Neutral Citation Number:[2014] EWHC 2245 (Admin)

Case No: CO/6966/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2014

Before :

MR JUSTICE OUSELEY

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Between :

DETENTION ACTION	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
EQUALITY HUMAN RIGHTS COMMISSION	**Intervener**

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Ms N Lieven QC and Ms C Kilroy (instructed by **Sonal Ghelani, Islington Law Centre**) for the **Claimant**
Miss C McGahey (instructed by **Treasury Solicitor**) for the **Defendant**
Ms S Harrison QC and Ms M Brewer (instructed by **Clare Collier, Equality Human Rights Commission)** for the **Intervener**

Hearing dates: 17th, 18th, and 20th December 2013

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Approved Judgment

MR JUSTICE OUSELEY :

1. Detention Action is an incorporated charity set up in 1993 to support individuals in immigration detention, and to campaign on issues relevant to immigration detention generally. In this action, it challenges the lawfulness of the policy and practice applied by the Secretary of State for the Home Department, SSHD, in the operation of what is known as the Detained Fast Track, DFT. This is the policy for the detention of some asylum seekers, while their asylum claims are determined first by the SSHD, and then while they appeal if the claim is refused. They are detained on the basis that their claim and any appeal can be determined quickly. In summary, Detention Action contends that the DFT system as now operated is so unfair as to be unlawful, and it is unlawful at both common law and as a breach of Article 5 (1)(f) ECHR. This is a general claim, and not one which relates directly to any specific detainee. There is no individual Claimant.

2. The Equality and Human Rights Commission, EHRC, intervened with permission both by written and oral submissions. Detention Action is not a "victim" for the purposes of s7 Human Rights Act 1998, but the EHRC may rely on any ECHR rights in any legal proceedings by virtue of s30(3) Equality Act 2006. It supported the submissions of Detention Action, and added submissions on Articles 3 and 5, and Articles 13 and 14, principally the latter, the protection against non-discrimination in the exercise of Convention rights. A possible failure to comply with the public sector equality duty in s149 of the Equality Act 2010 was fleetingly raised. That, in my judgment, has to be pursued, if pursued at all, in a formal claim. It did not add anything of substance to the Article 14 arguments here.

3. Ms McGahey for the SSHD submitted that although there might be individual occasions when the DFT was operated unlawfully, contrary to its terms, the Court should be very cautious before making any general findings that the system was unlawful, generalising from individual case histories and anecdotal evidence.

4. This claim is concerned with those whose claims are thought by the SSHD to be capable of quick determination and who are therefore detained for the purpose of processing the claim and any appeal swiftly; their numbers include some in respect of whom bail or temporary admission would probably be refused anyway on other grounds; that should in law and by policy, but may not always in practice, be stated on the form giving reasons for detention.

5. This claim is not concerned with those, sometimes still called asylum seekers, whose claims have failed, who have no further appeal rights or other rights to remain, and are detained pending removal. Nor is this case concerned with those who are detained, while their claim is considered, because of the risk that they would abscond or commit offences, or that they would fail to comply with conditions attached to their admission or liberty. I am not concerned either with those who are detained in the Detained Non-Suspensory Appeals, DNSA, part

of the DFT after the adverse decision is made, since the question of detention pending appeal cannot arise as they have no right of appeal in-country.

The statutory provisions

6. I start with the statutory basis for the detention of asylum seekers. This is in paragraph 16 of Part 1 of Schedule 2 to the Immigration Act 1971, but this power is not peculiar to asylum seekers; it applies to those whom immigration officers may examine, by virtue of paragraph 2 of that Schedule, to see if they have or should be given or refused leave to enter. Paragraph 16 provides:

> "(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.
>
> (2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—
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> (a) a decision whether or not to give such directions;
>
> (b) his removal in pursuance of such directions."

7. That aspect of the statutory framework is set out more fully in paragraphs 8-9 of the speech of Lord Slynn in *R (Saadi) v SSHD* [2002] UKHL 41, [2002] 1WLR 3131, a case to which the parties made extensive reference as the primary decision on the lawfulness of the DFT as it then was operated. I note that, under paragraph 21 of Schedule 2 to the 1971 Act, a person liable to be detained can be granted temporary admission, and that an application for bail can be made by such a person seven days after arrival; paragraph 22 of Schedule 2.

8. There is no separate statutory provision which deals with the detention of those whose application for leave to enter or whose asylum claims have been refused but who are appealing against that adverse decision. The structure of Schedule 2, which governs detention, shows that paragraph 16 also covers detention pending appeal. Paragraph 29 of Part 2 to Schedule 2 to the 1971 Act deals with bail pending appeal. The Asylum and Immigration Tribunal (Fast Track Procedure) Rules SI 2005 No. 560 apply only to those who were in immigration detention under Schedule 2 when served with notice of the decisions being appealed and who have been continuously in detention since.

9. There is also a European Union aspect to the statutory framework. Article 18 of Council Directive 2005/85/EC, the Procedures Directive on minimum standards for granting refugee status, prohibits detention on the sole ground that a person is an applicant for asylum, and it requires that an applicant in detention must be able to have that detention speedily reviewed. Article 23 covers examination

procedures at first instance, here the SSHD decision. It permits an accelerated procedure, provided that the basic principles and guarantees in chapter II are adhered to. It does not require the exclusion from such a process of those with "special needs" or those whose claim is likely to be well-founded. Article 23 (3), expressed in general terms, is additional to the more specific but nonetheless still wide range of circumstances in which an accelerated procedure may also be provided. Ms Harrison QC is right that "mere administrative convenience" is not one of those bases, nor is there an express or implied assumption that all claims are fit for accelerated examination. Nonetheless, I see nothing either to suggest that the DFT in principle falls foul of any Directive provision, nor is that a point more than hinted at by Ms Harrison. It was not a point in the claim. Nor do the exclusions expressly list any of those categories which the EHRC says should be excluded from the DFT, any of which may involve the circumstances which explicitly do permit accelerated procedures to be applied. Article 39 does require the existence of an effective remedy before a Tribunal against an adverse decision.

10. The 2003 Council Directive 2003/9/EC, setting minimum standards for the reception of asylum applicants, the Reception Directive, defines detention in Article 2(k) as "confinement …within a particular place, where the applicant is deprived of his or her freedom of movement".

11. Article 7 is headed "Residence and freedom of movement". It provides:

> "1.Asylum seekers may move freely within the territory of the host Member State. The assigned area shall not affect the inalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.
>
> 2.Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.
>
> 3.When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their normal law."

12. Article 14 provides for "Modalities for material reception conditions". Article 14(8) provides for an exception to the general modalities, which cover different forms of housing, where provided in kind:

> "Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:

> - an initial assessment of the specific needs of the applicant is required,
>
> - material reception conditions, as provided for in this Article, are not available in a certain geographical area,
>
> - housing capacities normally available are temporarily exhausted.
>
> - the asylum seeker is in detention or confined to border posts.
>
> These different conditions shall cover in any case basic needs."

13. It was the SSHD's contention, opposed by the EHRC, that Article 7 did not apply to detention as defined in Article 2(k), but applied instead to the not uncommon practice in some EU member states of confining applicants to specific localities larger than a detention or removal centre. "Detention" was used in the Directive for much narrower circumstances. In so far as significance attached to this point, I see a distinction between Article 7 and detention on the language of the Directive, and this case is concerned with detention.

14. Article 17 of the Reception Directive requires account to be taken of the specific situation of vulnerable persons such as pregnant women, and the victims of torture and sexual violence.

15. Council and Parliament Directive 2013/33/EU, the 2013 Reception Directive, must be brought into force domestically by July 2015, by Article 30, at which point 2003/9/EC will be repealed in those member states which, unlike the United Kingdom, have signed up to it. Articles 7 and 8 continue the distinction between residence in a specific place and detention, using the same definition of the latter as in the 2003 directive. Article 8 limits the use of detention:

> "2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.
>
> 3. An applicant may be detained only:
>
> (a) in order to determine or verify his or her identity or nationality;
>
> (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

> (c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;
>
> The grounds for detention shall be laid down in national law."

16. Article 9 contains guarantees for detained applicants. Detention should last only so long as Article 8(3) was satisfied. Delays in administrative procedures do not justify continued detention. There should be a speedy review of the lawfulness of detention, with free legal representation. Article 10 deals with conditions of detention. Article 21 requires special consideration to be given to vulnerable persons, who include pregnant women, victims of human trafficking, torture victims, those with mental disorders, and those subjected to serious violence including rape and FGM. An assessment has to be made, within a reasonable period of time after the application for international protection is made, as to whether an applicant has special reception needs to be taken into account in the asylum procedure. It may or may not be that this will affect the lawfulness or lawful operation of the DFT, but it does not assist on any argument as to the scope of the currently applicable Directives.

17. Ms Harrison submitted that the EU Charter of Fundamental Rights, Article 47, developed the law further since, unlike the ECHR itself, it gave Article 6 ECHR equivalent due process guarantees to immigration and asylum decisions, which included equality of arms, and a reasonable opportunity to present the case under conditions which did not place the applicant at a substantial disadvantage vis a vis his opponent. This however, she accepted, was no more than the expression of common law principles.

18. Article 5 ECHR precludes deprivation of liberty "save in accordance with a procedure prescribed by law" and in specified circumstances, one of which, Article 5(1)(f), covers lawful detention to prevent a person effecting unauthorised entry into the country. Article 14 ECHR requires Convention rights to be secured without discrimination on grounds such as sex. Victims of human trafficking are recognised as a "particular social group" in the context of the Refugee Convention. Discrimination under Article 14 can involve treating like cases in a different fashion or different cases in a similar fashion, but whichever aspect is involved, such a difference or similarity requires justification. A difference based on a ground such as sex requires justification by particular weighty reasons. Article 14 covers the concepts of direct and indirect discrimination.

