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The Annual Report of the Certification Monitor* - 2004

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* Full title: Monitor of certification of claims as unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002.

The 1st Annual Report of the Certification Monitor

Section 1: Introduction

1. This is the first of two annual reports which I will make as "Certification Monitor". I was appointed in February 2004 to the post of Certification Monitor by the Secretary of State for the Home Department. My appointment was made pursuant to s 111 of the Nationality Immigration and Asylum Act 2002 (the 2002 Act). I am the first holder of this post. My appointment is for two years. A summary of my recommendations can be found in Annex A at the end of this report. The report covers my work in the first year of my appointment, and is dated January 2005.

2. As Certification Monitor my duty is to make a report once in each calendar year to the Secretary of State regarding the use of the powers given to him by s.94(2) and 115(1) of the 2002 Act. Each report is then to be laid before Parliament. I can be requested to report on other occasions, but have not been asked to do so to date.

3. Annex B contains the full text of the relevant sections of the 2002 Act. In short, ss94(2) and 115(1) allow, and in some cases require, the Secretary of State to certify asylum and human rights claims he considers to be "clearly unfounded", thus preventing the applicant from appealing the refusal until after he or she has been removed from the UK. This is known as a "non suspensive appeal" (NSA), so called because such appeals (unlike nearly all other immigration and asylum appeals) cannot be brought while the asylum claimant is in the UK and so do not "suspend" removal directions. The asylum applicant must wait until they have left the UK to lodge an appeal. The system of certification is commonly called the "non suspensive appeal system" (NSA system).

4. The statutory post of Certification Monitor was initially proposed as an amendment to the 2002 Act by the Government in response to Parliamentary concerns about the certification powers contained in ss94 and 115. These concerns were mostly about the potential for "flagrant unfairness", particularly that individual asylum seekers might be removed before mistakes by Home Office officials were rectified, and the impact this might have on compliance with the UK's international obligations under the Refugee Convention and the European Convention on Human Rights.

5. In announcing my appointment, Beverley Hughes stated to the House of Commons that in particular I would consider the procedures used to

determine whether claims are unfounded and the quality and effectiveness of decisions made under this procedure.[1]

6. My appointment did not take place until February 2004, at which point the Secretary of State's use of the power to certify under ss115 and 94 had been in operation for more than a year. It is my view that it would have been better for the Monitor to have been in post at or as soon as possible after implementation. It would have provided more timely information to Parliament regarding the use of the certification powers; as it stands it will be over 2 years since they were introduced before this report is laid before Parliament. Secondly, the Monitor's first annual report might then have been laid before Parliament in time to inform debates regarding legislative changes to the system made by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. *I recommend there be no delay in the appointment of my successor.*

7. I can confirm that I am not employed within a Government Department, something the terms of my appointment prevent. I am employed as a solicitor at Birnberg Peirce and Partners, and I conduct immigration and asylum cases. This provides invaluable background knowledge of asylum law, and of the asylum system, without which it would be extremely difficult to monitor decision-making quality and the NSA process. While holding the post of Certification Monitor I have undertaken not to act for those whose cases are being dealt with within the NSA process, nor those detained at Oakington, in order to maintain my independence.

8. From the time the NSA system was introduced, to December 2004, there were 2118 decisions to certify claims for asylum and / or human rights applications. To the end of December 2004, there were 207 appeals that had both been lodged and determined. 3 of those appeals were allowed, despite the difficulties of winning such an appeal (see below). There had also been 138 applications for Judicial Review which resulted in the certificate being withdrawn by the Home Office; and 3 applications for judicial review where the certificate was quashed by the High Court.

[1] Hansard, 11 Feb 2004 : Column 69WS

Section 2: Monitoring Process

9. I have 40 days per year to monitor the use of the certification power and to produce my report. I consider that 40 days is the minimum period within which to monitor the system and produce such a report. In summary, I have taken time to familiarise myself with the NSA system, met with Home Office Officials, Non Governmental Organisations, and Legal Representatives, visited the case-working groups based in Croydon and Liverpool responsible for NSA decision making, visited Oakington Detention Centre and viewed the NSA process for detained clients there, attended a training session for NSA caseworkers, and reviewed files of individuals whose cases have been certified as "clearly unfounded". I have also spent time writing this report.

10. I was inducted by visits to Oakington, and to the caseworking units in Croydon and Liverpool where decisions are made. I had the opportunity to speak with caseworkers and senior caseworkers at all three locations about how decisions were made, and to immigration officers at Oakington about associated issues such as the management of those detained. I was shown relevant computer systems and resources available to caseworkers. I was "walked through" the Oakington process and had a chance to observe conditions there. I met with staff from the Refugee Legal Centre and the Immigration Advisory Service who provide legal advice and representation to the majority of applicants detained at Oakington, and they gave me information about the system from their perspective and the perspective of their clients.

11. I attended a day-long training session for caseworkers who were joining the NSA decision-making teams. Such caseworkers have prior experience of making decisions in asylum cases. I was able to observe the training given to those individuals to equip them for their new role. Attendance on this training course was a pre-requisite for the caseworkers to be accredited to make NSA decisions. A senior caseworker must be satisfied subsequently of a case-worker's ability to make NSA decisions before they become fully accredited.

12. I also attended a meeting of the Home Office "project board" responsible for implementing the NSA system. This Board included representatives from the Home Office as well as other Government Departments, such as the Legal Services Commission and the Department for Constitutional Affairs. I have been provided with the minutes of this project board since its inception, providing useful background to the period prior to my appointment and the way in which the NSA system was implemented.

13. I have reviewed about 100 files. These files included cases where certification had taken place under both s115 and s94. These were selected by the Home Office on a random basis, and generally the complete file was provided to me.

14. Due to time constraints, the number of files reviewed was not sufficient for statistical analysis. However, it provides sufficient information to map out areas of concern, and to feel relatively confident that most issues with the NSA system will have emerged in the sample.

15. The sample contained some files from each of the NSA nationalities. I also specifically asked to review a sample of files of applicants who were not detained and a sample of files from three nationalities where certification has proved to be particularly problematic, i.e. Romania, Jamaica and Bangladesh. I also asked to see a sample of files where Judicial Review proceedings had been instituted by Legal Representatives, and where the Home Office had conceded that the certified should be withdrawn.

16. Where I had significant concerns about the way the file had been handled, I drew these to the attention of Home Office officials. In some cases this resulted in remedial action being taken or guidance to caseworkers being issued.

17. I was also, from October 2004, provided with approximately twice monthly short briefings by the Home Office. These briefings contain information of relevance to my role as monitor, including statistics, legal developments, and practical and operational matters.

18. I had a meeting in September with senior home office officials responsible for the NSA system to feedback some of my comments. It is envisaged that this will be a regular event. Hopefully this will allow more rapid adaptation of the system to concerns I raise, rather than awaiting an annual report.

Section 3: The NSA Legal Framework

19. This section contains a summary of the legal framework within which NSA certification takes place. Inevitably the law in this area is complex, and I have aimed to make this section relevant for a non-legal audience.

20. In most asylum cases in the UK, the applicant has a right of appeal prior to removal. If they appeal, no removal can take place until after the appeal process is over. The asylum applicant has the choice of an oral hearing or a paper hearing where there is simply a review of the relevant paperwork. Most asylum applicants who are given the choice elect for an oral hearing in which an independent Immigration Judge[2] will hear oral evidence from the applicant and any other witnesses they choose to call in support of their claim, review relevant documents submitted by both the applicant and the Home Office, and hear oral submissions from the applicant (or their legal representative) and in all likelihood from the Home Office as well, if the Home Office chooses to attend the hearing. This appeal system is generally seen as a crucial safeguard of fair decision making: it means any decision by the Home Office to refuse asylum is reviewed by an independent decision-maker, who should have an opportunity to assess all the evidence and decide whether the Home Office decision is correct. It helps to ensure that the UK does not contravene the Refugee Convention by returning anyone to a situation where there is a real risk that their fundamental human rights will be breached, and that the UK does not breach the European Convention on Human Rights.

21. Ss115 and 94 of the 2002 Act give the Secretary of State the power to certify a claim as clearly unfounded, and the Act creates an alternative system for such cases. If an asylum and / or human rights claim is/are refused and also certified by the Secretary of State as being "clearly unfounded" there is no right of appeal exercisable from within the UK. Instead the applicant is removed and can only appeal from outside the UK, i.e. after return has taken place. An appeal of this kind is widely regarded as being an inadequate remedy to an individual wrongly refused asylum – firstly they face removal to the place where they claim a serious breach of their fundamental human rights is reasonably likely to take place, and secondly they may have no option but to stay there in danger until the appeal is heard which takes several months. Also, the appeal hearing itself is less likely to afford relief – credibility is often the key issue (or at least a key issue) in asylum appeals - i.e. is the applicant to be believed? This is one reason why an oral hearing is normally chosen in asylum cases: without hearing from the applicant the independent Adjudicator will not be able to reach an informed judgment whether or not they are telling the truth. Where the applicant has already been removed they have no opportunity to explain themselves in person and

the adjudicator will find it almost impossible to make a decision whether their account was truthful or not. I therefore consider the key issue regarding the NSA system is whether it provides adequate safeguards to ensure that no one is returned to face persecution or in breach of their human rights.

22. The meaning of "clearly unfounded" has been set out in various decisions of the higher courts. One definition is that the claim is "so clearly without substance that it is bound to fail"[3]. The approach that decision makers should take has also been set out, and is as follows;

    i. Firstly, consider the factual substance of the claim

    ii. Consider how the claim stands with the known background information (i.e. information about the country of origin of the applicant)

    iii. Consider the claim in the round, and decide whether it is capable of belief

    iv. Consider whether some part of it is capable of belief

    v. Consider whether, if eventually believed in whole or in part, the claim is capable of falling within the refugee convention or the ECHR

    If the claim cannot on any legitimate view succeed, then the claim is "clearly unfounded". If on at least one legitimate view of the facts or the law the claim could succeed, then the claim is not clearly unfounded. In practice this has led to an approach by caseworking staff, responsible for decision making in NSA cases, to consider the claim at its highest, i.e. to assume the applicant is telling the truth. If this would mean the claim could succeed at appeal, it ought not to be certified. If nevertheless the claim would be bound to fail, for example because the claimed future ill treatment would not be serious enough to meet the requirements of the Refugee Convention / ECHR, or because the background country information indicates that the applicant's own Government would protect them from the harm feared, or if there is a safe area of their own country where it is reasonable to expect them to live, then the claim will be certified.

23. Certification as "clearly unfounded" is more likely to occur where an applicant is entitled to reside in one of the countries originally listed in s115 and s94 of the 2002 Act, or in one of the countries added to this list by subsequent order. This is because ss94 and 115 place a duty on the Secretary of State to certify claims which he considers to be "clearly unfounded" where the applicant has a right to reside in one of the listed countries – there is no discretion not to certify and thus the Home Office decision maker is required by law to consider whether to certify or not.

[3] Thangarasa and Yogathas, House of Lords, October 2002

24. The ten countries originally listed in s 94 and s115 were:

    i. the Republic of Cyprus,

    ii. the Czech Republic,

    iii. the Republic of Estonia,

    iv. the Republic of Hungary,

    v. the Republic of Latvia,

    vi. the Republic of Lithuania,

    vii. the Republic of Malta,

    viii. the Republic of Poland,

    ix. the Slovak Republic, and

    x. the Republic of Slovenia.

25. Claims from nationals of these ten countries were certified between 7/11/02 and 1/5/03. S115 came into force on 7 November 2002, and applied to claims made on or after 7 November 2002 where a decision was made before 1st April 2003. S94 was brought into force on 1st April 2003 and applied to decisions on an asylum or human rights claim made on or after that date.

