rights than they would in prison, because if you are in a prison system and you have a mix of people, how can you say well that person is allowed to have more time on the phone than that other person. You can't control it in that way. Whereas if they were all allocated to just one centre then potentially they might be allowed some more flexibility I don't know but it remains to be seen what's going to happen. It would make perfect sense and would not be surprising if they are holding both FNPs and detainees who haven't offended in The Verne, though it is difficult to know what they are actually doing. It's really worrying.

The other thing that struck me about the prison situation is that a lot of the prisons are really remote so if you want to go and take instructions from somebody in prison, like I had to do, you can get to where it was but it took me so long to get there, I ended up having I think a 45 minute cab from the train station into the middle of the countryside, and then had infinite problems trying to get in to the prison itself even though it had all been pre booked and pre-arranged, and then actually we didn't even have a private room it was one open room with people taking instructions all in this one room. It was crazy. And a very limited time as well the time I was given was about half the time that we had been allocated. And you travel

however many hours to get there to sit there for not even an hour, which is unsustainable for a private or legal aid firm that needs to keep their business going. People won't go because it is ineffective. That particular case I never even got paid for it. And when things like that happen it does make you think again when you hear of somebody else in that similar situation, you just think can I afford, for the sake of my other clients to travel all that way for such a short amount of time, for not much professional reward. The upshot though of us thinking that way is that people get abandoned. And getting abandoned in a prison is probably the last place that you are going to get abandoned.

There's always records to be broken – at the moment the longest detention period I've dealt with was 5 year but I have heard other cases being longer. It's a huge part of anybody's life. And the worst thing about it is that the drama doesn't end once you get released um you're just partially free. My friend has been released now for over 3 years and he's still in limbo, still waiting still nothing happening. Can't work, that's it so yeah.

Interviewer: Thank you so much for answering my questions it's been really useful.

Elly: No problem!

Appendix 3

Transcript of Interview with Alex Finch, (Solicitor B) Fri 15th August (typed up 16th) via telephone

1. What is your background, who do you work with?

I qualified as a solicitor in 2010 and was working at that time for Thompson and Co solicitors which is, um, sorry I meant to ask you before. You're not planning to publish this? The firm has a contract with detainee fast track. Doing detainee Fast Track (DFT) work fairly regularly from 2012/2011. We also conducted legal surgeries. I was involved in detainee DFT as a case worker, doing that and bail hearings. I think I did approach detention action group (or something similar) a few years ago trying to provide some help but they never got back to me. I have now left legal aid and I'm not practising, I'm no longer regulated. I'm a non-practising solicitor. I am on the role as a solicitor but non-practising. I no longer work in legal aid I only do private work now. My knowledge of DFT is at least 9 months old.

2. When you were working with the legal aid with the people on DFT, how flexible did you find the home office was? Particularly in the initial stages of allocating them legal aid. How flexible were they in giving you more time, to get the representations together before the substantive interview, and flexible in terms of being able to take them off the DFT if you felt as if they shouldn't have been on it?

Um, that's a very good question, I'm just thinking. I would say that, erm, there was a – I would say that there were medical reasons for – I would say firstly that most detainee FastTrack case workers were aware of the criteria for, um, for exercising flexibility. They've got their flexibility policy, um, and they're aware of what the document says. But the documents can be interpreted either conservatively or liberally, and, er, so the areas in which they adopted a very restrictive, um, – let me put it another way – the areas where they were, er, adopting what I would consider as a reasonable interpretation of the flexibility policy were in the medical cases – so where someone was literally saying 'hi I'm unwell I can't be interviewed' or where there was substantiated evidence of torture, but where, um, in my experience, er, in other cases, so not involving direct medical grounds, the detainee FastTrack caseworkers were very poor at exercising flexibility because the timescales for example where further documentary evidence had to be obtained and time was required to do that, um, they were, I can't remember an instance in which they did exercise flexibility. And many of the cases in which they did refuse to extend timetables then went on appeal and on appeal the court did then give more time but, er, erm, even though the home office is supposed to actually be a primary decision maker, in my view that was inconsistent with the, I mean the home office is supposed to make a decision that is supposed to be standing up by itself, whether the claimant qualifies for asylum; in practice they tended to view the totality of the process. So their initial decision and then the decision of the judge as the primary decision so they would be satisfied if, um, they just initially wrote down all the reasons why the claim should be refused and then see what happens on appeal, is generally the attitude. So, where more time is required to collect more evidence, um, which is going to be relevant to issues in appeal, they are very poor.

3. In terms of, let's say, somebody who claims to be tortured, obviously claiming to having been tortured is not enough for them to assume you were, but did you also find that to

be a problem, if you had to obtain further evidence that they were tortured (like an independent report). Would they be inflexible with regards to that?

Erm, well, can I offer you an anecdote? That might be more useful to you than a general judgment about whether they were good or not. I had a client who was from Pakistan. So he was claiming to have been stabbed shortly before he left for the UK and he said during his interview, um, at which I was present, sorry I can't remember if it was an interview, but he certainly said during the asylum interview: 'go and look in my bag which is in reception at Harmondsworth it contains my tunic with my blood all over it'. And they literally said to him 'erm, we can't go and look in your bag'. Erm, they refused his asylum claim, and at the appeal (laughs), it was quite a dramatic moment for me because I was the advocate for him, er, we were then able to get his bag, because it then turns up at court when at Hatton Cross, he was able to pull it out of the storage bag that it was in, in front of the judge, revealing that it was indeed covered in (someone's) blood, erm, I don't know if it was really his blood, it was a pretty compelling moment and we won the asylum appeal, but the home office had opposed all attempts to facilitate getting hold of that tunic. It's not just a question of flexibility; it also a question of their coordinating flexibly with the detention centres because whether he can get hold of his tunic (which is in his bag) is also dependent of Harmondsworth erm which is run by Serco, which is run by the home office, um, so it's not just a question of what the home office are doing, so much as there's a whole shebang of Serco, GO and the home office all sort of working together but it's just absolutely crazy that they ended up losing this appeal which, a). they should've just said 'right let's work out a way that we can have a look at this tunic' um, if they'd done that, firstly, if that was his blood then they should've allowed his asylum appeal originally and if it wasn't, they could've had a good look at it and might've been able to determine, erm, you know, earlier, but....