19. Ms Harrison also made reference obliquely to the power to detain under DFT criteria, rather than under general detention criteria, those whose entry was not unauthorised, but whose asylum claim is made while they have no continuing leave to be here. (There is no suggestion that the DFT is applied to those who apply for asylum while their leave is extant.) They are likely to be individuals who claim asylum as a result of enforcement activity. The delay in making a claim is relevant to the judgment as to the suitability of the claim for quick determination, but not necessarily since victims of trafficking are very likely to

come to light through enforcement action. The power to detain them is in paragraph 16 (2) of Schedule 2 to the 1971 Act. There may also be a justification for detention beyond the fact of entry into the DFT, since they may be offenders awaiting removal, multiple claim-makers, or present a risk of absconding. Otherwise, it was not suggested that the making of a claim as a result of enforcement action, warranted a distinction between them in entry to and passage through the DFT. And the fact that they make up the bulk of those in the DFT, 70 percent or so it appears, does not mean that the lawfulness of the operation of the DFT for the minority who are new arrivals should be assessed differently.

The role of policies

20. These general statutory provisions are operated by the SSHD pursuant to various policies. These are powers for the executive to detain individuals, without the benefit of a Court order, or following a trial, conviction, and sentence but rather pursuant to a quite generally expressed statutory power.

21. The Supreme Court considered what was required for the exercise of such broad executive powers to be lawful in *R(Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245. The principles are not altered by the fact that that was a deportation case.

22. Lord Dyson said at paragraph 34:

> "34. The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.
>
> 35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it.
>
> 36. Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision."

23. He cited principles enunciated by the ECtHR in *Medvedyev v France* (Application No 3394/03)(unreported) 29 March 2010 Grand Chamber paragraph 80:

> "The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the convention, a standard which required that all law be sufficiently precise to avoid all risk of arbitrariness, and to allow the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances of the case, the consequence which a given action may entail."

24. The ECtHR has repeatedly stated that the law in this respect had to be "accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness". Ms Harrison QC placed emphasis on those last words. To my mind, however, avoidance of "all risk" of arbitrariness, if given the scope she appeared to contend for, seems an impossible task in any system of law, whether in the drafting of legislation or policy or in judicial decision-making over a large number of cases with similarities between them. "Arbitrariness" does not include reasonable but differing judgments, or the legitimate and necessary drawing of lines by time and circumstance, which can all have an element of the arbitrary, at least to some eyes, about them. It cannot require more than the common place notion of avoiding a real risk of a breach of an ECHR right, used as the test in removal cases. A broad grant of executive discretion, however, does not satisfy those requirements; it needs to be sufficiently circumscribed and subject to adequate legal safeguards against abuse; see paragraphs 32 and 33 of *Lumba*, Lord Dyson citing *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105, on stop and search powers.

The case law on the evolving DFT

25. The lawfulness of the DFT in its earliest form was considered by the House of Lords in *R(Saadi and Others) v SSHD* [2002] UKHL 41, [2002] 1WLR 3131, and by the ECtHR, in *Saadi v UK* (2008) 47 EHRR 17; but, emphasised the Claimant and the EHRC, its form was different from that which it has now assumed. The SSHD did not agree on the extent or significance of the changes.

26. In 2000, faced with a very large number of asylum applicants, the SSHD introduced a fast track procedure for considering some of their applications: certain applicants were detained for up to 10 days at Oakington Reception Centre to facilitate the expeditious determination of their asylum applications. They were not said to be abscond risks. The House of Lords was satisfied that detention for those purposes fell within the scope of both paragraph 16 of Schedule 2 to the 1971 Act and Article 5(1)(f) ECHR. So far as the former was

concerned, "pending examination" in paragraph 16 meant "the period up to the time when the examination is concluded and a decision taken"; see paragraph 22 of *Saadi*. The lawful exercise of the power did not require the SSHD to show that the examination would not take place because the applicant would run away if not detained, nor that temporary admission was not appropriate. The period of detention had to be reasonable in all the circumstances. At paragraph 24, Lord Slynn said:

> "24. There is obviously force in the argument for the claimants that if there is no suggestion that they might run away then it cannot be strictly necessary to detain them as opposed to requiring them to comply with a fixed regime enabling detailed examination to take place. This, however, ignores the reality—large numbers of applicants have to be considered intensively in a short period. If people failed to arrive on time or at all the programme would be disrupted and delays caused not only to the individual case but to dealing with the whole problem. If conditions in the centre were less acceptable than they are taken to be there might be more room for doubt but it seems to me that the need for speed justifies detention for a short period in acceptable physical conditions as being reasonably necessary.
>
> 25. This does not mean that the Secretary of State can detain without any limits so long as no examination has taken place or decision been arrived at. The Secretary of State must not act in an arbitrary manner. The immigration officer must act reasonably in fixing the time for examination and for arriving at a decision in the light of the objective of promoting speedy decision-making."

27. So far as Article 5(1)(f) was concerned, it was not necessary to show that the applicant was seeking to evade immigration control by his entry; nor was there a test of necessity for the detention in order to inquire into whether or not the asylum claim should be granted; paragraph 36. He expressed no concluded view on whether the removal limb of Article 5(1)(f) was engaged.

28. The issue thus became whether the detention was unlawful, as a disproportionate, response to the reasonable requirements of immigration control. Lord Slynn concluded:

> "45. In Chahal's case 23 EHRR 413, 466, para 118 the Court of Human Rights said that the lawfulness of detention had to be seen against the substantive and procedural rules of national law "but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness". I do not see that either the methods of selection of these cases (are they suitable for speedy

> decision?) or the objective (speedy decision) or the way in which people are held for a short period (i.e. short in relation to the procedures to be gone through) and in reasonable physical conditions even if involving compulsory detention can be said to be arbitrary or disproportionate. The evidence of Mr Martin gives strong support to the view that it was appropriate, in the light of the Secretary of State's experience, for the Secretary of State to adopt the Oakington policy and that other alternative methods would practically not be effective.
>
> 46. The need for highly structured and tightly managed arrangements, which would be disrupted by late or non-attendance of the applicant for interview, is apparent. On the other side applicants not living at Oakington, but living where they chose, would inevitably suffer considerable inconvenience if they had to be available at short notice and continuously in order to answer questions.
>
> 47. It is regrettable that anyone should be deprived of his liberty other than pursuant to the order of a court but there are situations where such a course is justified. In a situation like the present with huge numbers and difficult decisions involved, with the risk of long delays to applicants seeking to come, a balancing exercise has to be performed. Getting a speedy decision is in the interests not only of the applicants but of those increasingly in the queue. Accepting as I do that the arrangements made at Oakington provide reasonable conditions, both for individuals and families and that the period taken is not in any sense excessive, I consider that the balance is in favour of recognising that detention under the Oakington procedure is proportionate and reasonable. Far from being arbitrary, it seems to me that the Secretary of State has done all that he could be expected to do to palliate the deprivation of liberty of the many applicants for asylum here."

29. The particular circumstances to which Lord Slynn referred are set out principally in paragraphs 14-18: 3 days to substantive interview, 2 further days to decision allowing time for further representations, on-site legal advice, a considerably more relaxed and spacious regime than at other detention centres, detention averaging 7-10 days, all to achieve 150 interviews a day, which required tight scheduling. The process was intended to deal quickly with the straight forward claim; Home Office policy was that the process did not include "any case which does not appear to be one in which a quick decision can be reached…any case which has complicating factors, or issues, which are unlikely to be resolved within the constraints of the Oakington process model…unaccompanied minors…any person who gives reason to believe that they might not be suitable for the relaxed Oakington regime, including those

who are considered likely to abscond."; paragraph 15.The Home Office witness rejected the suggestion that the Oakington process involved the application of a rigid nationality criterion; nationality had a role to play along with other factors, including individual circumstances, telling either way for suitability for inclusion in the process.

30. The ECtHR judgment accepted the approach of the House of Lords to Article 5(1)(f): entry was unauthorised until authorised, and a person's detention till entry was authorised, was detention to prevent his effecting an unauthorised entry. However, detention was not justified if lesser measures would suffice to safeguard the public interest. A balance had to be struck between the two interests; the duration of detention would be relevant in striking the balance. To avoid being arbitrary, detention had to be carried out in good faith; detention had to be closely connected to the purpose of preventing unauthorised entry of the person; and the place and condition of detention had to be appropriate to the person who might have fled their own country in fear; and the length of detention should not exceed that reasonably required for the purpose pursued; paragraph 74.

31. The detention was not arbitrary because the purpose of detaining 13000 out of some 84000 asylum applicants in the year, was to obtain speedy decisions for those in the fast track and those in the increasing queue behind them. Their detention was necessary to achieve the objective of holding 150 interviews a day-which required the avoidance of even small delays; cases were selected as suitable for fast-tracking. This was a policy undertaken in good faith, and as the aim of the detention was to process the claim more quickly and efficiently, the detention was closely connected to the purpose of preventing unauthorised entry. The place and conditions of detention were specifically adapted for asylum seekers: various facilities for recreation, religious observance, medical care and legal assistance were provided; detention was free from arbitrariness. The seven day period of detention before release, after refusal of the asylum claim by the SSHD, did not exceed that which was reasonably required for the purpose pursued. The Court concluded in paragraph 80 that:

> "…given the difficult administrative problems with which the United Kingdom was confronted during the period in question, with an escalating flow of huge numbers of asylum-seekers, it was not incompatible with Art.5(1)(f) of the convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily. Moreover, regard must be had to the fact that the provision of a more efficient system of determining large numbers of asylum claims rendered unnecessary recourse to a broader and more extensive use of detention powers."

32. The question whether the processes at Oakington were inherently unfair arose in *R(L and another) v SSHD* [2003] EWCA Civ 25, [2003] 1 WLR 1230. Lord Phillips gave the judgment of the Court. The Court of Appeal held that there was no reason why the Oakington fast track procedure should not afford

adequate opportunity for asylum claimants to demonstrate that they had a case, or in the main group of cases with which that case was concerned, an arguable case. But it also said, in response to the contention that there were certain categories of case, for example where medical evidence was required, which could not be fairly dealt with in the compressed timetable there, for which it would expect the inappropriateness of the fast track to be recognised. But no reasonable procedure could cater for the position where a traumatised person did not reveal the trauma when opportunity to do so was provided. Country experts were often not driven by the circumstances of any particular case. Much of what the Court of Appeal said was directed to certified cases, with which this case is not concerned.