26. The initial ten countries listed in s94 and s115 were removed on 1st October 2004, by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 so that the NSA system no longer applies to nationals of EU countries. They are now subject to separate arrangements. I understand that no decisions to certify under s94 took place relating to nationals of these countries after 1/5/04 when the countries concerned joined the EU. Most EU nationals now have no right of appeal against refusal of an asylum or human rights claim, since there will be no decision to remove them from the UK, and it is this that triggers the right of appeal. Those with a right of residence in these ten countries, but who are not nationals of an EU state, can still have their asylum claims certified, but on a case by case basis (see below).

27. Subsequent to the commencement of the 2002 Act, there have been 3 additions to those contained in s94. The first of these took effect on 1 April 2003 when a further seven countries were added[4]. These "wave 2" countries remain on the s94 list and are:

    i. Albania,

    ii. Bulgaria,

[4] As a result of The Asylum (Designated States) Order 2003

iii. Jamaica,

iv. Macedonia,

v. Moldova,

vi. Romania, and

vii. Serbia and Montenegro.

28. A further order took effect on 23 July 2003, when a further seven countries were added[5]. These "wave 3" countries remain on the list as well, and are:

i. Bangladesh,

ii. Bolivia,

iii. Brazil,

iv. Ecuador,

v. South Africa,

vi. Sri Lanka, and

vii. Ukraine.

29. There has now been a further addition to the list of India, added on 14th February 2005.

30. States, parts of States, and since the 2004 Act also parts of States in relation to particular groups of people[6] can be added to the list by order[7]. So, for example, Turkey could be added, or Istanbul, or Istanbul for those of Turkish ethnic origin. So far only whole States have been added. To be added to the list, the Secretary of State has to be "satisfied" that it meets the test laid down in s94. This requires that in the State or part of the State, either for the whole population or for the group, there is in general "no serious risk of persecution" and that removal will not in general contravene the United Kingdom's obligations under the Human Rights Convention. A legal challenge in the High Court to the decision to designate Bangladesh resulted in a decision from the Judge that this was unlawful. The Secretary of State has been granted permission to appeal this decision to the Court of Appeal. Whatever the final outcome, the High Court decision that Bangladesh should not have been designated due to its Human Rights record does indicate that the extent to which the designation of countries, especially those which were added later, is controversial.

[5] As a result of The Asylum (Designated States) (No. 2) Order 2003
[6] S94(5)(A)-(C) 2002 Act, as amended by the 2004 Act
[7] S94(5) 2002 Act, as amended by the 2004 Act

31. Lord Filkin made a commitment to the House of Lords in on 31 March 2003 that in future "For any states that we consider adding to the list … we will, as promised, invite comments from the {Advisory Panel on Country Information[8]] about the country information on which we propose to make our decisions." This had not been done up until then, because, it was explained by Lord Filkin, although during the passage of the Act Ministers had given the impression that consultation with the Panel would take place before designation, there had been a delay in setting up the Panel. I consider the Advisory Panel to be extremely important source of independent advice and expertise about country conditions, and therefore *I recommend that in future that the Advisory Panel on Country Information be consulted in line with this commitment before adding to the s94 list.*

32. Above I have explained how claims for asylum or human rights protection made by those entitled to reside in a listed country must be considered for certification. However, any asylum claim or human rights claim, made by a person of any nationality, can be certified under s115 or s94 of the 2002 Act, on what has become known as a "case by case" basis, provided it is "clearly unfounded". Until relatively recently this power to certify claims from those not from a listed country was rarely used, although it is beginning to be used more frequently now. During November 2004, for example, a total of 72 claims were certified on a case by case basis, including 40 claims by Indian nationals and a significant number of claims by Turkish nationals.

33. It is anticipated that, during 2005, the numbers of cases certified on a case by case basis will increase, although the Home Office was not able to provide an estimate of the likely numbers involved. *I recommend that any increase in case by case certification be approached with extreme caution.* The Home Office has said that the "second pair of eyes" (see below for details) for all case by case certification will be a Senior Caseworker with specialist knowledge of the country concerned. Nevertheless, Home Office caseworkers who interview applicants and draft the decision will require a working knowledge of an increased number of countries, and in my view decision-making quality is likely to be reduced. Countries producing significant numbers of asylum seekers are not included on the NSA country list largely because they are not considered to be free of persecution and human rights abuses, and the certification decision will inevitably be more complex in such cases, since the proportion of manifestly unfounded claims is likely to be lower. As stated above, Lord Filkin gave an undertaking to the House of Lords in April 2003 that no further additions would be made to the s94 list without advice from the Advisory Panel on Country Information. *I therefore additionally recommend that the advice of the Advisory Panel on Country Information is sought where there is a policy decision to begin certification of claims from particular countries without formally adding the country to the list, as appears to have been the case with claims from Turkey and India.* I note that India has since been designated,

[8] An independent body established by the Home Office to review its country information used as a basis for asylum decisions

but the point remains a valid one generally. I expect to report further on case by case certification in my next report.

Section 4 - NSA Procedure.

34. I have set out below a description of the procedure that is followed in respect of NSA cases because the quality of decision-making is inevitably dependent, in part, on the adequacy of the procedures followed, and I have recommendations to make about this issue.

35. Applications for asylum must be made in person by the applicant and may be made at "Port", i.e. at the air or sea port of arrival, at an Asylum Screening Unit located in the Home Office in various cities for those applying after they have entered the UK, or on "detection" e.g. following arrest.

Screening

36. Asylum applicants are then "screened", a process involving taking their finger prints and photograph, and completing an initial questionnaire which runs to some 20 pages regarding their family, education, employment history, nationality, ethnic origin, and details of each stage of their journey to the UK. They are then issued with an Applicant Registration Card, the size of a credit card, with their photograph, name and nationality, whether or not they have permission to work and also containing bio-data (their fingerprints). Up to this point, there is no difference in NSA cases to the procedure followed in all asylum cases.

Detained route - Oakington

37. For those who are nationals of, or who have been resident in, one of the countries on the s94 list[9], at the time of screening it is decided whether they should be detained and transferred to Oakington Reception Centre, near Cambridge. Oakington is a centre used for immigration detention on a short term basis. It has relatively low security. It was been used as a place of detention for fast track decision making before the NSA process was introduced, and since November 2002 when certification began Oakington has been the location for detention and decision making in about 35-50% of NSA cases.

38. Provided the asylum applicant and any dependents are considered suitable for detention at Oakington, and there is space for them, then they will be detained and arrangements made to transport them there. On arrival at Oakington applicants are given a leaflet in their own

[9] See above; currently Albania, Bulgaria, Jamaica, Macedonia, Moldova, Romania, Serbia and Montenegro, Bangladesh, Bolivia, Brazil, Ecuador, South Africa, Sri Lanka, Ukraine and, since February 2005, India.

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language or one which they may reliably be assumed to understand, which explains the NSA procedure. If such a language is not available, the services of "Language Line" will be used.

39. Applicants generally arrive within 24-48 hours of making their claim for asylum, although in some cases this can take longer. Families where the principal asylum applicant has a right of residence in a listed country are also detained at Oakington, like single individuals. Usually the whole family will be detained together, however, the Immigration Service regularly detain the head of a family whilst allowing the remainder of the family to live in the community. In line with this practice, the families of NSA applicants may be separated from them in this way. However this has only rarely been applied at Oakington, which has sufficient family accommodation to accommodate 180 detainees. Indeed the general practice at Oakington is to avoid splitting families wherever possible. Unfortunately the policy of detaining applicants with their families means that significant numbers of children have been detained at Oakington pursuant to the NSA process. It should be noted that families are usually considered to be at low risk of absconding, and are therefore not generally detained during the processing of an asylum claim, and that it is Home Office policy is to detain children for "as short a time as possible and for no longer than is necessary."[10] Home Office statistics do not distinguish between dependents who are adults and dependents who are children, so I cannot specify how many children have been detained as a result of NSA decision making at Oakington, but it is likely to be significant. *I recommend that alternatives to detention should always be carefully considered where children are involved – e.g. a requirement on the parents to report frequently – and that family cases are dealt with wherever possible (which should be the vast majority of cases) by way of the non-detained route. I also recommend that the current pressure felt by staff to ensure that the family accommodation is as full as possible at Oakington is addressed – the fact that there is space in a detention centre to house a family should not be a reason to detain. I also recommend that statistical data records adult and child dependants separately.*

40. HM Inspectorate of Prisons (HMIP) is also concerned about the detention of children at Oakington. During an inspection visit to Oakington during June 2004 (reported published November 2004) it was found that while most children held at Oakington were held for short periods, 15 of the 41 children detained at the time of the inspection had been held for between one and four weeks, and the longest stay in the previous year had been 21 weeks. This was in contrast to a previous inspection visit, before the introduction of NSA processing, when no children were held for more than seven to ten days. The HMIP report makes comment on the disruption caused to education of some children, including missing GCSE examinations in one case, and the fact that the majority of child protection "cause for concern" forms were opened because of staff worries about children's failure to thrive, often because of traumas associated with detention.

[10] Beverley Hughes, Minister for State, 8 May 2003, to the House of Commons, Hansard Column 927

Mechanisms for deciding to detain children, and reviewing their detention and developmental needs, were not sufficiently robust in the view of HMIP. The report observed that the detention of children should be authorized at a senior level, by an Assistant Director, and this was not being done at Oakington. I agree with this observation – I found no evidence of an Assistant Director's involvement in the detention decisions in family NSA cases in the files I reviewed. HMIP's report also states that it found no evidence of a balancing exercise being carried out, weighing the necessity of detention and the welfare of the child, as article 8 ECHR requires. I agree with this observation as well – there seemed to be no consideration during detention reviews on the files I saw of the welfare of any children, except where this was raised in one case as a matter of concern by the legal representative. The HMIP report states "it remains our view that the detention of children should be exceptional, and only for very short periods" and where a child is detained recommends an independent review of a child's welfare and development after 7 days. I endorse this recommendation. This is relevant to my role as Certification Monitor because acute anxiety about family members' welfare will affect the ability of the principal applicant to properly prepare and present their case in the short timescales involved. This was evident in some of the files I reviewed; one example being where the distress of a mother about her children's welfare was documented repeatedly on the file. If the claim is certified there is, of course, no appeal process before removal where any difficulties in presenting the initial case could be drawn to the attention of an independent Immigration Judge.

41. HMIP stated in its 2004 report about Oakington that "since our last inspection [in 2002], the population and function of Oakington had changed. In particular it was holding detainees facing the prospect of imminent removal without a right of appeal: some of whom would be removed immediately after completion of the fast track process. This had implications for security, vulnerability and the length of time detainees, including children, spent in the centre. The Centre had paid attention to the security risks; but in our view had paid insufficient attention to the need for effective systems to manage the increased risk of suicide and self-harm; or to provide sufficient purposeful activity for longer-staying detainees". The report notes the use of the secure Detainee Departure Unit – a locked down separation unit – for various incompatible functions, including the detention of those thought to be at high risk of absconding, disruptive detainees, those at serious risk of suicide and self-harm and as a temporary staging post for those due to depart the Centre. These functions were held to be incompatible and unsustainable. The systems for supporting those at risk of self harm were insufficient to cope with the current population held at Oakington. I recommend that these issues are addressed promptly. There are thus concerns that for some detainees, Oakington does not provide a conducive environment to advance their claim for asylum. As stated above this is particularly relevant as there is no right of appeal against certification, which might have allowed any difficulties an individual had in presenting their claim to be resolved before removal.

42. At some stage, probably on the date the claim was made, a "One Stop Notice" will have been served on the applicant. For those subject to the Oakington NSA process, 3 working days is allowed to complete and return this. This form requests the provision of "additional grounds", i.e. any reasons in addition to the asylum claim that the individual has for wishing to remain in the UK.

43. Once an individual arrives at Oakington, they are given a series of dates – for an interview with their legal representative, for their asylum interview, and for their decision interview.