4. If a client of yours was put on the DFT and you strongly believed that he shouldn't have been on the DFT because he met one of the exclusion criteria, was there a procedure that you could use to get them off the DFT that worked?

Well, no, I mean it's also possible to make representations. But I would say that the representations were at least dealt with by the fast track and at least Harmondsworth, even if the response was usually 'no', at least they did respond fairly quickly to any of questions of temporary admission if you write them a letter as soon as you realise what's happening saying 'he's got to be released because of blah blah blah' they'll write back their letter saying no because we might lose him and then you'll apply for bail.

5. Was it possible to apply for bail before the substantive interview?

Before the substantive interview, no. You won't be able to get a bail listing because you get told about the nature of the client and have a possible opportunity to speak to him you know about 24 hours before.

6. So the only thing that you could do would be to make representations, even though they were dealt with, they weren't usually successful?

You'd have to, yep, er, make the representations at the interview. Say during the interview that he's being prejudiced for whatever reason and then on a PLR visa the whole process has been corrupted from the beginning because of this procedural deficit

Theoretically you could lodge a judicial review, sorry not a judicial review, theoretically you could lodge a habeus corpus but in practice, no, probably incredibly unlikely.

7. So even though you believed he shouldn't be put on the DFT, even though there are technically options available to you, they didn't tend to work. You'd have to wait for the substantive interview?

Well, I mean, to apply a habeus corpus, you'd have to apply to the legal services commissions, I mean I think you'd have to apply to the legal services commission (or whatever it's called now), erm, to get funding. The solicitor in question, even if they believed that there were some sort of grounds for arguing that there was unlawfulness in the detention, they would be investing substantial time in applying for funding, erm, to go for habeus corpus, and to represent people in that situation effectively requires an enormous commitment of time and energy on the part of the solicitor.

8. In terms of bail, because we were moving onto bail, did you find that you were in agreement with the bail decisions that the home office made?

Well, no, obviously I didn't agree with what they were saying. I'm not sure if I can answer that question. Did I tend to agree with what the home office decided on bail? Erm, I don't know, there's too many cases to consider.

9. Sometimes they would refuse bail because they thought they would abscond, from that angle, did you ever come across a case where you thought the home office was making the right decision that they may abscond, or that the evidence was substantive enough?

I don't think – sorry, it's slightly hazy in my mind. I don't think you can oppose bail. I don't think you can, I don't think the home office need to ask you that this person's going to abscond to keep them in, sorry, to keep them in fast track. I don't think it's an absconding issue; I think it's whether they meet the criteria for, a quick decision.

10. So maybe I'm confusing it with – when they've finished the DFT and they've got a negative decision, then it's different.

Yes I think the procedure is: during the DFT process, special conditions for bail exist, a lower threshold for detention exists, as per the decision of Saadi, but once they've finished that process then the normal conditions for bail exist again. Then they then do include, erm, absconding. In those situations, if we did apply for bail – so you're contemplating someone applying for bail, having been refused, presumably, their asylum claim?

11. Yeah, I guess if you were working in legal aid you wouldn't have worked with many people who had been appeals right exhausted on the DFT and were, erm, therefore detained under different criteria?

If they're just awaiting removal, having been on the DFT, and then they're still in Harmondsworth, erm, then I mean certainly immediately any chance of getting bail would recede to a very small probability, if they are completely appeal rights exhausted and there's no possibility of a fresh claim, because they're just waiting to be gotten rid of again. But if they don't get removed after – I think I used to advise people that if they hadn't been removed within a month, erm, contact me and we'll see if it's worth getting bail – but you'd need surety.

12. So I suppose you didn't do that many bail cases after...

I mean a person in those circumstances really wouldn't have much chance of getting bail, so I mean we wouldn't – you can't make a bail application on legal aid unless you think there's at least a 50% chance of it working, because of the criteria for controlled equal representation.

13. I don't know if you have looked at the detention action judgment, the case that was heard last year, and the judgment came through in July.

(Laughs). I think I should have seen it, but I haven't.

(Cont.) It just said that the detainee fast track procedure was lawful in theory, but the way it was operating in practice was unlawful at the moment. But that doesn't mean that it can't act as a lawful means. They said that the way to make it lawful would be time have more time with your solicitor, between the screening and the substantive. And I read something on the detention action website that they're suggesting 4 clear days with your lawyer before the substantive interview, in order to make the whole process lawful and fair. Do you think that four days before the substantive interview is enough time to prepare everything to give yourself the best chance to prepare your case, or do you feel it's not enough?

Ok, I think four days would be a spectacular improvement on what currently goes on. But, it's hard to say. It would definitely be a massive step in the right direction.

14. In your experience, on average, how much time did you have with your clients when you were working with them?

Erm, prior to the beginning of the interview. Sometimes literally less than an hour.

15. Was there ever a problem with understanding what they were saying, or were you always given an interpreter?

Erm, it would be our responsibility to get an interpreter. They send you a pro forma fax and it would tell you what the language was and then you'd call up your interpreter for that language.

16. So less than an hour, you can't do anything can you?!

It's really just enough time to introduce yourself, explain how the interview works, and get the forms signed. But it's not enough time to obviously explore the claim, or give them any useful advice about asylum law, other than the most general terms.

17. So often they would not say their case properly, or they would omit things that you think they should've emphasised and things like that?

Well, you would be hearing the details of their claim for the first time during the interview.