33. The DFT was again considered in *R(Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481. After the Court of Appeal decision in *Saadi* in 2003, the SSHD set up a pilot fast track scheme at Harmondsworth Removal Centre near Heathrow. Its lawfulness was challenged. The process was limited to single males from countries where there was in general thought to be no serious risk of persecution. There was a screening process to determine suitability for this track. A solicitor would usually have the morning in which to interview the client, and the substantive interview would take place that afternoon, but not on the day of arrival. The interviews were conducted by the more experienced officials. The decision would be taken the day after the interview; there were two days in which to exercise the right to appeal, with an appeal hearing the next day, and a Tribunal decision within two or three days, and ten days for statutory review. Of the 1438 cases on this fast track, 151 were removed before decision, almost all the rest were refused asylum, 270 were removed from the fast track pending appeal; 19 out of 995 appeals were allowed by Adjudicators, 1 out of 16 appeals to the Immigration Appeals Tribunal succeeded.

34. The RLC's concern was that the system was inherently unfair and therefore unlawful because the decision-making process was so compressed, compressed into 3 days. Sedley LJ gave the judgment of the Court. The first question for the Court of Appeal was to identify the test for whether a system was so unfair as to be unlawful. This was: did the system provide a fair opportunity to asylum seekers to put their case? To put it another way: was there an unacceptable risk of claims being processed unfairly? The risk of injustice had to be reduced to an acceptable minimum; an unacceptable risk had to go beyond the risk of aberrant decisions and instead inhere in the system itself; the prospect that a decision could be corrected by judicial review did not necessarily answer the point; paragraphs 6 and 7.

35. Sedley LJ continued in paragraph 8:

> "The choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-round of asylum applications. But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency; and whether it has done so is a question of law for the

> courts….we adopt Professor Craig's summary of the three factors which the court will weigh: the individual interest at issue, the benefits to be derived from added procedural safeguards, and the costs to the administration of compliance. But it is necessary to recognise that these are not factors of equal weight. As Bingham LJ said in *Thirukumar* [1989] Imm AR 402,414, asylum decisions are of such moment that only the highest standards of fairness will suffice; and as Lord Woolf CJ stressed in *R v Home Secretary, ex parte Fayed* [1998] 1 WLR 763,777, administrative convenience cannot justify unfairness. In other words, there has to be in asylum procedures, as in many other procedures, an irreducible minimum of due process. "

36. The Court rejected the contention that unfairness in the initial decision-making process was capable of correction through the appeal process, since the applicant was entitled to a fair decision at both levels; and**:**

> "Secondly, and perhaps more important, the consequences of the risk which most concerns the RLC may very well not be susceptible of appeal. If the record of interview which goes before the adjudicator has been obtained in unacceptably stressful or distressing circumstances, so that it contains omissions and inconsistencies when compared with what the applicant later tells the adjudicator, the damage may not be curable."

37. The Court, applying its test, concluded that there was no unacceptable risk of unfairness to asylum seekers, that is, there was no unacceptable risk, inherent in the way the system was operated, of a claim being processed unfairly. That is a high threshold. But that was qualified in a respect important for this case:

> "23. But provided that it is operated in a way that recognises the variety of circumstances in which fairness will require an enlargement of the standard timetable - that is to say lawfully operated - the Harmondsworth system itself is not inherently unfair. A written flexibility policy to which officials and representatives alike can work will afford a necessary assurance that the three-day timetable is in truth a guide and not a straitjacket.
>
> 24. Here, what has been identified is a gateway risk of injustice, in the nature of things not case-specific but caused by potential rigidity in a system which requires genuine flexibility in its timetable.
>
> 25. We have recognised this risk and indicated what in our view needs to be done to obviate it. But, like Collins J, we

> do not consider that the system itself is *inherently* unfair and therefore unlawful. On the contrary, so long as it operates flexibly - as the Home Office accepts it should – the system can operate without an unacceptable risk of unfairness. Although therefore a material part of the RLC's concern needs to be addressed, Collins J was right to refuse relief, and the appeal consequently fails."

38. The concern was the extent to which flexibility was applied in practice to the tight timetables, where individual cases required more time or removal from the fast track.

39. There are other authorities on the correct approach to the lawfulness of a policy. A policy, applied according to its terms, must not expose individuals to a significant or serious risk of a breach of Article 3, *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2006] 2 AC 148, Lord Bingham at paragraph 29, and Lord Hope at paragraphs 80-81, but that issue does not arise in this case. I have also considered *R (Medical Justice) v SSHD* [2011] EWCA Civ 1710 and *R(Tabbakh) v Staffordshire and West Midlands Probation Trust and Secretary of state for Justice,* [2014] EWCA Civ 827, which affirm those principles. There is no justification in these decisions for avoiding a smaller degree of risk, let alone "all risk" where it is arbitrariness in Article 5 which is the error to be avoided. "Arbitrariness" is not in a category of error all of its own.

The current policy

40. The most recent variation or clarification of this policy is dated 11 June 2013, and entitled "Detained Fast Track Processes". It was clarified, because, among other reasons, of European Commission concern, in its examination of member states' asylum arrangements, about a general presumption in the policy that all cases were suitable for fast tracking. The policy takes the form of an instruction to referring and screening officers, National Asylum Intake Unit, NAIU, officers and DFT unit officers. Its stated purpose is to lay out policy "which must be strictly applied to determine case suitability for entry to, and continued management within" the DFT. It also lays out the screening processes and operational considerations which may prevent a case entering the DFT even though otherwise suitable.

41. Section 2.1 sets out the DFT policy on the suitability of cases for the DFT**:**

> **"**An applicant may enter into or remain in DFT/DNSA processes only if there is a power in immigration law to detain, and only if on consideration of the known facts relating to the applicant and their case obtained at asylum screening (and, where relevant, subsequently), it appears that a quick decision is possible, and none of the Detained Fast Track Suitability Exclusion Criteria apply.
>
> DFT/DNSA suitability has no requirements as to nationality or country of origin and no other bases of detention policy

> need apply (see chapter 55 of Enforcement Instructions and Guidance (EIG). There is no requirement that an application be late and opportunistic; but where it is known or suspected that it may be, particular consideration should be given to entering the applicant into DFT/DNSA (See Section 2.2 below)."

42. It states that suitability must be considered not just at the time of entry into the DFT but at all stages of ongoing case management, and changes in circumstances relevant to the reason for detention.

43. The basis for the assessment of whether a quick decision is possible is set out in section 2.2:

> **"2.2 Quick Decisions**
>
> The assessment of whether a quick decision is likely in a case must be made based on the facts raised in each individual case. Cases where a quick decision may be possible may include (but are not limited to):
>
> - Where it appears likely that no further enquiries (by the Home Office or the applicant) are necessary in order to obtain clarification, complex legal advice or corroborative evidence, which is material to the consideration of the claim or where it appears likely that any such enquiries can be concluded to allow a decision to take place within normal indicative timescales;
>
> - Where it appears likely that it will be possible to fully and properly consider the claim within normal indicative timescales;
>
> - Where it appears likely that no translations are required in respect of documents presented by an applicant, which are material to the consideration of the claim; or where it appears likely that the necessary translations can be obtained to allow a decision to take place within normal indicative timescales;
>
> - Where the case is one likely to be certified as 'clearly unfounded' under s.94 of the Nationality, Immigration and Asylum Act 2002**."**

44. Other factors of particular relevance are whether the application for asylum was made merely to delay or frustrate enforcement of a removal decision, or if the

applicant had failed without reasonable cause to take the opportunity to make the application earlier, or if the applicant's entry to the UK had been unlawful or if the stay had become unlawful and there was no good reason for an earlier application not to have been made.

45. The indicative timescales for DFT, non-DNSA cases, would usually be quicker than 10-14 days from entry to SSHD decision, but timescales were not rigid and must be varied when fairness requires it; section 2.2.2.

46. This continues: "Cases receiving uncertified refusal decisions in the DFT process…are also, in the case of any appeal, subject to a fast-track appeals process which is governed [by the 2005 Fast-Track Procedure Rules]."

47. The suitability exclusion criteria are set out in section 2.3 UK Border Agency, UKBA, policy:

> "is that certain individuals are unlikely to be suitable for entry or continued management in the DFT. These persons are:
>
> - Women who are 24 or more weeks pregnant;
> - Family cases…;
> - [Children whose date of birth is not disputed];
> - Those with a disability which cannot be adequately managed within a detained environment...;
> - Those with a physical or mental condition which cannot be adequately treated…or managed… within a detained environment;
> - Those who clearly lack the mental capacity or coherence to sufficiently understand the asylum process and/or cogently present their claim. This consideration will usually be based on medical information, but where medical information is unavailable, officers must apply their judgment as to an individual's apparent capacity;
> - Those for whom there has been a reasonable grounds decision taken (and maintained) by a competent authority stating that the applicant is a potential victim of trafficking or where there has been a conclusive decision taken by a competent authority stating that the applicant is a victim of trafficking;
> - Those in respect of whom there is independent evidence of torture."

48. Section 3 sets out the process for referring cases to the DFT. All new asylum applications have to be referred to the National Asylum Intake Unit, NAIU, by screening officers for the NAIU to assess the appropriate process for the case. The screening interview is for the purpose of obtaining key information and for "early suitability consideration". The applicant must be fully screened, which includes fingerprinting and Eurodac checks. They must be asked if they have any documents, statements, or other evidence relevant to their claim, and about their family life or other personal circumstances whether, at that instant or in the future. The specific nature of the documents including their language must be ascertained and recorded. "Follow-up questions" must be asked and documented where relevant to the suitability policy: "It is vital to obtain and consider relevant information where it can be reasonably obtained in a screening setting (or, for information not available at that instance, to consider the likelihood of its later submission and its probable materiality".