44. Some individuals, for reasons of Home Office staffing capacity, are not admitted into the NSA system immediately on arrival. Some spend a period of days, perhaps even a week or more, detained at Oakington before they are formally admitted to the NSA process. This inevitably extends the time they spend in detention at Oakington. *I recommend that applicants are not held at Oakington for periods greater than a day prior to their entry into the NSA process, except where there are clear grounds for detaining the applicant in any event.*

45. Within 2 days of arrival at Oakington, the applicant should have a meeting with their allocated legal representative, at which the legal representative is able to provide legal advice to the applicant, and to take information from them about their claim. I understand if the applicant requires more than a single legal advice session, it is possible to arrange this prior to the asylum interview.

46. Two organisations provide "on site" legal representation at Oakington - the Refugee Legal Centre (RLC) and the Immigration Advisory Service (IAS). Both have staff permanently based at Oakington, and offices on the premises. Both are non profit making organizations, and both have been providing legal advice and representation to asylum seekers for many years. Both also have contracts with the Legal Services Commission (LSC) which is responsible for allocating public funding for legal representation for those who cannot afford to pay for this. IAS and RLC therefore offer free legal advice and representation to those who have limited financial means. A system of "exclusive contracting" has now been introduced, meaning that the legal representation of those detained at Oakington will only be funded by the LSC if this legal advice and representation is provided by either the IAS or the RLC, except in limited exceptional circumstances (i.e. the legal representative has done at least 5 hours work on the case already, prior to detention of the applicant at Oakington, or represents another close family member whose case is interconnected with that of the applicant). Off-site legal representatives have to work within the timetable laid down by Oakington, which may mean "out of hours" work at short notice. It is in my view a crucial part of the limited safeguards the NSA system affords that high quality legal advice is available to applicants during their interview and subsequently. Legal representation is also vital to ensure that the applicant understands what is happening to them and

what the process is likely to be in their case, and has access to independent advice and assistance when things go wrong. I will return to the issue of legal representation and the quality of legal advice afforded to applicants later in the report.

Trafficked persons

47. Given the nationalities of those commonly detained at Oakington, staff I spoke with were well aware of the likelihood that significant numbers of applicants detained there had been trafficked, either for forced labour or for prostitution. Such cases raise two different but linked issues.

48. Firstly the fact of being trafficked may be the source of the applicant's claim for asylum, and for a fair decision to be made on their claim it is vital that they are sufficiently recovered from their ordeal, and that they feel safe enough, to explain the basis of their claim in full by the time they are interviewed. Time to reflect is generally seen as crucial for those who have been trafficked and especially those who have been under the control of their traffickers in the very recent past. This presents significant challenges at Oakington because of the fast timetable in operation there. Therefore, all those involved in Oakington decision-making processes need to be vigilant to ensure that applicants are able to give information about their claims without fear of subsequent reprisals, and that they understand their options. Without this, the decision may be based on partial information about what has happened to the applicant and without full information an assessment of future risk should they be returned may be inaccurate. Once again, this is especially relevant since if the claim is certified there is no right of appeal and removal may take place almost immediately, allowing no opportunity to explain further what has happened.

49. Secondly there are issues about protecting applicants during their time at Oakington and beyond; clearly this is linked to the issue above, since if victims are under ongoing pressure not to speak out then this may mean they do not feel able to explain their claim. There is much more chance that they will be able to do so if there is freely available information about their options in a language they can understand, that they can access in an unobtrusive way, and preferably take away for future use. Even if they do not decide to seek help while in Oakington, if they have information about sources of potential assistance they might be enabled to do so in the future.

50. There is widespread acknowledgement of the ingenuity employed by traffickers to maintain control of their victims, and a warning that: "Care should be taken with selection of interpreters, to ensure that they do not have any involvement with traffickers and are not exposed to coercion from traffickers" is included on the crimereduction.gov.uk website. When I visited Oakington, staff there told me that if released from

Oakington applicants might fall into the hands of traffickers again (I was told many applicants of a certain nationality give the same address for their release, and that staff suspected this address was used by traffickers), and that the "package" provided to the applicant by the traffickers might include a lawyer. Staff at Oakington seemed resigned to releasing applicants to addresses they suspect are used by traffickers, and as far as I could ascertain the relevant addresses had not been passed onto the police for investigation. Equally, when I asked I was told that suspicions about particular law firms had not been reported to the Legal Services Commission or to the Law Society.

51. It is clearly also possible that some of those detained at Oakington might themselves be traffickers, and that these individuals might therefore be detained amongst their victims (for example if a van is stopped carrying a group of individuals working here illegally, the person controlling them may well be detained as part of the group).

52. *In light of the above, I recommend that clear procedures are put in place instructing staff what action they should take when they suspect the involvement of traffickers in any way. I recommend other agencies working at Oakington, for example RLC, IAS and the Refugee Council, also adopt robust policies which are client-focused if they have not done so already.*

53. In this context, I was surprised about the lack of clear policies and procedures in place at Oakington for dealing with trafficking. Following my visit, I asked repeatedly for the policies regarding trafficking in operation at Oakington; I was told it was under revision from the time I visited in March 2004 until both the old and new policies were provided to me in January 2005 when I understand the new policy was adopted.

54. The new Oakington "Victims of Trafficking" policy is more detailed than the old. It adopts the definition of "trafficking in persons" contained in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000). The Protocol includes in its definition of "trafficked" those trafficked for forced labour as well as for prostitution. However, I was disappointed to note that both the old policy and the new one focus almost exclusively on women trafficked for prostitution and on the Poppy Project. This is a project funded by the Home Office to help victims of trafficking and to assist in gathering intelligence about traffickers. The aim of the scheme is both to provide support to victims, and to help the police and other agencies tackle trafficking, by gathering intelligence from the women accommodated there; one of the criteria for acceptance onto the scheme is willingness to co-operate with the authorities. It is expected that victims will return to their country of origin at the end of any investigation or criminal trial. It is run by Eaves Housing, an organization experienced in supporting and assisting victims of

trafficking. However, while the service it provides is valuable, this is only available to women aged 18 and over, who are identified in London, and there are further restrictive criteria for eligibility. The policy makes almost no reference to other sorts of cases or the issues about care and protection of victims of trafficking within Oakington.

55. The criteria for the Poppy Project, in detail, are:
    - The victim has been brought to the UK,
    - She is being forcibly exploited,
    - She is working as a prostitute,
    - She has come forward to the authorities,
    - She is willing to co-operate with the authorities.

    However, women who are not currently working as prostitutes can be considered eligible if:
    - they demonstrate they have escaped from the trafficker,
    - that in the period immediately prior to their escape they had been working as a prostitute,
    - that the period they have not been working as a prostitute does not exceed 30 days,
    - that the remaining criteria are met.

    Accommodation space at the Poppy Project is limited to 25 beds

56. Both the restrictive criteria and the space limitations mean that the fact the Poppy Project cannot accommodate an individual is far from conclusive as to whether there are issues that need to be addressed within the Oakington system. As well as all male victims of trafficking, there will be trafficked women who fall outside of the current entry criteria cannot be accepted onto the scheme. These include (according to the Home office's own policy on trafficked cases):
    - Port of entry referrals by Immigration/NGOs (because the woman has not yet been working as a prostitute within the UK),
    - Women trafficked into another country (perhaps other EU countries) before being re-trafficked into the UK,
    - Women who escaped/left prostitution more than 30 days before referral (there is scope for limited discretion if the period since leaving prostitution is not significantly more than 30 days),
    - Women who have claimed asylum in the UK already and have exhausted all avenues of appeal through the asylum process (this is to prevent the Scheme being used as a last resort attempt to remain in the UK when the asylum process has been fully explored),
    - Women trafficked for purposes other than prostitution (domestic slavery, forced marriage, etc).

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57. I further note that the policy makes it clear that the asylum interview will still take place in Oakington even if a woman has been accepted by the

Poppy Project. She will be released after the interview to be accommodated by the Project. This is in contrast to what happens if her potential eligibility for the Poppy Project has already been identified prior to detention, in which case the policy states that; "Any cases that clearly meet the Project criteria should not be referred to Oakington", due to the need to complete various procedures there and to cooperate with legal proceedings if relevant. *I recommend that women accepted by the Poppy Project are released immediately and not interviewed at Oakington; I make this recommendation because I believe that many of those accepted by the Poppy project will benefit from their support before being interviewed.*

58. The Oakington "Victims of Trafficking" policy then goes on to state that "Those who do not wish to be referred to the Poppy Scheme should be processed in the normal manner. Whilst we do not accept that lengthy recovery and reflection periods are necessary in every case, or that they should be granted regardless of whether a victim chooses to assist in any prosecution of the traffickers, staff should be mindful that victims of trafficking may need time and assistance to recover from the effects of abuse at the hands of their traffickers and to make informed decisions about their future. As with any other applicant being processed through Oakington, ready access to their appointed representative, Refugee Council and medical services will be available. Where there is concern about a claimant's mental or physical health this should be referred to a SCW, and Primecare FMS advised at the earliest opportunity." It is unclear to me whether the policy is to allow traumatized victims of trafficking additional time to prepare their claims, which I would strongly recommend, or whether the policy is to resist any such application on the basis of the access to their legal representative and medical services that is possible at Oakington. I would suggest the policy is formulated more clearly in this regard.

Asylum interview

59. The Home Office has a team of caseworkers and senior caseworkers trained in NSA decision-making based at Oakington, and theoretically on day 3 but more often on day 5 or thereabouts the asylum interview takes place. This is conducted by an Executive Officer, with the assistance of an interpreter if this is required. The official conducting the interview is not always an accredited NSA caseworker, since the Home Office takes the view that it is not necessary, and that general asylum interviewing skills are sufficient. The interviewing officer will often only know the nationality and ethnic origin of the applicant prior to their interview, since in NSA cases the practice of requiring a written questionnaire to be completed about the claim, known as a Statement of Evidence Form, prior to the interview, is not used.

60. This year, public funding for legal representation at most asylum interviews was withdrawn, but it remains in place for those detained at Oakington. Thus those interviewed within the NSA process usually have a legal representative present at the asylum interview, as well as an interpreter provided by that legal representative to check on the

accuracy of the Home Office interpreter if this is needed. The interviews are not tape recorded, and the Home Office interviewing officer takes a written note of what is said by themselves and by the applicant. The legal representative does the same.

61. In my opinion, legal representation at interview in NSA cases is a vital safeguard, since it provides an independent observer able to take notes about what takes place, and to comment on any difficulties that arise. For applicants who are not able to speak English, who are frightened, who may be traumatized, who are not accustomed to dealing with British officialdom, and whose cases are being dealt with at an accelerated rate with no in country right of appeal it is vital, in my view, that this representation continue. The interview is their only opportunity to put forward their claim, and thus is the most important part of the process for them. In NSA cases, asylum interviews tend to last longer than they do in non-NSA asylum cases, often for two to four hours or more, depending on the claim and the level of detail the applicant provides in their replies to questions. The Home Office acknowledges the importance of providing an adequate opportunity to the applicant to set out their claim in full, and being asked to describe everything of relevance, as well as being questioned on issues likely to be relevant to the Home Office in reaching a decision on the claim. Any discrepancies must, it was emphasized at the training session for those due to become NSA caseworkers that I attended, be put to the applicant during the interview allowing them an opportunity to explain. Caseworkers are encouraged to take their time, and probe for further details that might be relevant. The importance of caseworkers putting to the applicant aspects of their claim on which certification was likely to rely was also emphasized in the training session I attended. In some cases there is a further interview with the applicant, if the caseworker or the senior caseworker decides this is necessary because something has been missed in the initial interview or there has been some problem in the way the interview was conducted.