18. Have you heard about the opening of the HMP The Verne. The prison called The Vern. It used to be a prison and then they said 'ok we're going to turn it into a detention centre for ex-offenders' and a week before hand they changed their mind, and they said 'no, no we're going to keep it as a prison'!

I haven't heard of that prison at all.

19. Ok, last question, I wanted to ask your opinion on the 2014 immigration bill that was passed I think in May. Do you see it making any changes to things?

I think it's quite definite what it's going to do. Do I see it making any changes? I've studied the whole act. There's about 115 sections so way too much to discuss in a phone call. I would say that, erm, obviously the loss of appeal rights for almost all non-asylum is devastating to the whole rule of law. Something which fewer people are talking about is, erm, the way in which an asylum claim is now going to be made. There is provision, the last time I looked at the act my understanding was that in order to make – I mean currently an asylum claim is defined to be a claim which is made at a designated place, which is: ASE Croydon, ASE

Liverpool, or at a port and essentially the same thing is going to happen to a human rights claim, so you're going to have to be there in person at a designated place (which is probably going to be Croydon) to make a human rights claim, so the idea will be if you want to be grubby and rely on human rights (because it's a dirty word) they're going to make you sit down at Croydon for hours like all the other asylum seekers, erm, I think it's very worrying because that effectively means that you can't submit human rights based representations on paper, in normal paper applications anymore, so that will be devastating. And especially without any legal aid, because people aren't going to know how to, so you're not going to be able to make it in writing, you're going to have to make it in person, but you don't have any legal aid to bring the lawyer along to Croydon to help you do that either so it's going to be incredibly difficult.

Thank you very much for your time and for speaking to me today.

No problem.

Appendix 4

Nathalie Lieven, (Barrister A)
6th September, 2014, via telephone

1. Hi Nathalie, thank you so much for agreeing to speak to me today. Have you managed to look at the consent form that I have sent across?

No, sorry I haven't looked, what do I have to consent to?

2. Don't worry I know you're busy. It just confirmed who I am and the purpose of this interview today. It also confirmed that the interview would be completely confidential, and any ideas from you that I use in my work will be completely confidential. You can stop the interview at any time.

That's fine. I'll send the form through later.

3. Thanks. So the first question I had. In the DA v SSHD judgment I noticed that the judge said that the DFT couldn't operate just as fast as the home office could get it to operate. But it wasn't prepared to say that is was inefficient on the evidence given at the hearing. I wondered if you could comment on that because I thought that the evidence was quite compelling.

Well, the evidence was compelling I think on inefficiency, but I think that it is a really difficult question about a point to which inefficiency becomes illegality. I mean I think that I'm not sure you completely understand that there were effectively 2 separate arguments in the case, one was unacceptable unfairness leading to unlawful policy, and the other was unlawful detention. Now it seems to me analytically that there are a lot of tension between the 2 because of course in some ways the unfairness arose from the speed. But the result of saying we want less speed, is it means we need... they should be detained for longer. Potentially. So I this the depar... the Home Office's inefficiency really went to the unlawful detention point because what we said was well you can't hold onto these people much much longer than Saadi, justify their detention on the basis of Saadi in this process when actually you're not doing anything on the process. Um, but we didn't kind of want to push too hard on you can only detain them on... because it's for three days. In Saadi, they were actually doing a much faster process, I mean, because we looked at this at the court of appeal I mean people were coming in and going out in 48 hours. The lawyers were seeing them in the morning and they were being determined, the decision interview was in the afternoon. So I don't think that the Home Office's inefficiency in terms of just not... because one of the major bits of evidence which very much came out of John Vine's report was um they were putting people into fast track and then they were just sitting on it for 10 days doing absolutely nothing. Now it doesn't seem to me that goes with the unlawfulness on unfairness grounds, it potentially goes to the unlawful detention grounds. But the judge didn't really rule on the unlawful detention grounds. He avoided that issue. Um, and I think the difficulty although I'm quite critical of the judge avoiding the issue and indeed we are appealing on part of the unlawful detention grounds, we are hearing next month. I think it would be quite, I think the Home Office's inefficiency in inexcusable, but it would be quite difficult to argue that it automatically gave rise to an unlawful detention. It seems to me that that is very case specific and so quite difficult to take on a generic level that X days is unlawful detention. That's a very very long answer to your question!

4. (Laughs) Don't worry it's very useful! I notice in the judgment the judge refers to the fact the whole process should take 20 days with the inclusion of appeals. Did you feel that he

addressed the circumstances surrounding the inclusion of appeals on the fast track detention criteria properly?

Well that is the point, that's the only substantive point in the judgment we are appealing. And there is a hearing next month about that. And we say in terms no he didn't address it properly. Because the Sec... as you'll have picked up from the judgment, the Secretary of State's position on detaining during the appeals process is a complete mess so he finds... can I just have a second while I dig around to find the judgment (sure sorry) ... he finds in terms that the original policy as set out by the minister was not to detain people through the appeal process. And then he says well there was a change in 2008 and then the policy became to detain people all the way through. Now, the first point is, there is no evidence of that change, he just made that up. The only evidence, sorry I've just said there was no evidence and the offered evidence which is inconsistent, the sum total of the evidence is an additional sentence in a subsidiary policy document which doesn't change the principle document which makes it clear that detention is only during the decision making and not during the appeal. So his basis of finding a change doesn't stack up. Secondly the Secretary of State didn't say there was a change in 2008 she said the policy all the way through was to detain on appeal. So there is an inconsistency between her position and the judge's position. And then thirdly the judge says well I haven't seen any justification for this but it's a matter for a different case, and he says that the justification would basically be the same. But that simply isn't right because the justification for detaining people during the decision making is what is set out in Saadi which is you know they need to be there so that they can be interviewed quickly so the Home Office can you timetable interviews so the whole process can be shot through really fast. But for an appeal, none of that applies. The only thing that person has to turn up for is the appeal hearing. And if they don't turn up for the appeal hearing, then it can be... it can go ahead without them. So you don't have to be detained onsite for your appeal, it's not necessary. The justifications in Saadi don't run. And also, I said to the court of appeal, there is a sort of ... the really important point here which is basically one party to litigation is detaining the other party to the litigation, enormously to that second party's disadvantage because it is much more difficult to run an appeal if you're in detention, because your access to your lawyers and your evidence is so restricted. And you know the idea that the justification is the same just can't be right. Um, there might be,... and of course it's really important to remember at this stage, that they can go on detaining people on normal detention criteria. So if they think someone's an absconsion risk, then they can go on detaining them. Nobody's ever argued about that. The point about DFT is that they have the power to detain people who aren't abscond risks. So I felt that, well I have to say it was mainly Charlotte I was slightly bemused but, we come to the conclusion that the judge got this wrong, um and we'd got good ground for appeal.