49. After screening all cases must be referred to the NAIU and if it is considered to be a possible DFT case, the referral must highlight the factors leading to this view with reference to policy and operational considerations, as well as drawing attention to information which may weigh against them. The referring officer if requested must send to the NAIU the screening interview form and other documents of potential relevance to suitability. The detention of DFT entrants must follow standard detention procedures. The form IS91R must be completed in every case and the relevant box must clearly identify that the reason for detention is for DFT processing in addition to any other reasons for detention which clearly apply.

50. The task of NAIU, as set out in section 4, is to consider the suitability of every referral against policy and operational considerations "based on all information and evidence held on file and otherwise known about the applicant and his claim." It must seek advice from senior DFT caseworkers in any case where there is doubt.

51. If a case is accepted into the DFT processes, the NAIU must confirm the reasons for suitability and if no factors were raised relevant to the exclusion criteria, it could simply say that there was no information weighing against a quick decision. Where there is information relevant to the speed of decision or to the exclusion criteria, each point will need to be addressed in sufficient detail to show "NAIU's meaningful consideration of the key facts" at the time of referral. The note will need to state that "a quick decision can reasonably be expected."

52. Section 5 deals with the sort of operational considerations which may preclude a suitable case entering the DFT. These include insufficient detention capacity. It is also relevant to give "forethought to the means by which removal may be effected, should the asylum application fail. This will mean giving consideration to the timeliness of obtaining travel documents in the particular case. Cases where obtaining travel documentation is a lengthy process would generally be operationally suitable for the DFT/DNSA process only if there is another factor relevant to the case with higher operational priority." Operational experience may also mean that certain types of case at a particular time may be judged unsuitable for the process. Certain "detainee profiles may

be inappropriate for one or more immigration removal centre at a particular time in order to maintain security and calmness in the detention estate. An individual may be served with an immigration decision which carries an in-country right of appeal before an asylum claim is made. If that happens, the asylum application may be considered within DFT."

53. I need to say a little about the extension of the DFT to encompass the appeal process. The genesis of this was the undoubtedly lawful fast-track appeals process piloted in 2003, and then established in 2005. There is no challenge to the logic of a fast track appeals process: it is obvious that the purpose of a fast track initial decision-making process would be undermined by a conventional speed appellate process. But there has been persistent uncertainty over whether the powers to detain the while were the general detention powers, such as to prevent absconding, or the same quick processing purpose as had lain behind the operation of the DFT up to the stage of the SSHD's decision, as the DFT was understood to operate in *Saadi*.

54. When the fast-track appeal process was first piloted with new Procedure Rules, the Minister for Citizenship and Immigration, Ms Hughes, told the House of Commons in March 2003, in a Written Statement, that these rules would enable fast-track decisions and appeals to be disposed of, to the point of removal if unsuccessful, within four weeks of the applicant's arrival. This would be based on the "co-location of key elements of the asylum process". These were, I surmise, the co-location of detention and appeal hearing:

> "Detention of asylum seekers for a short period of time for the purposes of making a speedy decision on their claim was upheld last October as lawful by the House of Lords. If the claim is refused or for any reason cannot be dealt with in accordance with the pilot timescales, a decision about further detention will be made in accordance with existing detention criteria. Detention in this category of cases will therefore normally be where it has become apparent that the person would be likely to fail to keep in contact with the Immigration Service or to effect removal."

55. On the face of it, "existing detention criteria" could mean those of the fast track or those applicable outside the fast track. The latter is the more obvious and natural meaning, in my judgment. Neither a Press Release which misstates Hansard, nor what it says Baroness Scotland said as the Minister in the House of Lords, nor the Notes to Editors shed any greater light on this aspect of Government policy, at that time.

56. In September 2004, Mr Browne, by then the relevant Minister, and Baroness Scotland returned to the issue in similar written statements to each House. I am not here concerned with what the statements said about revisions to the DFT more generally, but after dealing with how quickly SSHD decisions were being made, and stating that detention could continue after the 10-14 day timescale unless that made the length of detention unreasonable, they stated:

> "Continued detention may also be merited in some cases irrespective of decision time scale, where our general detention criteria apply. We may also detain claimants after we have made and served a decision in accordance with our general detention criteria."

57. That in my judgment leaves no room for doubt, and is consistent with what I judge the previous statement to have meant. The DFT detention criteria did not apply to the appeal stage; the general detention criteria did.

58. I am not surprised, in those circumstances, that ILPA's 2008 Guide to Best Practice in the DFT Process advised that the only criteria for detention under the Fast Track Appeals process were the general detention criteria, not the specific criteria for the DFT applied to Fast Track cases, that is those with a good prospect of a quick appeal decision. The Guide referred to the Operational Enforcement Manual 2008, section 38.4, which dealt with detention in the fast track, and which did not disabuse the reader who relied on ILPA's view. The general criteria, in 38.3, were introduced with the heading "Factors influencing a decision to detain (excluding pre-decision fast track cases)". This suggested that the general detention criteria applied to all other cases including post-decision fast track cases; indeed, the section on the DFT did not say that the relevant decision was the appeal decision if there were an appeal, nor, in my view, is that the meaning to be gleaned from the words used. Counsel instructed for the Home Office had made the same "mistake" on two occasions, submitting that the post-SSHD decision detention criteria were the general detention criteria, a "mistake" which officials should have picked up; Mr Simm thought it "regrettable" that they had not done so.

59. The current policy states in section 5.2.1 that if an asylum claim is unsuccessful "(a DFT case becoming appeal rights exhausted, or a s94 refusal decision being served)", detention may continue under general detention policy. This carries with it the clear implication that until appeal rights are exhausted or a s94 refusal decision is served, it is the DFT detention policy which applies to someone whose application was refused by the SSHD, whose appeal rights were not yet exhausted. This is consistent with the version new in 2008 and thereafter for some years which, after referring to *Saadi* as permitting the detention of someone for the purpose of deciding his application under accelerated procedures, had said: "Once a decision is made however, detention policy requires that removal be imminent. The decision may be regarded as including the time during which an individual has extant appeal rights…." This now clearly implies that the SSHD's policy is that the decision on appeal was part of the decision-making process to which the principles governing detention set out in *Saadi* applied.

60. I am satisfied that the DFT detention policy applies now, and has done so expressly for some years, to the appeal stage of the decision-making process. The policy changed, as I read it, or it may just have been badly expressed in the past. But it is clear now. The application of DFT detention criteria to the appeal stage is also lawful in my view.

61. There are two disputes about the actual extent of any changes to the criterion or criteria for inclusion in the DFT or for exclusion from it on which I need to comment. First, was a nationality list applied as policy? Collins J, at first instance in *Saadi*, [2002] 1WLR 356 at 363 paragraph 7, described the operation of the DFT as applying to the nationals of a listed country. But the evidence of Mr Martin for the SSHD, in *Saadi*, was that the question of suitability was whether it appeared that the application "could be decided quickly". Nationality was an important factor within the policy. Non-listed nationalities were not considered for the DFT, but the number of nationalities admitted had increased. Mr Simm's evidence for the SSHD in this case, in his third witness statement, was that nationality had never been a rigid criterion, and any list had been constantly amended, and, although in his first statement he accepted that the intake policy at Oakington had been based operationally on a list of suitable countries, he said that the question had always been whether the application could be decided quickly. In 2004, a new instruction was issued, and the various post 2004 operational instructions state that entrants had to come from the listed countries *or* have a claim judged suitable for a quick decision.

62. I accept his evidence on this. This is all at one with his evidence, and it seems to me to be borne out by the contemporaneous documents, that the fundamental criterion for inclusion in the DFT has always been whether or not the case was suitable for a quick decision. It also seems to me obvious that that would have been so. The specific role played by a list of countries may have become more flexible over time, but its role was always to assist in the identification of cases which could be decided quickly. That is at the heart of the rationale for the DFT, as accepted in *Saadi*. It is another issue whether the guidance is now adequate or the criterion too uncertain or arbitrary in application, an issue which goes to the lawfulness of the operation of the DFT.

63. There is an Operational Considerations list, colloquially known as the RAG, Red Amber Green, list of countries. Some such list is scarcely surprising since nationality is bound to be a factor in the judgment of the suitability of a case for the DFT. As Mr Simm explained, this list primarily addresses re-documentation, and includes other operational factors such as the availability of interpreters - an obvious consideration for fast track suitability. The ability to remove someone whose claim has failed at the end of the DFT process, is an obvious factor affecting entry into the DFT, since one purpose of a quick decision is to assist the quick removal of those whose claims have been examined and have failed. It also includes some brief guidance on other aspects of suitability. A list in this form began to be used in about 2009.

64. The RAG list describes itself as "not an exhaustive list" which "must not be used as a rigid tool". The list was subject to regular review. A senior officer was to be consulted about any country which did not appear on the list. The overall DFT suitability criteria determined whether a case should enter the DFT. Red meant that a senior official had to be consulted on cases which met the documentation criteria, and not engage the exclusion criteria, other cases "(high harm/high profile)" might mean exceptionally that they had to be referred to the senior official; Amber meant that a senior officer had to be consulted about all

cases not subject to exclusionary criteria; Green meant that no further consultation was necessary unless exclusionary criteria applied or documentary criteria were not met. The latter concerned the availability of the sort of documentation necessary for removal. Afghanistan alone, and not for example Pakistan, had a different colour for men and women. There was laconic suitability guidance in a few instances, for example in relation to Tamils from Sri Lanka and Ahmadis and Balochis from Pakistan, both otherwise Green countries, as is Jamaica without qualification; but the further guidance was usually that the case should be referred to a senior case worker.

65. Mr Simm explained that the list had not been published as it was neither policy or rigid guidance as to suitability; rather it was an "additional tool for senior caseworkers and the NAIU" in deciding whether a case was suitable for the DFT. The policy of taking operational factors into account was published. I shall deal with this further when I consider the criteria for entry into the DFT.

66. The second issue concerns the application of the DFT to women. Was the DFT at Harmondsworth limited to single male applicants from countries where there was believed in general to be no serious risk of persecution as described in paragraph 2 of *RLC* above? The answer is yes, but that could give a misleading picture. Mr Simm's evidence in this case was that single females and families had been included in the Oakington process, but not in the Harmondsworth process, the specific subject of the *RLC* case, because the accommodation there was not suitable for females and males together. Women were clearly included in the DFT at Yarl's Wood Removal Centre as from 2005.