62. Most of the interviews in the case files I reviewed appeared to have been properly conducted, in that there seemed to be no complaints during the interview or subsequently, although there was one example of a refusal to arrange an interpreter for a client who appeared to be struggling to understand English and to express herself in English. The representative clearly made oral representations for an interpreter to be arranged since a note of this was made by the interviewing officer. This was refused and the interview proceeded without an interpreter, resulting in a complaint by the legal representative afterwards. Eventually the interview was repeated. *I recommend that all requests for an interpreter for an asylum interview are acceded to – if the applicant wishes an interpreter to be present that should be sufficient, especially in an NSA case where the interview is in all likelihood their only chance to explain their case.*

63. In terms of the interviewing skills of Home Office interviewing officers, I have several comments to make. In most cases in the files I reviewed the interviewing officer seemed to elicit in the course of the asylum

interview the core details of the claim. However, the interviewing officer did not by any means always ask the appellant about the issues which later formed the basis of the Home Office's reasons for refusal letter. *I recommend that the likely basis of the refusal is put to the applicant in the asylum interview in a direct way in all cases.* The asylum interview is, in all likelihood, the applicant's only opportunity to answer the Home Office's concerns about their claim, and they cannot do this unless these are put to them clearly. If the Home Office official believes there is a safe area of their country where they could live, they should be told this, and asked whether there is any reason why this would not be possible for them. If the Home Office official thinks they are likely to refuse the claim on grounds of the existence of protection from the applicant's own Government, this should also be explained and an opportunity given for comment.

64. Following the asylum interview, there is a two day period in which the applicant and their legal representative can submit representations in writing and further evidence in support of the claim. In the case of the RLC and IAS, the legal advisors based at Oakington, this comprises a detailed letter of representation, setting out the factual background to the claim and relevant legal argument, and enclosing objective evidence in support. The RLC also provides a detailed statement from the applicant, setting out their claim. Generally these representations are of a reasonable or a high standard. However, in the files I reviewed, for applicants represented by other organisations and law firms, the quality of written representations was generally (although not always) poor. I will return below to the issue of legal representation for those within the NSA process.

Decision making

65. In the majority of cases, the Home Office's decision is to refuse and to certify the asylum claim and any human rights claim as "clearly unfounded". A minority of cases are refused asylum without certification, and can then appeal in-country prior to any removal taking place. On very rare occasions the decision is to grant some sort of status to the applicant; I am informed there has been a single grant of asylum in potential NSA cases while the applicant was still at Oakington. More often, those with stronger cases are released, pending a decision on their claim, and there may have been other decisions to grant asylum subsequent to release from Oakington in cases where a decision could not be made in the timescales operating at Oakington. On occasion, applicants where a decision has been taken not to certify their claims are transferred to Harmondsworth, and processed through a different fast track process, where the case progresses to an appeal hearing within 10 days.

66. The Home Office decision maker is not always the official who interviewed the applicant; a good proportion of the decisions where the applicant is detained at Oakington are made by staff based in Liverpool or Croydon. The process of decision making about whether to

recommend certification or not to the senior caseworker who will make the final decision will probably begin immediately following the interview. The initial decision may be made prior to receipt of the further written representations from the legal representative, therefore, but I am told this would be reviewed in the light of those further representations. There is legal authority that acknowledges that once a decision is made, there is a human tendency to be reluctant to change it. I believe it is vital that there is a clear decision-making stage, where all the evidence available is considered and it is decided whether this is a case that falls to be refused, and if so whether it should be certified. *I recommend that no initial decision be made prior to the receipt of written representations, provided these are submitted within the timescale agreed with the legal representative.*

67. Home Office caseworkers are allocated a very significant amount of time to make the decision and draft any "Reasons for Refusal Letter". Caseworkers told me they took approximately a half day to a day drafting the paperwork and formulating their recommendation about certification, depending on the case. They made it clear that they are not under time pressure, the emphasis being on properly drafted decision letters.

68. Once the Reasons for Refusal letter has been drafted the file is passed to a senior case worker, along with a short summary of the factual basis of the claim and a recommendation about certification. The senior case worker reviews all the documentation in the case, often amends the Reasons for Refusal letter, and makes the final decision whether the claim will be certified or not. Occasionally the senior caseworker will suggest the applicant should be re-interviewed. Sometimes the senior caseworker will not follow the recommendation to certify the claim. I was informed by several senior case workers that this happens in about 10% of cases. A senior manager told me that about 20% of applications from designated countries are not certified, but I also note that the Minister informed Parliament only about 3% of asylum applications from countries on the s94 list are not certified so there is some confusion about the numbers of cases where this occurs. However, it is also the case that there used to be significant concerns about the integrity of Home Office data on the NSA process, due to general problems with the systems used to collect the data. I can confirm that I saw, amongst the files reviewed, a small number cases where senior caseworkers declined to follow a recommendation to certify as clearly unfounded, and it is clear it does happen in what is probably a small minority of cases.

69. Senior caseworkers take perhaps a further half day to a day over the task of reviewing the decision, any Reasons for Refusal letter, and the recommendation regarding certification, the length of time again depending on the case and the expertise of the caseworker whose decision they are reviewing. This is known as the "second pair of eyes", and was a further commitment made by the Minister during the Parliamentary debates on the NSA process. As far as I could tell, in all

the files I reviewed a Senior Caseworker had reviewed the decision. Senior caseworkers have a crucial role in the NSA system, since it is only they who can take the final decision to certify a claim. However, I am aware that during times of staff shortage caseworkers were temporarily appointed to the post of senior caseworker to provide this function. *I recommend that the practice of caseworkers being temporarily appointed to the post of senior caseworker to deal with staff shortage is no longer used.*

70. The Home Office has a department of legal advisors, who have been very actively involved in the NSA process. At the start of the process, every Reason for Refusal letter which contained a decision to certify was referred to these legal advisors who checked the decision was in their view legally sound. The Treasury Solicitor, the Government's solicitor, was also involved in this process.

71. During the decision-making process, caseworkers and senior caseworkers can also ask the Country Information and Policy Unit for its advice about a particular aspect of the case. I saw no such requests noted on the files I reviewed. *I recommend far more use is made of CIPU for advice on individual cases, and believe that if this were to happen, the quality of decision making would be improved.*

72. I understand that additional material received from the applicant between the time the decision was made and the service of that decision would normally be reviewed by the decision maker and the Reasons for Refusal Letter amended to reflect any change of position.

73. Once completed, the relevant documentation, in most cases a detailed Reasons for Refusal letter and the accompanying formal notices of the decision, are served on the applicant in person, at the "decision interview". This occurs usually between day 10 and day 14.

74. If the applicant is granted asylum or some kind of status, then they are released, having been presented with their status papers at the decision interview. This is extremely rare in cases where the applicant comes from a designated country.

75. If the applicant is refused asylum and their claim is not certified, then they leave the NSA process. They may be granted temporary admission (i.e. released from detention, usually to accommodation provided by the National Asylum Support Service) or detained, in either case to await an appeal hearing on their claim.

76. If the applicant is refused asylum and their claim is also certified, then removal directions are set (i.e. a date for departure with a booked flight) with immediately or at a later date. The applicant will be detained in all likelihood until this date. In some removal is a simple process, since it is possible to remove the individual on documentation called an "EU letter", i.e. documentation prepared by the Home Office. In other cases this is more complicated, for example Jamaica and Moldova, where there is no agreement with the destination country that their nationals

can be removed on EU letters: if the applicant does not have a valid passport a one way travel document must be obtained from the relevant embassy. This can take, for example, about 3 months in Jamaican cases. During the documentation process the individual will probably be detained. Release is rarely granted by the Home Office, since it is thought likely that such individuals will abscond, although it is in some cases. The applicant can also apply for bail from an immigration Adjudicator. Once travel documents are arranged, and the flight booked, the individual will be escorted to the airport and to the flight itself.

77. Throughout the above process, it is possible for the applicant to make a voluntary departure, i.e. to confirm that they wish to leave the UK on a voluntary basis and withdraw their claim. However, the same problems outlined above in arranging their departure may be encountered.

78. Finally, Oakington is due to close in November 2006 because the Home Office has given a public undertaking that it will leave the site by then. Consideration clearly needs to be given as to whether detention during NSA decision-making is to continue, and if so where it is to happen.

Detained Route – non-Oakington

79. There may be those who are detained other than at Oakington whose cases are considered under the NSA system. An example would be a case that was not thought suitable for detention at the relatively low security of Oakington. The process will be as above, except that the timescale for decision making is likely to be slightly longer, and the applicant would have no access to publicly funded legal advice and representation during their asylum interview. *I recommend the Legal Services Commission rules covering legal advice and representation at asylum interview are amended, so that any individual who is detained and is being considered under the NSA procedure is eligible for advice and representation during their asylum interview. The current rules only allow this where the applicant is detained at Oakington, which is unfair to those detained elsewhere, but considered under the NSA system.*

Non-Detained Route

80. Those not suitable for detention, e.g. because of ill health, or age, or those who cannot be detained at Oakington because of lack of capacity there, will have their applications for asylum considered by the designated NSA decision making teams, but will be allowed to live in the community while their claims are processed.

81. Such individuals will be eligible for financial support and accommodation from the National Asylum Support Service (provided they are destitute and claimed asylum soon enough). However, by agreement with NASS they are kept in emergency accommodation (i.e. usually in a hotel or hostel) while an initial decision is made on their claim – this is in contrast to most asylum applicants, who will be moved on to permanent accommodation within a few weeks. I understand that

this is because the process of interviewing them and serving the decision runs more smoothly when their address is not changed part way through the process. *Given the delays in dealing with NSA non detained cases, I recommend this process is discontinued. Emergency accommodation is not particularly suitable for the long term accommodation of asylum seekers.*

82. Those in the non-detained route will be interviewed by a caseworker from either the Liverpool or Croydon NSA teams. It is the aim for this to take place about 14 to 21 days after the application for asylum is made. The interview takes place in most cases without a legal representative since the changes to the legal aid system means in most cases there is no funding to attend. *I recommend that NSA applicants who are not detained should have a legal representation during their asylum interview funded by the Legal Services Commission. I consider this to be an important safeguard to NSA applicants because the interview is such a key part of the NSA process and there is no appeal hearing to deal with any difficulties arising from it.* The major difficulty is in working out how to implement this – I recommend at a minimum those from designated countries should have access to this, since it is clear their claims must be considered for certification. If the applicant is from another country, and their claim is being considered on a case by case basis, it will not be obvious that this is the case to the legal representative or to the applicant, and here a method would need to be found for the Home Office to notify them of this prior to the interview, if access to legal representation at interview is to be made available.

83. Thereafter a decision will be made, ideally within about 7 days of the interview, and consideration given as to whether or not the claim should be certified. The same process of decision making described above is followed. The aim is for decisions to be made in such cases within 2 months. However, this time limit is often exceeded. Once a decision has been made, it is usually sent to the reporting centre where the applicant signs on, and should be served on them in person. Often the applicant will be detained at this point, if the decision is to certify their claim, on the basis that they have no appeal and can be removed. At the same time as the decision is served on the applicant, it should also be served on the legal representative, usually by fax. *I recommend that no-one certified in the non detained route should be removed within 24 hours of the decision being served.* To do so does not allow adequate time for legal advice to be taken. Clearly removal should not take place over a weekend following service of the decision on a Friday – in such cases the applicant may not have been able to contact their legal representative at all, most firms having no emergency, out of hours service for immigration cases. This is particularly pertinent for cases certified on a case by case basis, where the applicant and their legal representative will not have been told in advance of the decision being served that certification is being contemplated.