5. And we are not waiting for the result of that?

Well what happened was, we have an appeal hearing on relief, on the I think it was the 29th August, but the court of appeal judges didn't realise that we were also appealing this point about unlawful detention on appeal... during the appeal period. So they said they didn't have enough time to listen to that argument so the appeal has been split. So the hearing on the substantive appeal on the point that we have just been going through is sometime at the end of October sometime, but we are awaiting the judgment on the appeal that we heard at the end of August.

6. The judge found that the Rule 35 was ineffective, the screening procedure needed to be improved, and more time was needed with the solicitor. But he found that only one of these

things needed to be improved in order to make the process lawful. What was your reaction to that?

Well yes hmm, I mean we what he says is that he goes through the failings and he says well that on its own doesn't make it unlawful and that on its own doesn't make it unlawful, and we always said that each of these failings don't on its own make the process unlawful, we always said it was a combination. To some degree he's followed the analysis that we've followed, you know, it's quite a complicated legal situation this unfairness this coz you've got lots of you know you can't say ... if the appeal process was much better then you know the failings of rule 35 wouldn't matter so much. So you can't disaggregate the different bits. I mean the judge was obviously desperate to try and minimise the damage but do something about the unfairness so he saw one way of saying well there are all these different bits, but if you just have more time with your lawyers, that can make everything else OK. Um, it would have been better if he said: there are all these failings, what an improvement that could obviously be made if there was more time with the lawyers, but all the failings have to be looked at together. That would have been better. That would have been the order we would have liked him to make. And I think the order that was justified on the evidence. But we didn't appeal because we took the view that given that he'd been the first instance judge and had made these findings, we were unlikely to get anything better out of the court of appeal, even though we might have got something better out of the High Court if we'd had a different judge in the first place, but you know, that's the nature of litigation. You have to deal with what you get. Um, but we argued in the court of appeal that on relief that the judge should have brought the whole system to a stop until the unfairness had been remedied. In the remedy judgement, he says 'at the present time the unlawfulness hasn't been remedied'. It's about is 4 days enough etc which is relevant to your question.

7. Would you say that a different type of screening interview is needed to the one that is being used at the moment?

Well the problem with that is that there are very very different views within the claimant community – the immigration lawyers' community as to whether you should do more at screening... part of the problem is, particularly for vulnerable claimants, you know women who have been tortured or raped or whatever, they're just not going to be able to talk at that first screening interview. So you can improve screening, but it's never going to be a whole answer.

8. With regard to the nationality list, it emerged that there was a RAG list that was unpublished which was used in decision-making, is that why the issue was not found unfair by the judge?

Well, they said that it's not a nationality list. It's just a help I mean it's just to help the application of policy (paragraph 91 of the judgment). And um in some ways it didn't help us to say that there was a nationality list. We said one of the major changes since Saadi was that there wasn't a nationality list. So the judge was in a bit of a cleft stick because he couldn't find there was a nationality list without it falling foul of Lumba, but it was a policy that wasn't published. So, but also to look at the reality of it, in Saadi the nationality list was about effectively are these people likely to have good asylum claims, so it was you know safe country not safe country kind of analysis. The RAG list was really about whether you could remove people or not. So Pakistan I think was either Green or Amber, now nobody was suggesting that Pakistan particularly for women was a great place to be, but it is a place that people can be removed to. So the RAG list was doing a different function from the old nationality list. I think we said that it was an unpublished policy and then contrary to Lumba, but I think, it wasn't entirely clear that that was the case. The judge found that the test in

Lumba is satisfied. And also part of the difficulty was that I think by the time we got to court, everybody knew about the RAG list and it wasn't really unpublished anyway, I think they do now publish or semi-publish it.

9. My last question is about the conditions of detention. I felt that the conditions of detention were completely contrary to Saadi not just a little bit and I felt like he skipped over that fact. Yes we I certainly felt he skipped over it. However, the Secretary of State is being quite clever here; she gets the principle approved in Saadi and then she moves to something very different. But it would be hard to win on that point in the European Court because you know the conditions of detention here are about 5 million times better than they are in France or Italy. Let alone Greece. So, and to be honest the time periods are relatively short. And you know, it's not really going to run that point really. So although he did skip over it, I think the conditions of detention would have to be worse before a breach of article 5 would be found I'm afraid. Well you might get a different answer from someone who has experience immigration more, but I do work for the prison section of the MoJ and the prison system is a lot worse. And I know that there's a difference because those are the people who have committed criminal offences, but even though they were completely different from Saadi, you're completely right on that, they weren't bad enough to trigger an article 5 complaint. Thank you so much for your time, it's been really useful./ No problem happy to help.

Appendix 5

Consent Form


My name is Jessica Vicary. I am an MA student at the Institute of Commonwealth Studies, University of London. I am conducting research on immigration detention in the UK, with a focus on unlawful detention. I plan to write a dissertation based in part on what you and others tell me in these interviews.