67. There is little to be gained by any further dissection of the extent of changes in policy or practice. It is not possible to know whether any particular factor or factors mentioned by the Courts, or in the evidence but not mentioned by them, was crucial to the judgment of the lawfulness of the DFT in earlier cases, or whether they understood the position in the way contended for by Claimant or Defendant here. Certainly it does not follow that any change makes the system unlawful as a generality. But changes mean that *Saadi* and *RLC* may not give the current system an inevitable imprimatur of lawfulness. The crucial question is whether the operation of the DFT now satisfies the requirements of the law.

The Claimant's case

68. Ms Lieven QC for the Claimant submitted that the system as it operated created an unacceptable risk of unfairness for asylum seekers, and that detention in the DFT was unlawful on the more general basis that detention in it was unreasonable, arbitrary and disproportionate. There was a high degree of overlap between the factors supporting the two grounds, factors which she said had changed from those accepted as lawful in earlier decisions. The EHRC supported these submissions, contending that the policy no longer eliminated "all risk of arbitrariness", and that the policy was no longer compatible with Article 5 ECHR. The changes and their effects were summarised as follows.

(1) There are now considerably fewer asylum claims and fewer in the DFT than at the time of *Saadi,* so the need to avoid any delay in the process was

diminished; there was no evidential justification for the same detention criteria being applied to those who appealed against the refusal of their claim.

(2) The average period of detention in DFT was at least four times longer than the 7-10 days contemplated in *Saadi*, which was largely due to the inclusion of the appeals process in the DFT.

(3) There was now no nationality list to guide decision-makers on suitability: the only criterion was whether it was thought that a quick decision could be made; the focus was on operational issues, such as whether an unsuccessful applicant could be removed quickly; there was no clear guidance, such as a nationality list, as to what cases would be considered suitable, and a real risk that unsuitable claims were not identified and removed from the DFT.

(4) The range of cases now considered fit for inclusion was now much broader, and included cases previously thought of as inherently too complex for a quick decision: FGM, homosexuality, domestic violence from countries such as Pakistan, torture and rape.

(5) The already criticised screening process did not seek or have the information necessary for the NAIU to decide whether a case was capable of quick decision or suitable for the DFT on a consistent basis: the screening process was not directed to suitability for the DFT, the standard questioning was inadequate, inconsistent in scope and detail, partly at least because the policy itself was so vague and lacking in specific guidance. Nor was the screening interview the place where claims of a sensitive nature were likely to be made. The range of cases now potentially included was too broad and vague for the screening process as currently operated. Problems went beyond the aberrant case.

(6) The scope for persuading the SSHD to take a case out of the DFT was very limited, and errors at the screening stage on suitability were unlikely to be remedied; there was very little flexibility over the handling of cases in the DFT, or over their removal if unsuitable; the speed of the process made judicial review an unrealistic remedy. The safeguards for those who were unsuitable or potentially unsuitable for the DFT were ineffective, notably for victims of torture and trafficking. In reality, once a claim entered the DFT, the onus to show that it should be removed lay on the asylum applicant.

(7) The time elapsing between entry to the DFT and the substantive asylum interview, indicatively between 10 and 14 days, was not available for preparation of the claim because the SSHD did not allocate a legal representative to the applicant till at most a very few days before the interview, and the time after the interview for further representations was curtailed as the decision was issued the next day. Such a period of inactivity was not reasonably required for the proper operation of the DFT. The shortness of the time for instructing lawyers and the circumstances in which instructions had to be given, including the fact of detention itself, made it impossible to take proper instructions and to obtain supporting evidence. The actual decision-taking timetables were too short for all but the most

straightforward cases. The shortness of the available time had a more severe impact on the vulnerable applicant, notably victims of torture or trafficking, or of other sexual violence, or who were mentally disturbed.

(8) The appeal process provided few safeguards if any: entry into the fast-track appeals process was automatic for those detained in the DFT; there was no prior or separate consideration of the continued suitability of the DFT for an individual's appeal; timescales were too short to permit the proper presentation of evidence; the combination of an accelerated appeals process and detention the while was a substantial impediment to the fairness of the process; the FTT was very reluctant to permit the removal of a case from the fast-appeals track, because the hearing itself was the only effective point at which such an application could be made; a significant percentage of appellants were unrepresented.

(9) Oakington had closed and DFT detainees were held in Removal Centres in conditions of much greater security than had been regarded as appropriate in *Saadi*.

69. Although there had been changes to the DFT since the decision of the House of Lords and ECtHR in *Saadi* and of the Court of Appeal in *RLC*, the SSHD contended that the principles approved still applied. The Claimant submitted that changes were far more significant than that.

70. At this stage, because of the high degree of overlap between the two grounds of challenge, I shall deal with their facts and circumstances together.

The facts and circumstances of detention in the DFT

71. **The reduction in numbers claiming asylum.** Plain it is that the numbers of asylum seekers has dropped very substantially since *Saadi*. Then, there were 84000 claims a year, of which 13000 went in to the Oakington fast track, with 150 interviews scheduled per day. (I believe that 13000 figure, though not the 84000 figure, is main applicants alone because in the light of the way the DFT was then operated there would have been few if any cases with dependants). There were benefits to applicants and to the public interest in disposing of cases quickly which could be disposed of quickly. The numbers of main applicant asylum seekers was stable at about 25000 a year between 2005 and 2009. More recently, the number of main applicant asylum seekers dropped to 18000 in 2010, but that figure has been increasing since by 10 % annually. The figures, including dependants, vary between 31300 in 2008, falling to 22644 in 2010, (cf 18000 main applicants), and rising again to 27486 in 2012. The total entrants into the DFT varied between 1672 or 5.43% of applicants, including dependants, in 2008 to 2571 or 11.35% of applicants in 2010 to 2482 or 9% of applicants in 2012. It may be inferred from Mr Simm's evidence that there are about 14 interviews a day.

72. Mr Simm's evidence showed that 11% of asylum seekers made their claims at ports of entry, 43% registered at the Asylum Screening Unit in Croydon, and 46% made them on arrest by UKBA enforcement team or while already in

immigration detention under general detention criteria. Between April and October 2013, over 70% of the total 2687 DFT cases came from those arrested by police or immigration enforcement in connection with illegal entry or over staying, which led to the making of an asylum claim. 70% of the asylum seekers who enter on a visa wait more than a year before claiming asylum. Some 50% of asylum seekers have entered the UK on a valid visa.

73. A significant proportion of those who enter the DFT withdraw their claims, said Mr Simm, though giving no figures; 54% of DFT entrants left under the Assisted Voluntary Return Scheme in 2013. 99% of asylum applications in the DFT were rejected, compared to 74% in the non-detained track. 93% of the refusals were upheld on appeal. Between 50% and 71% of DFT entrants were removed at the end of the process in the 5 years, 2008-2012. This was significantly higher than the 17% -30%, (indeed, the latter was the only figure above 20%), removed at the end of the process in the non-detained track for that same period.

74. I do not consider that the substantial reduction in the number of asylum seekers is such that the lawful basis for a DFT has gone. The number of cases is still high, albeit variable. Whether one takes the higher of the recent years at 25000 or the lower figure of 18000 in 2010 which has been steadily increasing, or whether one takes the overall number of asylum applicants, which reflects the total number of those whose entry is being examined, this is still a large case load. It is in no one's legitimate interest for claims to be resolved slowly if they are suitable for a quick decision. The substantial proportion of asylum claims, and the quite high proportion of DFT entrants arising out of immigration enforcement, supports the legitimacy of that interest, as does the much higher number of subsequent removals than in non-detained cases. The number of interviews is very much lower, but the factors applying, at the time of *Saadi*, to the efficient use of resources, in the legitimate interest of quick decisions seem to me to continue to apply. If unmeritorious cases can be disposed of quickly, through a short period of detention, and would take far longer without that, I see no reason why the reduced number could sensibly have made the system unlawful. This point was far from the main thrust of Ms Lieven's submissions, which were directed more to the operation of the DFT, but it comes first logically.

75. The number of persons in the DFT who used the Assisted Voluntary Returns, AVR, programme level from the DFT was seen by the SSHD as supportive of the DFT aim of deciding suitable cases quickly in order to reduce the queue of those awaiting a decision. Mr Garratt, the Chief Executive of Refugee Action, RA, which was involved in the AVR, took a different view. He thought, based on a sample of 106 detainees who had sought AVR, and who had been recorded by RA staff as vulnerable or complex cases, that there were people in the DFT who should not be there on the SSHD's own policy. About half of the 3700 inquiries about AVR in the middle six months of 2013 came from those in detention. A much higher proportion of those enquiring about AVR in detention did so because of what was called the "Home Office system", 82%, compared to 37% of those not in detention. Of course not all of those detained were in the DFT. But he was concerned that people, especially with mental health

problems, would be so desperate to get out of detention that they would say whatever was necessary to that end, including the possible withdrawal of a well-founded claim to protection, and the acceptance of AVR. Although those in detention may dislike the Home Office "system", in what I believe is the language offered to them by the RA, I am not prepared to hold on this evidence that the decisions to accept AVR were made by those who lacked the capacity to understand their position, or who had had no advice about it. It is fair for the SSHD to use the AVR figures from the DFT figures in support of her contention as to the continued usefulness of the DFT policy.

76. Mr Garratt was also disturbed about a possible policy change whereby the SSHD would no longer permit a concurrent AVR application and asylum claim. I cannot take that issue further in the context of this action. That is really a separate claim, and should not be raised in a witness statement in reply, two weeks before the start of the hearing.

77. **The inclusion of the appeal process in the DFT.** I reject the suggestion that the inclusion of the appeals process in the DFT is unlawful, as a matter of principle. The statutory power to detain pending a decision on the grant or refusal of leave to enter clearly covers the power to detain while a statutory appeal right is exercised against a refusal. It is also clear now at any rate, and in my view has been clear since 2008, that it is the SSHD's policy to exercise that power on DFT criteria, and not on general detention criteria: the fact that a case is in the DFT is sufficient as a matter of policy for it to remain in the DFT unless either the SSHD or judiciary remove it as not or as no longer suitable for the fast-track appeal process. There is nothing unlawful about such a policy. On the face of it, I see no reason why, if the criteria are otherwise lawful, that should be an unlawful policy.