Unaccompanied minors

84. Unaccompanied asylum seeking children from the listed countries are not eligible for detention at Oakington. Unaccompanied minors almost invariably cannot be returned to their country of origin, whether this is a country on the "list" or not, since no suitable arrangements for their reception exist and it cannot be guaranteed that they will be adequately looked after on arrival. Therefore, if they do not qualify for asylum, they will be granted "discretionary leave", i.e. permission to remain in the UK. For children from the NSA countries, this is generally for a year, or until their 18th birthday, whichever is the shortest period. This is in contrast to children from other countries, who are granted discretionary leave for either for a 3 year period or until their 18th birthday, whichever is the shortest, for the same reason, i.e. inadequate reception arrangements should they be returned. Although unaccompanied children are not formally excluded from being considered under the NSA process, because at the current time children from NSA countries are granted permission to stay, their asylum claims are not certified. This is because such an individual does not have a right of appeal under the 2002 Act, so the issue of certification does not arise. However, they will not be able to appeal against the refusal of asylum, since they have only been granted this permission for a year – it is not until the grant of leave exceeds a year that an appeal can be brought. These children must therefore wait until the end of their period of discretionary leave, and apply to extend it.

85. If a further period of leave is granted then, because they now have cumulative leave to remain for more than a year, they can appeal the refusal of asylum under s83 2002 Act, and this right of appeal cannot be certified because there is no certification power where the appeal is being brought under s83. As a matter of policy the Home Office does not certify a claim where leave to enter or remain has been granted, because the individual will not be able to exercise their right of appeal, since to do so they must be abroad.

86. Only if the child has completed 6 years in the UK before the age of 18 will they be granted permanent permission to remain here (Indefinite Leave to Remain). Most UASC are older than 12 on arrival, and will not have completed 6 years of discretionary leave by the time they are 18. Once they reach the age of 18, then they will not be granted an extension of stay, except in very exceptional circumstances. This is because they will now be treated as an adult and capable of caring for themselves, and therefore the lack of reception arrangements in their country is no longer a bar to removal. For young adults from NSA countries, this will often mean certification of their asylum claim and removal once they reach the age of 18.

87. I believe it is unfair to treat children from NSA countries differently to those who are from other countries. I believe grants of short term leave of a year at a time to children who are under 17 (and would therefore otherwise be granted leave until their 18th birthday) creates unnecessary bureaucracy (dealing with applications to extend stay every 12 months) for both the Home Office and for the carer of the child (in all

probability social services). It may create obstacles for social services putting in place stable long term arrangements for their care and it creates uncertainty for a child which is unnecessary. It also prevents a timely hearing of their asylum appeal, which cannot take place until leave of more than a year has been granted, i.e. the applicant must wait a year and whatever time it takes to grant a further period of leave before appealing. I believe that this is not to be in the interests of justice, particularly since it is common knowledge that the memory of a child will fade particularly quickly with time. *I therefore recommend that children from NSA countries are not treated differently to other children, and are granted the standard period of discretionary leave.*

Disputed age

88. Assessing the age of adolescents is notoriously difficult, partly because of variation between individuals, partly because documentation may not be available or there may be a dispute about its genuineness, and partly because in the asylum context there are also issues of age assessment of those from a different culture. It is possible for example that those who have come from other cultures may typically look older than an average British teenager of the same age, due to harsh life experiences, for example. It is an area of decision making where the Courts have acknowledged the usefulness of expert opinion.

89. Some of those whose applications are dealt with under NSA procedures claim to be under the age of 18, but this is disbelieved by Home Office officials. In such a case, the applicant may be detained at Oakington and treated as if they are 18.

90. I reviewed a file where the decision to treat the applicant as an adult and detain them at Oakington was based on an assessment by a chief immigration officer, with no training or particular expertise in assessing age. His view relied on the appearance of the applicant. Despite a report obtained by the Legal Representative from a Consultant Pediatrician (one who was, on occasion, also used as an expert by the Home Office on this same issue) stating that the applicant was clearly under 18 based on clinical signs as well as an interview, the Home Office maintained their position that the applicant was over 18. Eventually, after Judicial Review proceedings were instigated by the Legal Representative, and after advice to the Home Office from their own Counsel, the decision on age was reversed, with a different immigration officer also observing that in her opinion the applicant's appearance clearly indicated he was under 18! This is demonstrative of the difficulty in determining age, and the inevitably subjective nature of a decision made by an immigration officer based on an assessment of the applicant's appearance.

91. The current policy at Oakington is, I understand, to refer cases where age is disputed for assessment by a social worker from Cambridge Social Services Department. If the social worker decides that the applicant is under 18, then the Home Office will accept this decision and they will

be released from detention. Social services will then be responsible for supporting and accommodating them.

92. I believe it is vital that extreme caution is exercised in deciding the age of applicants. Since this is a difficult task, *I recommend that the benefit of the doubt should be given in all cases where the age assessment indicates the applicant to be under 20* – I understand in most cases a Pediatrician would give a 4 year band for probable age, it being most likely that they fall within the mid portion of that band, and least likely to be at the edges of it. Thus an applicant judged to be 19 may only be 17. This approach should ensure that no applicant who is in fact under 18 is detained at Oakington. The importance of such an approach is emphasized by the delay in assessment by social workers – this can take about a month, and although I am told no NSA decision will have been made in the meantime, the applicant will have been detained for a considerable period.

Disputed nationality

93. These are cases where the applicant asserts they are a national of one country, and this is disbelieved by the Home Office, which either asserts they have a different nationality or that they are entitled to reside in a country other than the one in which they claim to fear persecution. In NSA cases, this has most frequently arisen where an applicant arrives on South African travel documents (those with a right of residence in South Africa are included on the list) but claims to be Zimbabwean.

94. In one NSA case and another uncertified case, applicants who arrived on South African passports, claiming that these passports were false and that they were in fact Zimbabwean, were removed to South Africa. Their claims to be Zimbabwean were disbelieved and they were removed to South Africa on the basis they were entitled to reside there, and that the South African passports they possessed were genuine, and not false as the applicants claimed. However, on arrival in South Africa they were detained in a detention centre, and removal directions were set for Zimbabwe; clearly the South African authorities believed them to be Zimbabwean after all. When this came to light, both applicants were brought back to the UK following legal proceedings. As a result there was a temporary suspension of removals to South Africa of those claiming to be Zimbabwean, but I understand removals are taking place again. This is because as a result of agreement reached between IND's Director General and his opposite number in South Africa in July 2004, it is possible to arrange for a thorough nationality check to be undertaken by the South African authorities. They have agreed that on undertaking such a check they will confirm whether or not the person is entitled to reside in South Africa, and if they confirm that they are, they will stand by this confirmation when the person is removed to South Africa. Such checks are now commonly referred to as 'enhanced' nationality checks.

95. It is possible that an incorrect assessment of a person's nationality might result in return to persecution and / or a serious breach of their human rights. The applicant who was returned to South Africa following certification of his claim had had no consideration given to whether there was a risk of persecution to him on return to Zimbabwe, since his claim had been decided on the basis that he was South African. There was no appeal hearing at which this issue could be further examined, perhaps with expert evidence. At the time of the removal of these two individuals to South Africa removals to Zimbabwe had been suspended as a result of concerns about the situation there. *I recommend that a great deal of caution is employed when making decisions in NSA disputed nationality cases, and that the same approach should be applied in these NSA cases to the issue of nationality as is applied to other issues involving the credibility of the applicant – i.e. is the assertion regarding nationality capable of belief? If it is, then the claim should not be certified, and there should be an in-country right of appeal where this issue can be examined in more detail.* I believe that this is vital, since an applicant returned to a country which is not their own may face removal from that country, as a non national, as happened here. This will invariably be to their country of nationality, which in disputed nationality cases is usually a country where there are serious breaches of human rights, like Zimbabwe, since it is of course rare for the Home Office to suspect an applicant of claiming a different nationality to their own unless this is perceived as potentially advantaging them in some way.

Appeals

96. Once the applicant whose claim has been certified has departed from the UK, they or their legal representative can lodge an appeal against the refusal of asylum. Lodging an appeal was done, at the time of writing this report, by sending a completed appeal form to the Home Office. The independent adjudicator who is to hear the appeal is instructed that the "appeal …. shall be considered as if he had not been removed from the United Kingdom"[11] in order to deal with the technical difficulty that to qualify for refugee status an individual must, according to the Refugee Convention, be outside his country of nationality.

97. The appeal process is due to change shortly, but during the period covered by this report has been as follows. The Home Office, on receipt of the notice of appeal, prepares a bundle of papers for the appeal, containing a summary of the case, the interview notes, documentation submitted by the applicant, notice of decision, reasons for refusal letter, and the notice of appeal. This is sent by the Home Office to the Immigration Appellate Authority (IAA), i.e. the specialist immigration court which has had responsibility for determining almost all immigration appeals in the first instance. The IAA lists the appeal on receipt of these papers from the Home Office, and sends a notice with a first hearing date and a full hearing date to the applicant and their legal representative. This means that, rather unusually for legal proceedings,

[11] S94(5) 2002 Act

the Home Office (one of the parties to the appeal) has been in control of when the appeal takes place, although this is shortly to change. In the files I reviewed, it took about a month for the appeal bundle to be prepared. *I recommend that the time preparing documentation by the Home Office is shortened – the appeal should be heard as soon as practicable, given that the applicant is abroad and potentially facing persecutory treatment while awaiting the outcome of the appeal. Specifically I recommend that once the appeal has been received, the bundle should be prepared within, at most, a week.*

98. The first hearing in an immigration or asylum appeal is generally an administrative hearing. However, if the Appellant has not complied with certain formalities, specifically returning a form providing information about their case, and also does not attend the first hearing, then the Adjudicator can determine the appeal at the first hearing in the absence of the Appellant and their legal representative. Presumably because of practical difficulties obtaining instructions and perhaps difficulties securing public funding for the appeal, in the case files I reviewed many Appellants were unrepresented by this stage and did not return the form to the Court. Often the Adjudicator therefore determined the appeal at the first hearing. If this happens, the Home Office is also not represented either, since it is not Home Office policy to attend these first, administrative hearings. In other cases, the appellant had indicated they wished the appeal to be determined on the papers, i.e. without an oral hearing, and in these circumstances the appeal was also decided at the time of the first hearing.

99. If the reply to directions is returned, then the appeal is usually heard on a later date as specified in the initial hearing notice. It is Home Office policy always to attend full oral hearings in NSA cases. Sometimes in the files I reviewed the Appellant was represented. In most cases the Appellant was not represented. In none of the files I reviewed were witnesses called on behalf of the Appellant (e.g. a relative or a friend who might be able to give evidence about what had happened to the Appellant, or an expert).

100. No Appellant attended their appeal hearing in the cases I reviewed. Nor in any of the files I reviewed was there evidence that an Appellant had applied to return to the UK for their appeal hearing, but as this application would probably have been made from abroad, at the relevant entry clearance post, it is possible this had happened without the knowledge of the Home Office in the UK. The official Home Office view is that, "We would not agree to any such request. This is for two principal reasons: Firstly we would resist such a request as a matter of policy. To agree would undermine the central purpose of section 94 - which is to prevent certain asylum applicants from bringing an in-country right of appeal. Secondly we interpret the wording in section 94(2) "may not bring an appeal" to encompass the whole process of pursuing an appeal, not merely the lodging of that appeal. The effect of this interpretation of the law is that if an appellant lodges a section 94 appeal abroad, and then is given leave to enter the UK for the hearing, the appeal would be automatically abandoned."