If you agree to be interviewed, we will talk about events that have occurred, as well as your attitudes to and opinions on the subject. As we talk, I may take written notes about our conversation so I can remember the most important parts after I leave.

Your participation in this interview is completely voluntary. If I ask a question that you do not want to answer, you do not have to answer. If, at any time, you want to stop the interview, you can tell me and we will stop. There is no problem if you choose not to participate or to stop the interview. It is completely your choice.

I will make every effort to protect your privacy at all times. I will not use your name in anything I write as a result of this study and I will not tell anyone that I interviewed you or what we talked about.

Please certify that you have read and understood this statement and that you give consent to be interviewed.

 (signature) 1-08-2014 (date)

ELEANOR A. GLASS (printed name)

Appendix 6

Consent Form

My name is Jessica Vicary. I am an MA student at the Institute of Commonwealth Studies, University of London. I am conducting research on immigration detention in the UK, with a focus on unlawful detention. I plan to write a dissertation based in part on what you and others tell me in these interviews.

If you agree to be interviewed, we will talk about events that have occurred, as well as your attitudes to and opinions on the subject. As we talk, I may take written notes about our conversation so I can remember the most important parts after I leave.

Your participation in this interview is completely voluntary. If I ask a question that you do not want to answer, you do not have to answer. If, at any time, you want to stop the interview, you can tell me and we will stop. There is no problem if you choose not to participate or to stop the interview. It is completely your choice.

I will make every effort to protect your privacy at all times. I will not use your name or linked institution(s) in anything I write in this study and I will not tell anyone that I interviewed you or what we talked about.

Please certify that you have read and understood this statement and that you give consent to be interviewed.

Consent Given via telephone after viewing consent form over emails (signature)

15.09.14 (date)

Alex Finch _____ (printed name)
(Solicitor B)

Appendix 7

Consent Form

My name is Jessica Vicary. I am an MA student at the Institute of Commonwealth Studies, University of London. I am conducting research on immigration detention in the UK, with a focus on unlawful detention. I plan to write a dissertation based in part on what you and others tell me in these interviews.

If you agree to be interviewed, we will talk about events that have occurred, as well as your attitudes to and opinions on the subject. As we talk, I may take written notes about our conversation so I can remember the most important parts after I leave.

Your participation in this interview is completely voluntary. If I ask a question that you do not want to answer, you do not have to answer. If, at any time, you want to stop the interview, you can tell me and we will stop. There is no problem if you choose not to participate or to stop the interview. It is completely your choice.

I will make every effort to protect your privacy at all times. I will not use your name or linked institution(s) in anything I write in this study and I will not tell anyone that I interviewed you or what we talked about.

Please certify that you have read and understood this statement and that you give consent to be interviewed.

Consent given via telephone after reading the consent form (signature) 06.09.14 (date)

Nathalie Lieven _____ (printed name)
(Barrister A)

Appendix 8

Direct Communications Unit Tel: 020 7035 4848
2 Marsham Street Fax: 020 7035 4745
London www.homeoffice.gov.uk
SW1P 4DF

jessicavicary@gmail.com
FAO Jessica
Reference: T10300/14

20 August 2014

Dear Jessica,

Thank you for your e-mail of 30 July to the Home Office about your request for an interview with the Home Secretary or another Minister, in relation to your dissertation. Your e-mail has been passed to the Direct Communications Unit and I have been asked to reply.

Unfortunately, due to heavy diary commitments, the Ministers are not able to agree to your request for an interview.

I am sorry that we are unable to be of assistance on this occasion.

Yours sincerely,

J Jones

E-mail: Public.Enquiries@homeoffice.gsi.gov.uk

Appendix 9²

Timescales

According to UKBA procedure,⁶ timescales for the Detained Fast Track are fast.

- Day 1:** Arrival at Harmondsworth IRC. Legal representative visit
- Day 2:** Legal representative visit (if not on Day 1) and substantive interview
- Day 3:** Service of initial decision by UKBA. If granted, released from detention
- Day 5:** If refused, final day in which to appeal to First-Tier Tribunal
- Day 9:** Appeal hearing
- Day 11:** Determination from appeal hearing. If granted, UKBA considers whether to appeal. If not, released from detention
- Days 13–21:** If appeal refused, reconsideration and further appeals on a point of law possible at the Upper Tribunal and outside the Immigration and Asylum Chamber
- Day 22:** All appeal rights exhausted

² (Detention Action, 2011: 11)

Appendix 10

Percentage of those being removed from the fast track before the initial decision³

| Year | Harmondsworth (men) | Yarl's Wood (women) |
|-------------|----------------------------|----------------------------|
| 2008 | 13% | 26% |
| 2009 | 16% | 28% |
| 2010 | 17% | 25% |
| 2011 | 16% | 30% |
| 2012 | 14% | 21% |

³ (Home Office Statistics, Q2 2014, as_12)

94 Appeal from within United Kingdom: unfounded human rights or asylum claim

(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).

[F1(1A)] A person may not bring an appeal against an immigration decision of a kind specified in section 82(2)(c), (d) or (e) in reliance on section 92(2) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) above is or are clearly unfounded.]

(2) A person may not bring an appeal to which this section applies **[F2]** in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.

(3) If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded.

(4) Those States are—

(a)-(i) **[F3]**

[F4(k)] the Republic of Albania,

(l) **[F5]**

(m) **[F6]**

(n) Jamaica,

(o) Macedonia,

(p) the Republic of Moldova, and

(q) **[F5]**]

[F7(r)] **[F8]**

(s) Bolivia,

(t) Brazil,

(u) Ecuador,

(v) **[F9]**

(w) South Africa, and

(x) Ukraine.]

[F10(y)] India.]

[F11(z)] Mongolia,

(aa) Ghana (in respect of men),

(bb) Nigeria (in respect of men).]