78. What the evidence from the SSHD does not provide is any separate rationale for the appeals process to be included in the DFT for those who do not fit the general detention criteria. The number of appeals, and the need for the appellant to be in detention so that the appeal process runs smoothly is not explained, though the data suggests that there are well over 2000 appeals a year in the DFT. There are eight Fast Track Courts: three at Hatton Cross and Harmondsworth, two at Yarl's Wood; each Court aims to hear two appeals a day. Ms McGahey spoke of the difficulties of hearing the appeal of someone released from the DFT on the fast track timetable: they would need accommodation near one of the three hearing centres for ease of access; the lawyers would have to be nearby as well for meetings; they would have to arrange meetings although just released to new accommodation in what might be a strange place; there would be plenty of opportunities for travel arrangements and meetings to go awry. The proper operation of the fast track appeals process would be undermined.

79. Now, I accept that Ms McGahey may well be speaking of the logistics and resource problems which the SSHD would expound to justify continuing detention other than on general detention criteria during the appeals process, reasons dismissively rather than accurately described as "mere administrative

convenience". But there was no evidence from Mr Simm expressing those or other reasons.

80. That is, as I understand it, because the attack on inclusion of the appeal process in the DFT, was seen as based on the unlawfulness of even allowing the same considerations of "convenience" in the interests of a quick decision, to apply to an appeals process at all, as well as other reasons, such as lack of clarity of policy, duration of detention, and fairness. An attack on the lack of detailed justification was not the basis of the challenge in the Grounds, or not clearly. It was made rather more explicit in the Claimant's Skeleton Argument. The SSHD may have misunderstood the Grounds, but up to then might reasonably have thought that the policy justification, if it were the policy, for the inclusion of the appeals process in the DFT was not controversial, and that by 2008, so some five years ago, the policy of detaining by reference to the DFT criteria, was also clear, and not controversial in law. There may or may not be an arguable case about the rationale for the inclusion in the DFT appeals process of appellants who would be released under the general detention criteria. It is not difficult to see the sort of reasons which might be put forward to justify the policy. The policy is not so obviously unlawful that no reasoning could save it. I am not prepared to hold it unlawful in this case given what I understand to be the reason for the state of the evidence, and the lapse of time since 2008. That issue, if it is to be pursued, will have to be pursued in a separate case.

81. **The duration of detention.** The indicative timetable in the DFT is for a substantive decision to be made on the asylum claim in 10-14 days from entry to the DFT, and it is usually quicker for those in the DFT non DNSA process because greater time is allowed for the latter to submit representations after the interview. 8 days has been achieved fairly recently. Up till November 2012, 44 days was the expected duration of the whole process to the exhaustion of appeal rights, if an appeal were pursued against a refusal, but then efficiency was improved and the expected duration was reduced to 28 days for that whole process.

82. The time in detention before the initial decision is made on the asylum claim does not differ so markedly from that which was considered reasonable in *Saadi.* 7-10 days has become 10-14 days but at the lower end of that range for those not in the DNSA part of the process. The DNSA did not exist at the time of *Saadi*, but the greater time before decision, at the upper end of the range, is a consequence of the greater time allowed for them to submit representations after the interview. This reflects the likelihood that there will be no appeal rights in-country. I do not see that period in those circumstances as disproportionate or excessive, so as to be unlawful.

83. The period to which the Claimant refers as being so much longer than that at the time of *Saadi*, is the consequence of the inclusion of the period awaiting the decision on appeal in the period spent in detention. *Saadi* does not hold that the maximum period in detention awaiting a decision should not exceed approximately 7-10 days regardless of the process. If 10 days is taken as the period of detention for the initial decision, the further period in detention pending a decision on an appeal would be 34 days, if the total were 44 days, and

more recently a further 18 days. In September 2013, over three DFT centres, the average period from entry into the DFT until appeal rights were exhausted was 23.5 days. This varied as between centres from 33 days to 16. The period appears to fluctuate also with the number of entrants.

84. The lawfulness of the period in detention pending appeal has to be judged not just as an extra; the whole period has to be considered. It must be borne in mind that the appeal arises only because the initial decision has been adverse, and the individual has decided to appeal. The period in detention pending appeal is not disproportionate at the lower end in view of what has to be done before an appeal is heard. Nor again at the lower end is it disproportionate overall. However, where detention is justified for the purposes of enabling the process to be carried out efficiently, and to avoid the waste of resources and time, it is necessary for the Government exercising such powers to test its processes and to eliminate those inefficiencies on its part which extend the time in detention. I find it difficult to see why the period to the conclusion of the appeal should be greater than the further 20 or so days recently achieved, except if some particular circumstance affects an individual case. That same level of efficiency should be maintained by the provision of adequate resources, although there may always be exceptional circumstances to justify a particular delay. That period is also more akin to the period achieved for the initial decision.

85. Neither is there an overall maximum for the process. While I do not think that a defined long stop period is necessary for the system to be lawful, the regular detention reviews should explicitly consider (1) the reasonableness of the length of time so far passed in what is intended to operate as a Fast Track for cases suitable for a quick decision, and (2) whether continued detention beyond say 30 days has involved the SSHD in inefficiency on her part. The predicate for the lawful detention in the DFT is that the system is operated efficiently for the avoidance of delays. If the needs of efficiency, logistics and avoiding the waste of resources justify detention in the Fast Track, so too resources must be made available for it to achieve its ends. The DFT cannot operate just as fast as the SSHD enables it to operate. But I am not prepared to hold on the evidence that it is being operated unlawfully at the present in that respect.

86. There is a further point which the Claimant raises about the period which elapses before the first decision is taken which, even if not significantly greater than that contemplated in *Saadi,* is now used or rather not used for the purposes of progressing the initial decision, a "period of inactivity" as Mr Simm described it. I shall deal with that point when considering the time available for the instruction of legal representation and the effect of that on the lawfulness of detention.

87. **The criteria for entry to the DFT.** I turn next to the clarity of the criteria for detention at each stage. I have already concluded that the SSHD applies, and that it is clear that it is her policy to apply the same suitability criteria at each stage. If the criteria are lawful at the first stage for entry into and remaining in the DFT before the SSHD's decision, there is nothing in the nature of the appeal process which suggests that they are unsuitable for application there as well. It may require a different answer in the light of the decision under appeal, the

evidence required and its possible duration, and it should receive separate consideration. But that is not the same as saying that the criteria of their nature are inapplicable. There is also a judicial element in the appeals process which can lead to the removal of a case from the fast track, and if so that will lead to release from detention under fast track criteria, though not necessarily from detention under general criteria.

88. The essence of the criteria is that the case is suitable for a quick decision. There are a number of instances of positive indications that a case is suitable for a quick decision. I do not think that the need for clarity and the avoidance of arbitrariness requires the entire set of circumstances favouring entry into the DFT to be spelt out, and any not covered to mean that a case must fall outside it. Any defined line, or set of boxes to be ticked, leads to what could be described as arbitrary distinctions. There is nothing inherently arbitrary in an overarching criterion supplemented by the obvious major instances which support it. Scope for the exercise of judgment does not mean that objectionable arbitrariness and inconsistency is allowed. Bail and sentencing decisions call for judgment; and the application of rigid criteria, tramlines or box ticking is not the answer to a risk of arbitrariness. Likewise the cases likely to be unsuitable are spelt out non-exhaustively but covering probable major areas; again they are not simply rigid criteria. The same comments I make about the role of judgment apply here too. The role of operational criteria is spelt out: but that reduces the risk of arbitrary decisions since it identifies the role of operational factors in the ability to achieve a quick decision and then to act on it. It would be absurd not to take operational criteria into account, in particular the ability to remove the applicant if the claim fails.

89. The fact that a nationality list was of greater importance in *Saadi* than it is now cannot make the decision-making process arbitrary. Such a list is capable of giving rise to accusations of arbitrariness by comparison with other countries not on the list. The existence of such a list was not a sine qua non of a lawful policy, or of avoiding the risk of arbitrariness; it was one of a number of factors which, in the light of the experience of asylum claims then being made, avoided arbitrariness in entry to the DFT and showed that the DFT in operation had been set up realistically to achieve its objective.

90. The RAG list itself was not published but the fact that operational considerations, and of this type, affect entry into the DFT is part of the published policy. The precise detail of how they affect it in relation to otherwise suitable cases, country by country, in the RAG list was not published because it was not seen as policy, but rather as a tool or guide varying over time. I accept that it plays the part described by Mr Simm, but the decision as to whether or not it is a policy document is for the Court, and that is not determined by its description as "operational" or policy or guidance. Nor is that affected in principle by the fact that it varies over time with circumstance.

91. The RAG list, in my judgment, is guidance for officials principally as to how one aspect of the declared policy, operational factors, applies to the main applicant countries, varying over time; its lower role in the hierarchy of

documents is important. The RAG list helps officials to apply the criteria to particular cases rather than telling them what the criteria are. The basic criterion of the policy is clear, suitability of the claim for a quick decision, as are the likely supporting inclusionary and exclusionary factors, and the role of operational considerations, which are themselves identified. Not all internal guidance documents on particular aspects of the application of policy can be regarded as policy itself. I regard those as the objectives, principles, means and significant factors which an official will consider. Treating it as policy could mislead applicants as to how in reality cases from those countries could be treated, because the test remains whether the case is suitable for a quick decision. I do not accept Ms Lieven's suggestion that the application of the RAG list required more detailed guidance for caseworkers: it is not the policy document to which they look; it helps in the application of policy.