101. Also in none of the files I reviewed was there an application that the Appellant be allowed to give evidence by video link. Of course, many Appellants are not represented by the time of their hearing, and in any event may feel too unsafe to give evidence in this way from their home country, since in many countries which generate asylum seekers giving evidence by a video link would probably attract attention to the appellant and might be officially monitored. The Home Office's position is that it would oppose any such application, since they consider that the appeal is likely to turn on objective country information, not the credibility of the applicant, because legal representation in sufficiently meritorious cases is enough to ensure a fair hearing, and because video link in every NSA case would have significant resource implications and would delay the hearing of appeals significantly. *I recommend that video link be considered as an option by the Immigration Appellate Authority and / or its successor organization and those representing Appellants, in cases where it would assist the Adjudicator to make a fair decision on the claim. Such cases are likely to be rare, but this is not a possibility that should be dismissed out of hand. I also recommend that the Home Office re-considers its policy of always resisting such an application.*

102. When the hearing takes place, the Adjudicator will consider the case "as if [the Appellant] had not been removed from the United Kingdom".[12] In many of the files I reviewed, where there was a hearing, the Home Office had made submissions attacking the credibility of the appellant, in addition to relying on the reasons contained in the Home Office refusal letter (which invariably do not contain challenges to an applicant's credibility). Although the Adjudicator may decide to make a finding that an applicant lacks credibility, whether this is advanced by the Home Office or not, they are much more likely to do so if the Home Office puts this forward. I believe it would be fairer if this was not done, since the Appellant has no opportunity to answer this challenge since they are not in court. The Home Office has asserted in certifying the claim that it is not possible for the appeal to succeed, regardless of whether the applicant is telling the truth or not. If the Home Office is confident of its case, there is no reason to put credibility forward in the hearing. *I therefore recommend that the Home Office does not challenge credibility at the hearing unless this was done in the Reasons for Refusal letter.*

103. In all the files I reviewed, where an appeal was heard, the appeal was dismissed (i.e. the Adjudicator decided that the applicant did not qualify for refugee status nor for protection under the ECHR). However, there have been three cases in which the appeal was allowed in NSA cases. Clearly an allowed appeal indicates that the Home Office decision to certify the claim was not the right decision. If the appeal is allowed, and the Home Office does not challenge the decision by trying to appeal further, then the Appellant must be brought back from wherever they are, and given refugee status or Humanitarian Protection, depending on

[12] S94(9)

the reason why their appeal was successful. Bringing an applicant back to the UK may not be a straightforward process. In one case where the appeal was successful there were considerable difficulties obtaining a passport for the individual concerned, since she was Romanian and her Government had placed restrictions on her obtaining a passport due to her assumed breaches of UK immigration law. There was a very significant delay in her return to the UK as a result, with the potential of further exposure to human rights abuses in Romania. This both emphasizes the potentially serious consequences of decisions to certify which are wrong, and the practical difficulties of the current system. Prior to this example, I understand the Home Office had been unaware of the possibility that such difficulties might arise in bringing back a successful NSA appellant.

Judicial Review

104. Those whose claims have been certified have a single legal safeguard against return. This is an application for Judicial Review to the High Court. An application for Judicial Review can be brought on the grounds that, for example, the decision to certify the claim as "clearly unfounded" is unlawful, or unreasonable. A more detailed discussion of the implications of the outcome of Judicial Review applications that have already been brought in NSA cases is to be found below. I will set out here a much simplified description of the Judicial Review procedure.

105. If a legal representative notifies the Home Office that they intend to bring an application for Judicial Review of the decision to certify, removal of the applicant is delayed for 3 working days in NSA cases. In this time the solicitor must obtain a reference number from the Court for their application. In order to do so, they must obtain a legal aid certificate (usually by applying to the Legal Services Commission on an emergency basis), instruct a barrister to draft the relevant legal argument, and then file a completed form, a fee and an indexed bundle of documents with the High Court. Once this has been done, removal directions will be cancelled, until the application for Judicial Review has been concluded.

106. An application for Judicial Review takes place in two stages. The first is the "permission" stage, where unmeritorious applications are filtered out. A High Court Judge makes a decision, initially on the papers, whether or not the case should go forward to a full hearing, after the Secretary of State has had an opportunity to make his comments in writing on the application. If the applicant is not granted permission on the papers, they can make a further application for permission at an oral hearing. An extension to the legal aid certificate must be applied for from the Legal Services Commission for such a hearing.

107. If permission is granted, the application for Judicial Review will proceed to the second stage, an oral hearing of the full application. At this hearing argument will be heard from both parties as to whether the decision to certify was lawful. If the Judge decides it was not, he or she

can "quash" the decision to certify; if the Judge decides the decision was lawful, then the decision will stand. Either party can appeal the decision of the Judge to the Court of Appeal.

The quality and availability of legal representation

108. While the IAS and RLC generally provided an acceptable or good quality of advice and representation on the files I reviewed, many applicants are ill served by other legal representatives within the NSA process. Standards of best practice commonly accepted by immigration and asylum lawyers were rarely adhered to. I saw examples of the following forms of unacceptable practice:

- little or no understanding of the certification power, with representatives trying to assert a right of appeal under old legislation that was no longer in force after the claim had been certified;
- little or no work done on behalf of the applicant, other than attending the asylum interview – for example the opportunity to make written representations before the Home Office decision not taken up, and no attempt made to assemble evidence to support the application. This was particularly marked for human rights applications which went beyond asylum applications (see below);
- applicants detained for a lengthy period of time prior to removal, due to difficulty obtaining travel documentation, but no application for temporary admission (i.e. release on conditions) or bail being made;
- in one case an application for Judicial Review was brought, but the applicant has been removed in error to their country of nationality before the conclusion of proceedings due to Home Office error – no protest was made about this on the files I had, and I could find no request that the applicant be returned to the UK pending the resolution of legal proceedings. Clearly a serious procedural error by the Home Office was here compounded by poor quality legal representation.
- no attempt to challenge by way of judicial review Home Office decision letters where I considered this should have happened, because the decision to certify the application was not, in my opinion, justified.

109. I was also made aware that the IAS and RLC often have difficulty in locating good quality legal representatives able to take on judicial review applications of the decision to certify a claim, if the RLC or IAS judge that such an application to be merited but cannot assist themselves.

110. All legal representatives should have a wide working knowledge of nationality, general immigration and asylum law in order to properly represent asylum applicants. This is particularly important in NSA cases, where there is no right of appeal which might otherwise allow time to identify such issues. In my view, the non-asylum aspects of

cases were dealt with less well by all representatives, which may reflect lack of experience in dealing with general immigration cases as opposed to asylum cases.

111. I would draw particular attention here to applications based on article 8 ECHR, i.e. cases based on the applicant's right to respect for their family and private life. By way of an example, I saw a case file concerning an application by a man whose British girlfriend was heavily pregnant and in a state of acute distress, and only just over the age of 18. As far as I could tell this case was not dealt with well by his legal representative. His case could have been put much more forcibly and backed up by evidence; it was clear that such evidence did exist since it was provided when specifically requested by the Immigration Service. In another example an elderly Sri Lankan applicant was said to have a heart condition and to be living with her daughter. Assuming this to be accurate, basic evidence pertinent to the case was not provided by the legal representative, in that the Home Office was not provided with a statement or letter from the daughter, a medical report evidencing the medical condition, or even evidence of the daughter's existence and of her immigration status here. These two examples are reflective of a general trend which I observed – little attempt to evidence human rights claims which went beyond straightforward asylum applications.

112. As stated above, at Oakington Applicants are, as standard, allowed 2 working days following the interview to make written representations. In most cases where IAS or RLC were not the legal representatives there were no written representations at all, or if there were they were of very poor quality. There was clear evidence that many of the legal representatives did not understand the legal framework of s115 or s94: for example I saw files where legislation which was out of date was relied on to assert a right of appeal and it was clear that there was no understanding of the process of certification and the effect of certification on the part of the solicitor concerned. It was obvious to me that such applicants were not receiving adequate advice and representation, which may have impacted on the applicant's understanding of the asylum process and what was required of them. As stated above the short timescales involved and the lack of an in country right of appeal mean that applicants need high quality advice and representation so that they are able to put forward their case, so assisting the Home Office decision-maker by ensuring they have the information they need to make the correct decision. It was evident to me that in many of the cases files I reviewed that legal representatives were not a safeguard against inappropriate certification.

113. There is now a new system of accreditation, whereby all those legal representatives doing publicly funded immigration and asylum work must pass an examination by April 2005, or in some cases August 2005. The scheme is intended to ensure that legal representatives have an adequate level of knowledge about a wide spectrum of immigration and asylum law and practice, enhancing the quality of legal advice and representation received by applicants and ensuring that the poor quality

representation of the sort described above no longer occurs. There are three different levels of accreditation. I do not think the standard required at level 1 of the accreditation scheme is high enough given the complexity and importance of this work. *I recommend that those who represent asylum applicants within the NSA system are required by the Legal Services Commission to accredit until at level 2, the senior level.*

Section 5 - The quality of NSA decision making

114. Reviewing files was a time consuming task, since in most cases there was more than one file, and sometimes as many as four files, with documents scattered between the files and duplicated in different files. Caseworking notes were also divided between files on what seemed in some cases to be a random basis. All this made it difficult to work out what was going on, and to follow the progression of the case. I *recommend that in future efforts are made to rationalize Home Office files*; although I understand that there should from 2004 be only one file, I saw many examples where duplication of files persisted. This way of organizing files must make it more difficult for caseworkers dealing with the file to work out what is happening, and will contribute to errors being made.

Appeals

115. The outcome of appeal hearings in certified cases is not a particularly guide as to whether the case was properly certified, since, as noted above, the appellant is not in the UK to attend their hearing, making the task of establishing their credibility almost impossible. Many appellants are also unrepresented. Most significantly, even where an appeal is dismissed, this may well not indicate that the claim was properly certified – the test is whether the claim is "clearly unfounded", and there will of course be a group of weaker claims which are not "clearly unfounded" but where it is likely that any appeal would be dismissed.

Country Information

116. The quality of decision-making is to some extent determined by the background evidence that is available, usually information about conditions in the country concerned. For each of the designated countries, a Country Information and Policy Unit (CIPU) Report is available; that is a report drafted by researchers based at the Home Office's own research unit. This is not the result of the Home Office's own research, but a compilation of information drawn from a wide range of other sources. For each designated country an Operational Guidance Note (OGN), a shorter document, is also available, also produced by the CIPU and summarizing parts of the CIPU report thought to be most relevant for decision making. Caseworkers and Senior caseworkers I spoke to all maintained that the CIPU Report and / or the OGN was their main source of information on country conditions, and it was easy for them to access these documents from their computer desktop. A direct link to the US State Department Report was also provided, however, and caseworkers told me that at times they also looked to this source for further information.

117. At the training session for NSA caseworkers that I attended, it was made clear that if a caseworker was unsure about a particular issue, because for example it was not covered by the CIPU report, they could ask the CIPU directly for information or further research. I did not see

any examples of this happening, and recommend that it be used more frequently as a resource by NSA caseworkers, in order to ensure their decisions are fair and well reasoned. Caseworkers and senior case workers commented to me that because the CIPU reports and OGN's are well researched, most issues were covered, but of course this is not always the case.

118. Home Office caseworkers also stated that they tend to assume information from CIPU to be accurate. One of the difficulties with this approach is that the CIPU report might provide contradictory information about a particular issue, noting that while some evidence points in one direction, there is also evidence pointing in the opposite direction. This is often left unresolved in the CIPU report, with no indication as to which view is preferred. This may well reflect an inevitable uncertainty about a particular issue in the country concerned, or regional variation, or a situation of change and flux. I believe that, in accordance with general NSA decision making principles laid down by the Courts (see paragraph 22 above), the benefit of the doubt must be given to the applicant in such circumstances. This is not what I observed in the case files I reviewed, and is a serious flaw in Home Office decision making.

119. It is also vital that the CIPU report is accurate, especially given the almost complete reliance on it that I have identified above by NSA decision makers. The Advisory Panel on Country Information has been established to help to ensure that this is the case, and I note that its reports so far have been critical of the small number of CIPU reports they have so far looked at in detail, criticising their clarity, their accuracy, and the selectiveness of their quotations from other sources. These criticisms raise the strong possibility that Home Office decision makers will be basing their decisions in NSA cases on inaccurate or misleading information.