[F12(cc)] Bosnia-Herzegovina,

(dd) Gambia (in respect of men),

(ee) Kenya (in respect of men),

(ff) Liberia (in respect of men),

(gg) Malawi (in respect of men),

(hh) Mali (in respect of men),

(ii) Mauritius,

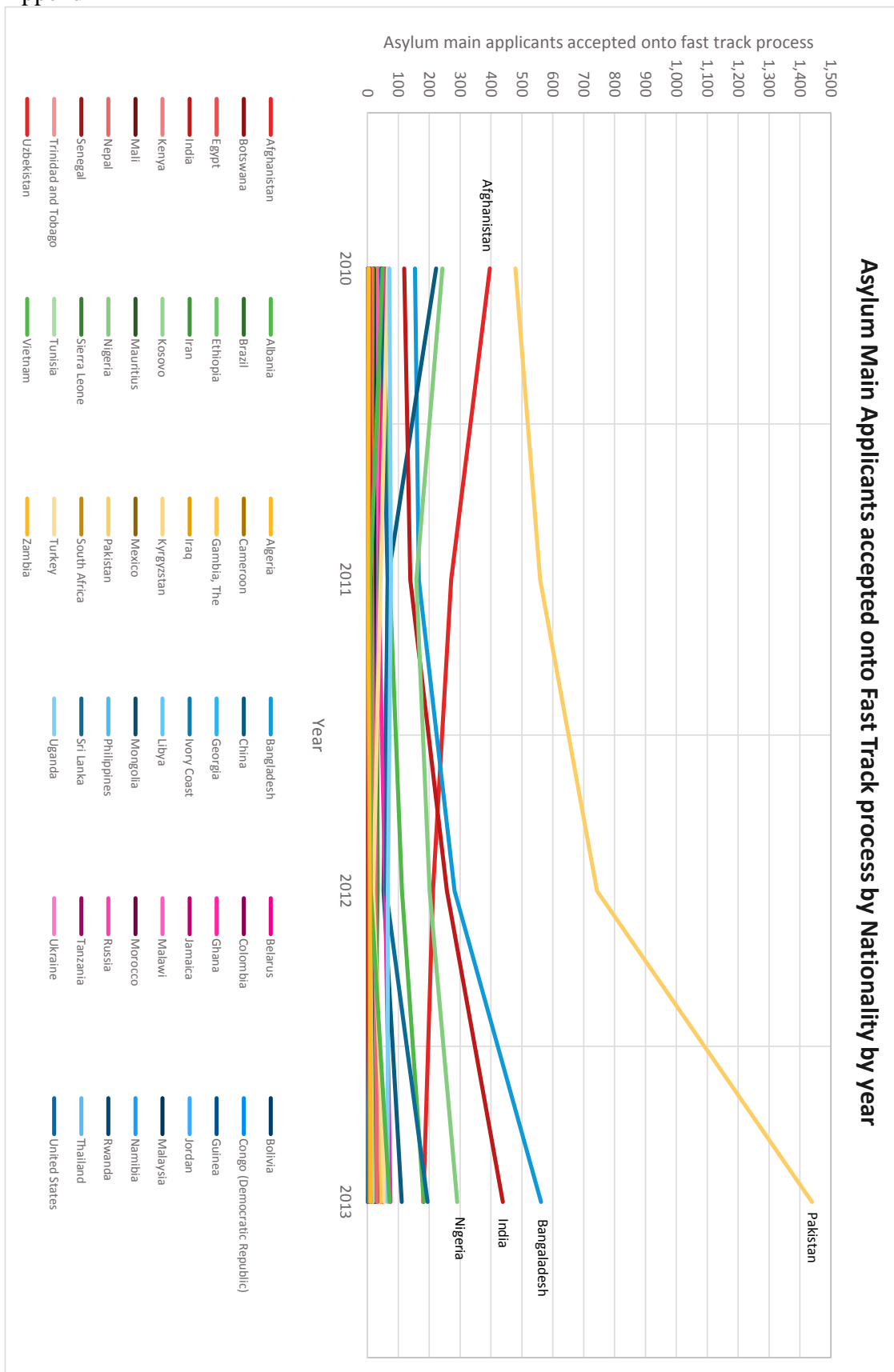
(jj) Montenegro,

(kk) Peru,

(ll) Serbia,

(mm) Sierra Leone (in respect of men).

⁴ S. 94 (1-4) of Nationality, Immigration and Asylum Act 2002



⁵ (Home Office Statistics, Q2 2014, as_12)

Appendix 13

Table as_01: Asylum applications for main applicants compared with DFT applicants, by country of nationality⁶

| Year | Geographical region | Country of nationality | Total applications | Percentage total annual increase/decrease | Percentage DFT annual intake increase/decrease⁷ |
|-------------|----------------------------|-------------------------------|---------------------------|--|---|
| 2013 | *Total | *Total | 23,584 | .. | .. |
| 2013 | Asia | Afghanistan | 1,038 | +3% | -25% |
| 2013 | Asia | Bangladesh | 1,123 | +6.2% | +99% |
| 2013 | Asia | China | 739 | -6.2% | +113% |
| 2013 | Africa | Nigeria | 931 | -3% | +44% |
| 2013 | Asia | Pakistan | 3,359 | +2.4% | +93% |
| 2013 | Asia | Sri Lanka | 1,811 | +4% | +225% |

⁶ (Home office Statistics, Q1 2014, as_01)

⁷ (Home Office statistics, Q2 2014, as_11)

Appendix 14

Percentage of those being removed from the fast track before the initial decision⁸

| Year | Harmondsworth (men) | Yarl's Wood (women) |
|-------------|----------------------------|----------------------------|
| 2008 | 13% | 26% |
| 2009 | 16% | 28% |
| 2010 | 17% | 25% |
| 2011 | 16% | 30% |
| 2012 | 14% | 21% |

⁸ (Home Office Statistics, Q2 2014, as_12)



Immigration Enforcement
Freedom of Information Team
Sandford House
41 Homer Road
Solihull
West Midlands
B91 3QJ

Jessica Vicary
By e-mail - jessicavicary@gmail.com

www.gov.uk/home-office

Tuesday 29 July 2014

Dear Ms. Vicary,

Re: Freedom of Information request – 32289

Thank you for your e-mail received on Friday 11 July 2014, in which you ask for information pertaining to immigration detention. Your request has been handled as a request for information under the Freedom of Information Act 2000.