92. However, the real issue is whether asylum applicants were disadvantaged by its non-publication in the sense that they were unable to focus their submissions on what were in reality important factors affecting the decision about which they were making representations, rather than the particular characterisation of the list as policy or not. In that context, the NAIU will be considering the RAG list, as will the screening officer. I can see some modest advantage to the applicant in explaining why his or her case is not suitable for the DFT in being able refer to the RAG list, and saying that the country is Green, but other factors apply, or Red but other factors do not apply, although it is the overall case which has to be considered. I think that there is a high probability that the fact of non-publication gives it a greater significance in the eyes of applicants than it in fact has. I see no good reason why it should not be available. But the DFT policy is not unlawful for want of clarity and openness about its criteria, or the absence of publication of the RAG list.

93. The fact that at the time of *Saadi* certain categories of applicant were excluded from but are now potential candidates for the DFT does not of itself make the system unlawful. Whether or not certain categories are inherently unsuitable for inclusion in the fast track is quite another matter. There is now rather greater experience in the handling of such claims, which may or may not be true or sufficient, if true, for a successful claim. This obviously affects what cases are potentially suitable now for quick decision. But in my judgment, there is nothing so uncertain about the categories of case which qualify for entry to or exclusion from the DFT to make the policy unlawful for want of sufficient clarity or precision to avoid arbitrariness, or so uncertain that applicants do not know predictably where they stand and are unable to make relevant representations or legal challenges about their position. In my judgment, the test in *Lumba*, above, is satisfied in relation to the transparency of the policy, its legal certainty and want of arbitrariness.

94. **The Screening Process.** The lawful operation of the DFT depends on the selection of cases which are suitable for it, and the removal of those initially placed in it which turn out not to be suitable, whether through error of judgment in the first place or because of further information. The initial allocation of asylum seekers to the DFT or to another track is made through the screening process. This process has been the subject of considerable criticism, and not just

in this case. In many ways it is here that the effective operation of the criteria and their ability to provide the necessary certainty and precision can be tested. To that I now turn.

95. The decision that an asylum seeker should be allocated to the DFT is taken by one of the small number of officials trained for that purpose at the NAIU. The screening interview is an important part of that process but is not the only part of it. It is carried out by screening officers, usually uniformed, at port, or at the Asylum Screening Unit, ASU, Croydon or by a separate team if the claim is made while in detention in an Immigration Removal Centre, IRC. These officers are trained in the process; Mr Simm said that the facilities had been improved. The quality of the interviews and decisions are audited.

96. The applicant receives a Point of Claim leaflet, sometimes before attending for the screening interview; it explains among other matters, the purpose of the screening interview, the sort of information sought or useful at it including personal information, the basis upon which a claim may lead to detention in the DFT and where advice may be obtained. Legal representatives are not excluded from the interview, if the applicant already has a representative, but where the applicant does not have one, the presence of a lawyer is not facilitated.

97. The interview is conducted on the basis of a pro forma questionnaire, and such supplementary questions as the interviewer thinks appropriate. It is not the purpose of the interview to consider the detail let alone the substantive merits of the claim, or to go into detail which could lead to pressure at the screening interview, or contradictions at the later substantive interview. Rather it gathers basic personal data such as identity, method of arrival in the UK, travel history, identity documentation held if any, medical conditions, if female, whether pregnant and if so the due date, family in the UK, what documents they have which may support the asylum application, convictions, support for organisations linked to terrorism or war crimes. They are asked to explain briefly the basis of their claim, and why they cannot return to their country of nationality: who they fear and why. The screening officer should ask supplementary questions about the basis of the claim; Mr Simm said that this "may help to establish its suitability for the DFT", as well as assist the interviewer at the substantive interview, and facilitate the applicant in accessing rights established by the Procedures and Reception Directives. This "considerable latitude" in questioning, accepted by the SSHD, led to a risk of arbitrariness according to the Claimant.

98. Applicants are now also asked if they have any further documentation which they wish to submit in support of their claim or personal circumstances. The length of time in which to obtain documents or other evidence to support a claim must be taken into account in deciding whether this would prevent a quick decision and therefore prevent entry into the DFT. This question was added as a result of *R(JB)(Jamaica) v SSHD* [2013] EWCA Civ 666, especially at paragraphs 28-30. This concerned the unlawful decision of the SSHD to include Jamaica on the list of countries where there was no general risk of persecution, and to allocate to the DFT a claim based on the risk of persecution as a homosexual in Jamaica; the Court regarded it as obvious that the time which it

would take to obtain the supporting evidence, because of its nature, and which the applicant had said existed, would prevent the fair determination of the claim in the DFT.

99. The NAIU also considers information available from other source such as previous asylum or other immigration applications, screening interviews, Home Office databases, Eurodac fingerprinting, Police National Computer and witness statements from enforcement officers and others where the applicant makes the claim following enforcement action. The NAIU can also ask that further questions be asked of the applicant, if not asked already, covering for example the type of evidence which an applicant may need or be awaiting and when it is expected to be received. Mr Simm describes this in his first witness statement. He also said, although Mr Paramesvaran, a partner in Wilsons LLP for the Claimant disputed it, that the sources of information about country conditions were better now, and had been since 2005, than at the time of *Saadi*. I agree with Mr Simm: the country information reports were greatly improved by 2005, and the Country Guidance system in the Upper Tribunal and its predecessors post dates *Saadi*. I was surprised at the assertion to the contrary which appeared to be based on a considerable misunderstanding by Mr Paramesvaran, which ought not to have persisted for a decade or more.

100. The Court of Appeal in *JB(Jamaica)* also pointed out that the pro forma questionnaire, used in the screening process, had not been designed with the suitability of the case for allocation to the DFT in mind, and that what was required were questions for that purpose appropriate to the particular case. The screening officer should ask supplementary questions to obtain information to assist that decision; he had to investigate "the nature and circumstances of the claim in a way that would enable an informed assessment to be made of the likelihood of being able to make a fair and sustainable decision within about two weeks". The Court was critical of the absence of supplementary questions to ensure that the kind of detailed assessment required by the policy was carried out; paragraph 28, Moore-Bick LJ. At paragraph 30, he said that although the period spent in the country before making an asylum claim could be relevant to the potential for a quick decision that would depend on the individual case. It was not necessarily wrong for the SSHD to conclude that no further time was required to provide information when the applicant had been in the UK for sometime; but that was not to say that further time could never reasonably be required. This may be particularly pertinent in an enforcement case. One factor was when the applicant knew that his fears could actually found a claim to international protection, and when he had had any legal advice. A case by case assessment was needed. *JB (Jamaica)* did not however hold that the screening system was unlawful in operation because of deficiencies or because of errors or failures in individual cases.

101. Sir John Vine, the Independent Chief Inspector of Borders and Immigration, expressed concern in 2012, reflected in *JB(Jamaica)*, that the screening process was inadequately focused on ascertaining the suitability of a claim for fair determination in the DFT. Ms Hewitt, Legal Director of the EHRC was concerned that the screening process did not require the NAIU officials to ask themselves whether the cases they screened could be decided fairly within the

process. A "detailed preliminary investigation" was required. The screening process needed to take account of the decision-making process in the DFT, and in particular of the fact that that would depend greatly on the account of the asylum seeker, which would probably need corroboration or expert support. She regarded the process as failing to identify vulnerable and complex cases, especially where gender-specific persecution was involved.

102. Ms Hewitt cited a conclusion of the House of Commons Home Affairs Select Committee 7th Report on Asylum of 2013 to the effect that it appeared that one third of cases in the DFT were wrongly allocated to it. That is not as full picture as is available. One third of the DFT intake on a "fast sample" was released from the DFT "very quickly" according to Sir John Vine in evidence to the Home Affairs Select Committee in April 2013. He said that some for example were victims of torture, but that had not come out at the screening interview. The same may be true of others who had experienced trauma of some sort but did not disclose it at that stage. It appears that some were released on the provision of further information.

103. I do not regard that as evidencing a failure in the screening process such as to make the DFT unlawful. It is not reasonable to take that as evidencing a 33 percent failure rate in screening. Mr Simm referred to other figures to provide a breakdown of the stages at which releases occurred between April and September 2013: in that period 21.5 % were released at various stages in the DFT process: 10% were released before a decision was made, just more than half of which were because an appointment letter had been received from the Helen Bamber Foundation or from Freedom from Torture, and 22% he ascribed to the flexibility in the system to cope for example with the need of an applicant to make further enquiries. 6% of those in the Fast Track Appeals process were released from the DFT.

104. This screening process does in my judgment largely address the issues relevant to suitability sufficiently for proper, reasonable and non-arbitrary decisions to be made on suitability of the claim for allocation to the DFT. The judgment that a claim is suitable for a quick decision requires personal and country information, identity documents, family position- which can lead to an Article 8 claim- medical conditions, travel route which can support a claim to have been trafficked, basis of claim and what more is needed or sought to support it. The length of time in the country without making a claim is relevant to the prospect of a case being suitable for a quick decision, though I take this further below. Facts relevant to operational considerations are explored: language of interpretation, and identity documents. Other available information is taken into account. The sort of issue which can lead to exclusion is explored to an extent, and in many instances further information depends on the willingness of the applicant to disclose what, for reasons good or bad, they may wish to keep to themselves at that stage.

105. However, one if not the most important purpose of the screening interview and process is to decide whether a case is suitable for a quick and fair decision, and then appeal, in a detained fast track, and not just in a fast track. The suitability of the applicant for detention is one issue which NAIU must address,

suitability of the claim for a quick decision is another, but it must also address the effect of detention on the fair determination of the application, including appeal, in the fast track.

106. The more detailed and specific the criteria, by nationality, gender, age, family, basis of claim, operational considerations, the more the focus of suitability is on the application of the specific criteria. The more general the criteria, the wider the potential range of cases in the DFT, the more focussed the questions need to be on the individual circumstances, nature of claim and the effect of the DFT timetable on its fair determination in detention, since specific criteria will no longer exclude some potentially unsuitable cases. Consideration is then required of the prospects of a fair determination within the confines of the DFT by asking questions about the individual case. The removal of the "general presumption" of suitability for the DFT requires more than just the deletion of the words, and instead requires questions which go further than hitherto to enable a specifically tailored decision to be made on suitability. The issue of whether a determination will be fair within the DFT needs to be addressed by questions about the factors which would enable that to be decided specifically.