Reasons for Refusal Letter

120. Standard paragraphs are widely used by caseworkers as a basis to draft Reasons for Refusal letters. There are standard paragraphs in use for all NSA countries, covering the most common scenarios for asylum and human rights claims. These are useful in ensuring consistency of approach, and assist in more efficient decision making. However, in my view they are often clumsily drafted, citing for example contradictory information from different sources about a country, usually taken from the CIPU report, but failing to state explicitly which is preferred and to give reasons for this. *I recommend that standard paragraphs be more closely tailored to individual cases, and that where there is contradictory information which is preferred is explained and reasons given for this.*

121. I also saw evidence that those making decisions might not be aware of wider policies operating within IND about how to deal with certain sorts of cases; and that their knowledge of the law in areas outside asylum law is not sufficiently developed. There seemed to be a particular weakness in respect of decisions in cases where there was an article 8

ECHR component; I have described one particularly extreme example of this above. I also reviewed two case files where a decision to refuse and certify was made in respect of elderly persons. At that time there was in operation a policy to consider whether the forcible removal of a person who was over the age of 65 was appropriate. One of these examples was picked up by one of IND's senior managers, and the decision was then reversed and permission to stay was granted to the individual. In the other case no consideration seemed to have been given to this policy; the legal representative was particularly poor; and despite raising the issue with IND officials I understand the applicant departed from the UK voluntarily with no further consideration given to whether leave should be granted in line with this policy. Her legal representative had not put forward any information about the applicant's relationship with her adult daughter, with whom she said she lived and who she said had permission to remain. This is a good example of where poor legal representation meant that the applicant was effectively without a legal representative, and where Home Office officials did not themselves identify the need to apply the Home Office's own policy about such cases in reaching a decision. I also reviewed the file of a person who raised facts that suggested he might have British Nationality, because of the date when he was born and the nationality of his mother. However no follow up questions were asked to discount this possibility; since nationality law is complex, and it is possible that someone might have British nationality without realizing this. I raised this case with Home Office staff but was told that the Home Office does not accept that caseworkers have any responsibility in such circumstances to ask further questions or to probe for further information – it is their position that it is for the applicant to realize himself that he might be British and advance a claim. I think this view is unduly restrictive, especially in an area as complex as nationality law about which the applicant may have no knowledge, and especially where there is no appeal to an Adjudicator, who has to some extent an inquisitorial role in proceedings. Of course the Home Office interviewing officer should have some knowledge about nationality law. I would add that case working staff I spoke to about the case all said they thought that further questions should have been asked in the interview once the nationality of the applicant's mother came to light, and that they hoped that had they been the interviewing officer they would have done so. Once again, these are the sorts of issues that might be expected to be picked up at an appeal hearing, but here with no in country right of appeal that is much less likely. *There is a need for all NSA decision makers and all those conducting interviews to have a good broad-based knowledge of immigration as well as asylum law, and the large number of Home Office policies and concessions in operation, and I recommend that this be incorporated as an integral part of the training programme.*

Judicial Review

122. One of the best guides to the quality of Home Office decision making is, in my view, the number of applications for Judicial Review which result in the certificate that the application is "clearly unfounded" being quashed by the High Court or withdrawn by the Home Office. I take

this view because the appeal process does not directly consider whether the decision to certify was correct, but rather whether overall there is sufficient merit to allow the appeal. It also has the limitations identified above, so the low number of successful appeals is not in any way an accurate guide to this issue.

123. I understand that there have been many fewer applications for judicial review than the Home Office anticipated. One interpretation would be that the quality of decision making is high, and that legal representatives do not think that it is possible to bring proceedings. However, from discussions with IAS and RLC their perspective is that the problem is locating legal representatives of sufficient quality to take on such cases. Also, applications for legal aid are more likely to fail if the legal representative is of poor quality, and where legal aid is refused expensive JR proceedings are unlikely to be brought. In other cases the legal representative has thought the case merited an application for Judicial Review, but the possibility of a lengthy spell in detention was sufficient to deter the applicant from bringing an application. Legal representatives commented that for some individuals, and especially those from certain nationalities and ethnic groups, and those with children, detention is a terrible experience, and one that they find almost unbearable.

124. There have been 147 decisions to certify that have been withdrawn by the Home Office following applications for Judicial Review. The relevant figures broken down by nationality are:

Jamaica 37
Kosovo 21
Albania 16
Sri Lanka 15
Bangladesh 14
South Africa 13
Romania 6
Moldova 5
Ukraine 4
Ecuador 2
Cyprus 1
Czech Republic 1
Latvia 1
Poland 1
Serbia and Montenegro 1

125. It is notable that the numbers of cases where certificates were withdrawn is particularly high for Jamaica, Kosova, Albania, Sri Lanka and Bangladesh. This may indicate that decisions to certify claims from at least some of the countries designated in wave 2 and 3 raise more complex issues; this is something that is acknowledged and was mentioned during the training session for NSA caseworkers that I attended. It also of course means that decisions to certify claims from those with a right of residence in a wave 2 or 3 country may be of more

questionable quality. This was to some extent reflected in the conclusions I have drawn from reviewing files.

126. These 147 cases can also be broken down further as follows. In 14 of those cases, the certificate was withdrawn by the Home Office after Judicial Review proceedings were threatened, but before a Judicial Review application was lodged with the Court. The remaining 133 certificates were withdrawn after the Judicial Review was lodged. The Home Office has, since I raised the issue of withdrawal, further analysed the case files, and they have stated that of these 133 decisions withdrawn after the JR was lodged, 64 were "withdrawn as a result of a changes in caselaw / policy guidance", with the remaining 69 being withdrawn for "other reasons". In addition I understand that there have been 12 applications for Judicial Review which progressed to a substantive hearting, and of these 3 were successful.

127. I have learnt in meetings with officials that there was, until I raised this issue, no monitoring by the Secretary of State as to why decisions to certify were withdrawn at the Judicial Review stage. I do not believe that the statistics that are cited above provide sufficient detail to understand what has occurred and for this to inform decision making. *I recommend that the reason why the certificate to certify a claim as "clearly unfounded" was withdrawn should be monitored as it may provide useful feedback about the sorts of errors being made. I also recommend that all caseworkers and senior caseworkers are told about any decision to withdraw the decision to certify that they have made, and the reasons for it.*

128. I also understand from Home Office representatives that they find the fact that 64 of the 147 certificates were withdraw as a result of changes in caselaw / policy guidance reassuring. I would make the following observations about this. Firstly there is insufficient detail in explanation provided to understand what happened and to know whether it is reassuring or not. Secondly, such issues (disputes regarding the interpretation of the law or over country information) would normally be dealt with within the context of an in-country appeal hearing. If disputes regarding the law and policy are being conceded at the Judicial Review stage by the Home Office this indicates that the Home Office is, potentially at least, misjudging the situation at the point of certification. Given the barriers to bringing Judicial Review applications mentioned above, as I have explained it is not a particularly robust or universally available remedy. The issue for me as Monitor is whether sufficient safeguards exist in the current system to ensure that no-one is returned to face serious human rights abuses; the availability of Judicial Review is not always going to provide, in practice, an adequate remedy. Thus it is crucial that the Home Office decision is taken cautiously, and that it is based on sound information regarding country conditions, accurate understanding of the law, and careful assessment of the facts as advanced by the applicant. I consider that the number of decisions to withdraw certificates following the instigation of Judicial Review proceedings calls into question whether the power to certify is being used properly and safely.

129. I reviewed a small number of the 147 case files where the certificate was withdrawn after Judicial Review proceedings were threatened or lodged by applicants. The other files could not be provided to me because the cases were still pending and the files were needed by Home Office officials. It was clear to me that the certification decisions in all 4 of these cases were unsound, and should never have been made.

130. In one case, for example, the applicant claimed to be a minor, but this was disputed by the Home Office. There was no referral to the local social services department for an age assessment to be done by a social worker, although the decision was made in February 2004, by which time I understand this to have been the accepted procedure. Eventually the applicant was released, in May 2004, after some 4 months of detention.

131. In another case, the Government's lawyer's identified that the CIPU report supported the applicant's claim for asylum. Further enquiries were made of the CIPU after the Judicial Review application was made by Home Office officials; of course these should and could have been made by the decision maker, at the point of decision making. In this case, damages were paid by the Home Office for a period of detention that was unlawful.

132. In a third case, the applicant's claim was refused in a letter using standard paragraphs which did not take proper account of the factual background advanced by the applicant in interview. The applicant was a young woman who was only 19 and stated she feared serious domestic violence (including beatings, rape and threats to kill) from her husband and an "honour killing" by her family, and who had tried to obtain help from her family, family friends and the police but been returned to her huband by them or denied help. The refusal letter relied on the fact that "if you encountered any problems on return to [country of origin] from your husband then you could and should approach the [country of origin] authorities for help and protection. There is no reason to believe that protection and / or redress would be denied to you by the [country of origin] authorities should you fully pursue it though the appropriate official channels." The problems already encountered reporting her husband to the police are dismissed as an "individual abusing their official position". Unsurprisingly, given the background evidence, the decision to certify was withdrawn.

133. In none of these cases was the decision to withdraw the certificate the result of a change in caselaw or policy guidance. The reasons advanced for refusing and certifying the claim reveal, I believe, an over-reliance on standard paragraphs, and a failure to examine the claim in the round and consider it carefully against the background country information. I also believe that reliance on the simplified and reduced Operational Guidance Note may be partially responsible, since a great deal of the detail of the full CIPU report is missing from this.

Section 5: Conclusions

1. The assertion that NSA process may have contributed to the reduction in applications from countries on the s94 list is not something I am in a position to comment on, although I would observe that the factors contributing to changes in numbers of applicants are many and their interaction a complex issue. However, a reduction in numbers of claims from NSA countries is an overriding objective of managers and others responsible for the NSA process.

2. As Monitor, my concern is whether the system offers adequate procedural safeguards against errors in Home Office decision making. In my view, the three successful appeals and much larger number of successful Judicial Review applications indicate that it does not. For the reasons set out above, the numbers involved may well be the "tip of the iceberg".

3. Whether the power to certify claims will continue to be available to the Secretary of State is a question ultimately for Parliament, of course. However, I am aware that the United Nations High Commissioner for Refugees maintains that accelerated processes have a higher likelihood of errors, and require the procedural safeguard of a suspensive appeal. While I would observe that while it is important that there is time for the applicant to prepare their cases properly and marshal all the relevant evidence, it is possible for in-country appeals to be determined relatively quickly. Within the fast track process at Harmondsworth detention centre, it is aimed to process asylum claims from arrival to the determination of the appeal within 10 days, although there is flexibility to make decisions more slowly where this is warranted by the complexity of the case or the need to collect evidence.

ANNEX A

Summary of Recommendations in the Report

1. Paragraph 31

I recommend that in future that the Advisory Panel on Country Information be consulted, in line with the commitment made to Parliament that this would be done, before adding to the s94 list.

2. Paragraph 33

i) *I recommend that the increase in case by case certification be approached with extreme caution.*

ii) *I therefore additionally recommend that the advice of the Advisory Panel on Country Information is sought where there is a policy decision to begin certification of claims from particular countries without formally adding the country to the list, as appears to have started here with claims from Turkey and India.*

3. Paragraph 39

i) *I recommend that alternatives to detention should always be carefully considered where children are involved – eg a requirement on the parents to report frequently – and that family cases are dealt with wherever possible (which should be the vast majority of cases) by way of the non-detained route. I also recommend that the current pressure felt by staff to ensure that the family accommodation is as full as possible at Oakington is addressed – the fact that there is space in a detention centre to house a family should not be a reason to detain.*

ii) *I recommend that statistical data records adult and child data separately.*

4. Paragraph 44

I recommend that applicants are not held at Oakington for periods greater than a day prior to their entry into the NSA process, except where there are clear grounds for detaining the applicant in any event.