Your first question is: *"I would be grateful if you could let me know the average cost per detainee per week of detaining someone in the financial year 2013/4, at each of the following Immigration Removal Centres:*

- Brook House, Gatwick
- Campsfield House, Oxfordshire
- Colnbrook, Middlesex
- Dover, Kent
- Dungavel House, South Lanarkshire
- Hamondsworth, Middlesex
- Haslar, Hampshire
- Larne House, Antrim
- Morton Hall, Lincolnshire
- Pennine House, Manchester
- Tinsley House, Gatwick
- Yar's Wood, Bedfordshire.

I would also like to know the average cost per detainee per week of detaining someone in The Verne, Portland, Dorset in May and June 2014."

The Home Office has twelve immigration removal centres, seven of which are operated by private sector suppliers under contract, three by the National Offender Management Service under a service level agreement and two are short-term holding facilities. The Verne is not operating as an Immigration Removal Centre and as such is not included within the stated figures.



⁹ FOI 32289, 29.07.14



Home Office

The average cost per night per detainee across the entire detention estate (regardless of location) for the last 2 years is: -

| | 2013/14 | 2014/15 |
|-----------------------------|---------|---------|
| Cost per night per detainee | £100 | £102 |

Your second question is: "I would also like to know what proportion (percentage) of those being detained in the detention centres were classified as being on the Detained Fast Track system on 1st June 2014 at midnight, in the following centres. If it is not possible to calculate this request on this precise day, an average percentage calculated in the present time will suffice:

- Brook House, Gatwick
- Campsfield House, Oxfordshire
- Colnbrook, Middlesex
- Dover, Kent
- Dungavel House, South Lanarkshire
- Harmondsworth, Middlesex
- Haslar, Hampshire
- Lame House, Antrim
- Morton Hall, Lincolnshire
- Pennine House, Manchester
- Tinsley House, Gatwick
- Yarl's Wood, Bedfordshire
- The Verne, Portland, Dorset."

Unfortunately, we are unable to provide an answer for this question under Section 22(1) of the Freedom of Information Act 2000 as this relates to information intended for future publication. This states that the information is exempt if the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not). I can inform you that the Department intends to publish this information at a later date.

For reference, the published statistics for asylum cases for Quarter 1 2014 are available here -

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311792/asylum-q1-2014-tabs.ods

For reference, the published statistics for detention cases for Quarter 1 2014 are available here -

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311803/detention-q1-2014-tabs.ods

In addition, the quarterly detention release statistics from January 2014 to March 2014 published by the Home Office, are available here -

<https://www.gov.uk/government/organisations/home-office/series/immigration-statistics-quarterly-release>.



Home Office

Your third question is: *"finally, I would like to know how many detainees were in their 7th, or more than 7th, month in detention on 1st March 2014 at the following centres:*

- *Brook House, Gatwick*
- *Campsfield House, Oxfordshire*
- *Colnbrook, Middlesex*
- *Dover, Kent*
- *Dungavel House, South Lanarkshire*
- *Hamondsworth, Middlesex*
- *Haslar, Hampshire*
- *Larne House, Antrim*
- *Morton Hall, Lincolnshire*
- *Pennine House, Manchester*
- *Tinsley House, Gatwick*
- *Yarl's Wood, Bedfordshire"*

In response, please see the attachment which breaks down the total number of and those serving 6 months or more by each Immigration Removal Centre.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, quoting reference 32289. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

Information Access Team
Home Office
3rd Floor, Peel Building
2 Marsham Street
London SW1P 4DF
e-mail: info.access@homeoffice.gsi.gov.uk

If you request an internal review, that review will be carried out by staff who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

**Immigration Enforcement
Freedom of Information Team**





Corporate Services, 020 7035 4848
2 Marsham Street (switchboard)
London SW1P 4DF
www.gov.uk

Jessica Vicary
<mailto:jessicavicary@gmail.com>

01 September 2014

Dear Miss Vicary,

Thank you for your e-mail of 31 July 2014 in which you ask for details of cost per person per night for Section 4 Accommodation. A full copy of your request can be found at Annex A [REDACTED]

Your request is being handled as a request for information under the Freedom of Information Act 2000.

I can confirm that this information is held by the Home Office however; it is not being disclosed, pursuant to the exemption under section 43(2) of the Freedom of Information Act 2000.

Section 43(2) allows us to exempt information if its disclosure would, or would be likely to prejudice the commercial interests of any persons. If we were to disclose the information to you, this would be likely to prejudice the commercial interests of both the Home Office and those companies with whom the Home Office enters into contracts.

This exemption requires us to consider whether, in every respect the public interest in maintaining the exemption stated above, outweighs the public interest in disclosing the information.

We have considered the public interest in disclosing the information to you. There will be a public interest in immediate disclosure to ensure that there is full transparency in the Home Office's use of public funds and in particular to maintain the Home Office's accountability to tax payers. Disclosure of this information would also enable the public to assess whether or not the Home Office is getting best value for money in terms of its contracts with those who manage its immigration detention facilities.

We have also considered the public interest in maintaining the exemption to communicate. There is a public interest in Government departments being able to secure contracts that represent value for money and anything that would undermine this is not in the public interest. Value for money can be best obtained where there is a healthy competitive



environment, coupled with protection of the Government's commercial relationships with industry, where this is not the case, there would be a risk that:

- Companies would be discouraged from dealing with the public sector, fearing disclosure of information that might damage them commercially, or
- Companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited and censored data.

Disclosure of accommodation pricing information provided in the course of a contract is likely to damage the relationship between the Home Office and its service provider as it will put them at a competitive disadvantage. Competitors will have access to accommodation pricing information that they would not otherwise be able to view because it is required as part of the contract arrangements.

We have therefore concluded that the balance of public interests identified lies in favour of maintaining the exemption. This is because the overall public interest lies in ensuring that the Home Office's ability to protect its commercial competitiveness and relationships with its current service providers is not prejudiced.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, quoting reference 32488. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

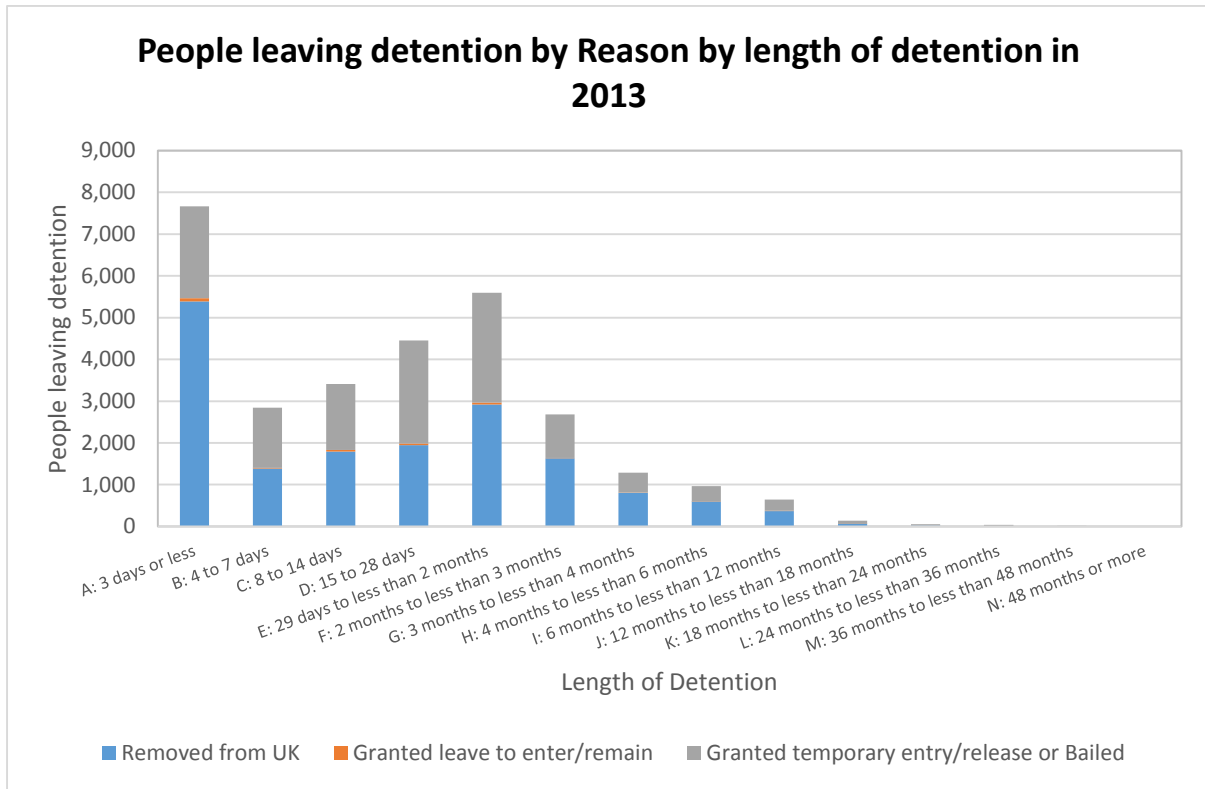
Information Access Team
Home Office
3rd Floor,
Peel Building
2 Marsham Street
London SW1P 4DF

E-mail: info.access@homeoffice.gsi.gov.uk.

As part of any internal review the Department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely

M Seedansingh
Information Access Team



¹¹ (Home Office Statistics, Q1 2014: dt_06)

People leaving detention by Reason by length of detention in 2013

| Length of Detention | Removed from UK | Granted leave to enter/remain | Granted temporary entry/release or Bailed | Total |
|-------------------------------------|-----------------|-------------------------------|---|---------------|
| A: 3 days or less | 5,390 | 74 | 2,201 | 7,665 |
| B: 4 to 7 days | 1,385 | 15 | 1,441 | 2,841 |
| C: 8 to 14 days | 1,791 | 38 | 1,585 | 3,414 |
| D: 15 to 28 days | 1,949 | 35 | 2,472 | 4,456 |
| E: 29 days to less than 2 months | 2,921 | 41 | 2,636 | 5,598 |
| F: 2 months to less than 3 months | 1,628 | 11 | 1,041 | 2,680 |
| G: 3 months to less than 4 months | 806 | 3 | 478 | 1,287 |
| H: 4 months to less than 6 months | 597 | 2 | 364 | 963 |
| I: 6 months to less than 12 months | 369 | 3 | 274 | 646 |
| J: 12 months to less than 18 months | 58 | 2 | 80 | 140 |
| K: 18 months to less than 24 months | 18 | 0 | 36 | 54 |
| L: 24 months to less than 36 months | 9 | 0 | 27 | 36 |
| M: 36 months to less than 48 months | 3 | 0 | 5 | 8 |
| N: 48 months or more | 1 | 0 | 4 | 5 |
| Total | 16,925 | 224 | 12,644 | 29,793 |

¹² (Home Office Statistics, Q1 2014: dt_06)