5. Paragraph 52

I recommend that clear procedures are put in place instructing staff what action they should take when they suspect the involvement of traffickers in any way at Oakington. I recommend other agencies working at Oakington, for example RLC, IAS and the Refugee Council, also adopt robust policies which are client-focused if they have not done so already.

6. Paragraph 57

I recommend that women accepted by the Poppy Project are released immediately and not interviewed at Oakington; I make this recommendation because I believe that many of those accepted by the Poppy project will benefit from their support before being interviewed.

7. Paragraph 62

I recommend that all requests for an interpreter for an asylum interview are acceded to – if the applicant wishes an interpreter to be present that should be sufficient, especially in an NSA case where the interview is in all likelihood their only chance to explain their case.

8. Paragraph 48

I recommend that the likely basis of the refusal and certification of their claim is put to the applicant in the asylum interview in a direct way in all cases.

9. Paragraph 66

I recommend that no initial decision be made prior to the receipt of written representations, provided these are submitted within the timescale agreed with the legal representative. There is legal authority that acknowledges that once a decision is made, there is a human tendency to be reluctant to change it.

10. Paragraph 69

I recommend that the practice of caseworkers being temporarily appointed to the post of senior caseworker to deal with staff shortage is no longer used.

11. Paragraph 71

I recommend far more use is made of CIPU for advice on individual cases, and believe that if this were to happen, the quality of decision making would be improved.

12. Paragraph 79

I recommend the Legal Services Commission rules covering legal advice and representation at asylum interview are amended, so that any individual who is detained and is being considered under the NSA procedure is eligible for advice and representation during their asylum interview. The current rules only allow this where the applicant is detained at Oakington, which is unfair to those detained elsewhere, but considered under the NSA system.

13. Paragraph 81

Given the delays in dealing with NSA non detained cases, I recommend this process [the placing of non-detained NSA cases in emergency accommodation] *is discontinued. Emergency accommodation is not particularly suitable for the long term accommodation of asylum seekers.*

14. Paragraph 82

I recommend that NSA applicants who are not detained should have a legal representation during their asylum interview funded by the Legal Services Commission. I consider this to be an important safeguard to NSA applicants because the interview is such a key part of the NSA process and there is no appeal hearing to deal with any difficulties arising from it.

15. Paragraph 83

I recommend that no-one certified in the non detained route should be removed within 24 hours of the decision being served.

16. Paragraph 87

I therefore recommend that children from NSA countries are not treated differently to other children, and are granted the standard period of discretionary leave.

17. Paragraph 92

I recommend that the benefit of the doubt should be given in all cases where the age assessment indicates the applicant to be under 20.

18. Paragraph 95

I recommend that a great deal of caution is employed when making decisions in NSA disputed nationality cases, and that the same approach should be applied in these NSA cases to the issue of nationality as is applied to other issues involving the credibility of the applicant – i.e. is the assertion regarding nationality capable of belief? If it is, then the claim should not be certified, and there should be an in-country right of appeal where this issue can be examined in more detail.

19. Paragraph 97

I recommend that the time preparing documentation by the Home Office is shortened – the appeal should be heard as soon as practicable, given that the applicant is abroad and potentially facing persecutory treatment while awaiting the outcome of the appeal. Specifically I recommend that once the appeal has been received, the bundle should be prepared within, at most, a week.

20. Paragraph 101

i) *I recommend that video link be considered as an option by the Immigration Appellate Authority and / or its successor organization and those representing Appellants, in cases where it would assist the Adjudicator to make a fair decision on the claim. Such cases are likely to be rare, but this is not a possibility that should be dismissed out of hand.*

ii) *I recommend that the Home Office re-considers its policy of always resisting such an application.*

21. Paragraph 102

I therefore recommend that the Home Office does not challenge credibility at the hearing unless this was done in the Reasons for Refusal letter.

22. Paragraph 113

I recommend that those who represent asylum applicants within the NSA system are required by the Legal Services Commission to accredit until at level 2, the senior level.

23. Paragraph 114

I recommend that in future efforts are made to rationalize Home Office files.

24. Paragraph 120

I recommend that standard paragraphs be more closely tailored to individual cases, and that where there is contradictory information which is preferred is explained and reasons given for this.

25. Paragraph 121

There is a need for all NSA decision makers and all those conducting interviews to have a good broad-based knowledge of immigration as well as asylum law, and the large number of Home Office policies and concessions in operation, and I recommend that this be incorporated as an integral part of the training programme.

26. Paragraph 127

i) *I recommend that the reason why the certificate to certify a claim as "clearly unfounded" was withdrawn should be monitored as it may provide useful feedback about the sorts of errors being made.*

ii) *I also recommend that all caseworkers and senior caseworkers are told about any decision to withdraw the decision to certify that they have made, and the reasons for it.*

ANNEX B – relevant legislative provisions

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).

(2) A person may not bring an appeal to which this section applies in reliance on section 92(4) 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) the Republic of Cyprus,
(b) the Czech Republic,
(c) the Republic of Estonia,
(d) the Republic of Hungary,
(e) the Republic of Latvia,
(f) the Republic of Lithuania,
(g) the Republic of Malta,
(h) the Republic of Poland,
(i) the Slovak Republic, and
(j) the Republic of Slovenia.

(5) The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that-

(a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
(b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.

(6) The Secretary of State may by order remove from the list in subsection (4) a State or part added under subsection (5).

(7) A person may not bring an appeal to which this section applies in reliance on section 92(4) if the Secretary of State certifies that-

(a) it is proposed to remove the person to a country of which he is not a national or citizen, and
(b) there is no reason to believe that the person's rights under the Human Rights Convention will be breached in that country.

(8) In determining whether a person in relation to whom a certificate has been issued under subsection (7) may be removed from the United Kingdom, the country specified in the certificate is to be regarded as-

(a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion, and
(b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.

(9) Where a person in relation to whom a certificate is issued under this section subsequently brings an appeal under section 82(1) while outside the United Kingdom, the appeal shall be considered as if he had not been removed from the United Kingdom.

111 Monitor of certification of claims as unfounded

(1) The Secretary of State shall appoint a person to monitor the use of the powers under sections 94(2) and 115(1).

(2) The person appointed under this section shall make a report to the Secretary of State-

(a) once in each calendar year, and
(b) on such occasions as the Secretary of State may request.

(3) Where the Secretary of State receives a report under subsection (2)(a) he shall lay a copy before Parliament as soon as is reasonably practicable.

(4) The person appointed under this section shall hold and vacate office in accordance with the terms of his appointment (which may include provision about retirement, resignation or dismissal).

(5) The Secretary of State may-

(a) pay fees and allowances to the person appointed under this section;
(b) defray expenses of the person appointed under this section.

(6) A person who is employed within a government department may not be appointed under this section.

115 Appeal from within United Kingdom: unfounded human rights or asylum claim: transitional provision

(1) A person may not bring an appeal under section 65 or 69 of the Immigration and Asylum Act 1999 (human rights and asylum) while in the United Kingdom if-

(a) the Secretary of State certifies that the appeal relates to a human rights claim or an asylum claim which is clearly unfounded, and
(b) the person does not have another right of appeal while in the United Kingdom under Part IV of that Act.

(2) A person while in the United Kingdom may not bring an appeal under section 69 of that Act, or raise a question which relates to the Human Rights Convention under section 77 of that Act, if the Secretary of State certifies that-

(a) it is proposed to remove the person to a country of which he is not a national or citizen, and
(b) there is no reason to believe that the person's rights under the Human Rights Convention will be breached in that country.

(3) A person while in the United Kingdom may not bring an appeal under section 65 of that Act (human rights) if the Secretary of State certifies that-

(a) it is proposed to remove the person to a country of which he is not a national or citizen, and
(b) there is no reason to believe that the person's rights under the Human Rights Convention will be breached in that country.

(4) In determining whether a person in relation to whom a certificate has been issued under subsection (2) or (3) may be removed from the United Kingdom, the country specified in the certificate is to be regarded as-

(a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion, and
(b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.

(5) Where a person in relation to whom a certificate is issued under this section subsequently brings an appeal or raises a question under section 65, 69 or 77 of that Act while outside the United Kingdom, the appeal or question shall be considered as if he had not been removed from the United Kingdom.

(6) If the Secretary of State is satisfied that a person who makes a human rights claim or an asylum claim is entitled to reside in a State listed in subsection (7), he shall issue a certificate under subsection (1) unless satisfied that the claim is not clearly unfounded.

(7) Those States are-

(a) the Republic of Cyprus,
(b) the Czech Republic,
(c) the Republic of Estonia,
(d) the Republic of Hungary,
(e) the Republic of Latvia,
(f) the Republic of Lithuania,
(g) the Republic of Malta,
(h) the Republic of Poland,
(i) the Slovak Republic, and
(j) the Republic of Slovenia.

(8) The Secretary of State may by order add a State, or part of a State, to the list in subsection (7) if satisfied that-

(a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
(b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.

(9) The Secretary of State may by order remove from the list in subsection (7) a State or part added under subsection (8).

(10) In this section "asylum claim" and "human rights claim" have the meanings given by section 113 but-

(a) a reference to a claim in that section shall be treated as including a reference to an allegation, and
(b) a reference in that section to making a claim at a place designated by the Secretary of State shall be ignored.

27 Unfounded human rights or asylum claim

(1) Section 94 of the Nationality, Immigration and Asylum Act 2002 (c. 41) (no appeal from within United Kingdom for unfounded human rights or asylum claim) shall be amended as follows.

(2) After subsection (1) insert-

"(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."

(3) In subsection (2) for "in reliance on section 92(4)" substitute "in reliance on section 92(4)(a)".

(4) In subsection (4) omit paragraphs (a) to (j).

(5) After subsection (5) insert-

"(5A) If the Secretary of State is satisfied that the statements in subsection (5) (a) and (b) are true of a State or part of a State in relation to a description of person, an order under subsection (5) may add the State or part to the list in subsection (4) in respect of that description of person.

(5B) Where a State or part of a State is added to the list in subsection (4) in respect of a description of person, subsection (3) shall have effect in relation to a claimant only if the Secretary of State is satisfied that he is within that description (as well as being satisfied that he is entitled to reside in the State or part).

(5C) A description for the purposes of subsection (5A) may refer to-

(a) gender,

(b) language,

(c) race,

(d) religion,

(e) nationality,

(f) membership of a social or other group,

(g) political opinion, or

(h) any other attribute or circumstance that the Secretary of State thinks appropriate."

(6) For subsection (6) substitute-

"(6) The Secretary of State may by order amend the list in subsection (4) so as to omit a State or part added under subsection (5); and the omission may be-

(a) general, or

(b) effected so that the State or part remains listed in respect of a description of person."

(7) After subsection (6) insert-

"(6A) Subsection (3) shall not apply in relation to an asylum claimant or human rights claimant who-

(a) is the subject of a certificate under section 2 or 70 of the Extradition Act 2003 (c. 41),

(b) is in custody pursuant to arrest under section 5 of that Act,

(c) is the subject of a provisional warrant under section 73 of that Act,

(d) is the subject of an authority to proceed under section 7 of the Extradition Act 1989 (c. 33) or an order under paragraph 4(2) of Schedule 1 to that Act, or

(e) is the subject of a provisional warrant under section 8 of that Act or of a warrant under paragraph 5(1)(b) of Schedule 1 to that Act."

(8) After section 112(5) of that Act (orders, &c.) insert-

"(5A) If an instrument makes provision under section 94(5) and 94(6)-

(a) subsection (4)(b) above shall apply, and

(b) subsection (5)(b) above shall not apply."