107. Whilst it is not for the Court to draft the questionnaire, the SSHD must consider what she needs to know in order fairly to make a decision that any claim is suitable for a quick decision and for detention, considering what is fair to the applicant as well as administratively feasible. The further question post *JB Jamaica* does not go far enough. The screening interviewer should ask why the documents and evidence were not available in view of the length of time which the applicant had been in the UK, or aware that he could make an application for asylum. An explanation can legitimately be expected. Those questions are not required by the pro forma, though some may ask them as supplementaries. That should be done routinely.

108. I see no reason either why the applicant should not be specifically asked for any reasons why he or she says that the claim is not suitable for decision in the detained fast track with specific reference, from the interviewer, to the timetables involved. It might or might not elicit more sensitive aspects of the claim, but at least it would direct the applicant to the issue in the interviewer's mind rather than simply providing information which leads to his making a judgment the nature of which may not be clear to the applicant, the Point of Claim document notwithstanding.

109. The screening process requires a questionnaire, and specified supplementary questions in cases which warrant them, focussed on whether the claim as then revealed can fairly be determined on the DFT timetable, bearing in mind the drawbacks of detention in the obtaining of legal advice, evidence and the fact that there are claims, as I shall come to by women in particular, where there is a reluctance to reveal the particular circumstances which in fact motivate the claim. The SSHD should review the questionnaire and screening process with that aspect firmly to the front. The reality of when legal advice is made available in relation to the substantive interview, and the limited effectiveness

of Rules 34 and 35 in relation to removing unsuitable cases from the DFT would need also to be borne in mind.

110. However the more specific questions now asked at the screening interview whether from the pro forma or by way of supplementary question, or those which I consider should be asked additionally if that does not already happen, do not mean that the process requires the presence of a lawyer for it to be fair or effective. It is not the substantive interview, and it is rightly intended that it should not become one. The balance may be difficult to get right always, but the balance can lawfully avoid necessitating the involvement of lawyers as a matter of fair process.

111. I accept that an applicant without the benefit of legal advice is unlikely to know about expert evidence which would support his case, and that the absence of a detailed analysis of the claim at that stage means that the judgment as to its suitability for the DFT is not made with full knowledge of the claim. That is inherent in the operation of the DFT with a screening process for entry. I do not think that a lawful screening process requires a "detailed preliminary investigation" of the claim, which could do more harm than good to the applicant, feeling pressure to reveal more than the basics of the claim without legal advice, which could then be used to create contradictions or important omissions for the substantive interview. The DFT does not face the stark choice that Ms Harrison suggested between objective criteria and standards, or such extensive questioning that the DFT cannot undertake it at the screening stage.

112. Although I regard the screening process as not as focussed on the issue of fairness as it should be, I do not hold that the policy or operation of DFT is unlawful on that ground. The scope for improvements does not show that the process as operated carries an unacceptably high risk of unfairness. But deficiencies in the screening process, and the knowledge that the process inherently cannot identify all the claims which are in fact unsuitable for detention or a quick decision does bear upon the question of when legal advice is available, how long before the interview it is available, and what safeguards are available, whether through flexibility or other ways of identifying the applicants or cases which should not be in the DFT.

Vulnerable categories

113. The next question is whether the limitations inherent in the screening process show that certain categories of claim should be treated as unsuitable for the DFT from the outset. Most of the issues concern how those who are or may be in vulnerable categories are screened out at this stage.

114. The way in which the vulnerable categories unlikely to be suitable for inclusion are considered was of some controversy in this case. Ms Hewitt's contention, with the support of UNHCR's detention guidelines, was that certain groups should not be in the DFT: victims of torture and other serious violence, and if detained, they should receive regular reviews; pregnant women and nursing mothers; women asylum seekers who had been sexually abused should

receive particular care in detention; those with long-term physical, mental, intellectual and sensory impairments should not be detained. This begs two general questions. First, the applicant for asylum may not be willing to reveal these vulnerabilities at the screening stage; indeed that is a common point made by the legal representatives, that time is very commonly required before those who claim to have a basis for international protection in those circumstances are willing to reveal that as the basis for their claim. Second, it assumes that all such claims are true in fact, significant to the claim, make it unsuitable for a quick decision by reason of complexity, and make detention in the DFT unsuitable.

115. The UNHCR deal with the second but not the first by saying that those who *claim* to be for example victims of rape or trafficking should not be in the DFT, and that safeguards were inadequate. I now deal with these categories.

116. **Torture.** This concern is with people who claim to have been tortured rather than with those who have not been tortured but claim to be at risk of it. The latter may or may not have claims suitable for the DFT but there is nothing in the mere fact of such a claim of risk which makes it unsuitable for a quick decision. Nor is there anything unlawful in a policy which does not automatically exclude someone who claims to have been tortured. The view can legitimately be taken that the mere fact of a torture allegation does not make it inherently complex, or unsuitable for a quick decision either. The policy of excluding only those who have independent evidence of torture is not unlawful; UNCAT may think that the threshold should be lower but that is a matter of legitimate disagreement, and not one which shows the policy to be unlawful. Not all such claims are truthful, and not all such claims, if proved to the lower standard of proof, show a real risk of persecution upon return. The SSHD is entitled to avoid a mere torture allegation, which can readily be made, without any supporting medical or other evidence such as physical signs, being the simple way of avoiding the DFT, which is a lawful basis for detention and examination. Once there is independent evidence of torture, the claim is regarded as both complex and the individual as not suitable for detention save very exceptionally.

117. There is scope for reasonable disagreement over how questions relating to a torture claim should be handled. These arguments were carefully considered in *MT v SSHD* [2008] EWHC 1788 (Admin), paragraphs 38-41 by Cranston J. The SSHD's policy is not to ask questions about torture at the screening interview since the applicant may not be ready to talk about it, or ready to trust his or her interviewer. The direct question may elicit a negative answer which, if the reasons for non-disclosure at that stage may be sound, could be used against the applicant. The then Medical Foundation took the view that the question should be asked "Have you ever been tortured?" since facilitating early disclosure was the lesser of the two evils. Voluntary disclosure of torture is rare at screening interviews. Cranston J took the view that it was not for the Court to choose between those two approaches; the question was whether the SSHD's approach was unlawful and he concluded that it was not. He also concluded that procedural fairness did not require the question to be asked on the off-chance that it would be revealed. That was in great measure to do with the fact that the making of a claim to have been tortured would not lead to exclusion from the

DFT, in the absence of independent evidence which was unlikely to be forthcoming at that stage. I regard that as a lawful approach.

118. Ms Harrison submitted that *MT* had in effect been superseded by *JB (Jamaica)*. I disagree; the latter did not deal with how far enquiries should be made about a possible basis of claim which had not been volunteered at all. I cannot see that it is unlawful not to ask asylum applicants generally about their sexuality or whether they had been raped or tortured. Mr Simm said that if torture were claimed at the screening interview, more specific questions would be asked. Mr Rhys Jones of the Helen Bamber Foundation said that screening officers sometimes refused to accept photographs or offers to show scarring or GPs' letters as independent evidence of torture. That may be so, but that is not a matter of a lawful policy but one for the training of those who implement it. Of course a GP's letter may be no more than a repetition of what the applicant can tell the screening officer.

119. Helen Bamber gave evidence that the question in the questionnaire inviting a brief explanation as to why the applicant cannot return to their home country was unlikely to elicit any response related to trauma. She said that "Can you tell me what happened?" was the most likely question to elicit the relevant material from a vulnerable person. Again I am not in a position to judge that. The SSHD's question is not unlawful, nor does the absence of Ms Bamber's question make the DFT unlawful. Whether the SSHD should ask her question instead is for the SSHD to judge.

120. The problem of a traumatised applicant repressing evidence was remarked on by the Court of Appeal, at paragraph 49 in *L* above, pointing out that no reasonable procedure could cater for the possibility that an applicant might not take advantage of the opportunity offered to put the material facts in his possession before the interviewing officer. Helen Bamber's evidence, and that of Mr Rhys Jones, was to the effect that such disclosures require the trust of the applicant, and it would be true for other traumatic cases, and are very unlikely to be made at the screening process. I accept that few come to the screening interview with independent evidence of torture: "not all" do so said Mr Simm; "very few" said the Claimant, attributing that to Mr Simm.

121. That has implications for the safeguards necessary for claims to be a torture victim made after entry to the DFT, and for how subsequent supporting evidence should be judged in relation to the continuing suitability of the applicant and claim for determination in the DFT. However, I am not persuaded that the screening process in relation to possible torture victims is unlawful.

122. Of course, the policy requirement that, if independent evidence emerges to support a torture claim the applicant should be removed from the DFT, is a necessary safeguard in view of the limitations of the screening interview. One specific supporting safeguard relied on in that respect by the SSHD, in the absence of a specifically obtained medical report, or other documents or corroborating evidence from an individual, both of which are unlikely readily to be at hand, is the operation of Rule 35 of the Detention Centre Rules, not specific to the DFT but applicable to it. This deals with the obligation on the

IRC medical practitioner to report to the IRC manager on the medical conditions of any detained person for which detention is harmful. Rule 35(3) provides: "The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture". Rule 35(3) does not require any expression of opinion by the doctor that the detainee is unfit for detention. The manager must send a copy of such a report to the SSHD without delay. The SSHD should respond within two working days. Often in this sort of case Rule 35 will operate in conjunction with Rule 34, whereby a medical practitioner must give a detainee, DFT or not, a physical and mental examination within 24 hours of admission to the detention centre; this can lead to a report that a person is unfit for detention, though it may not lead to release consistently with policy.

123. Davis J in *R(D and K) v SSHD* [2006] EWHC 980 (Admin) pointed out that a Rule 35 report, depending on its terms, could constitute independent evidence of torture, and that the required independent evidence of torture did not have to amount to proof, even to the lower standard in asylum cases. Burnett J in *EO and Others v SSHD* [2013] EWHC 1236 (Admin) made the same point, paragraph 56. At paragraph 50 in *D and K*, Davis J emphasised that Rule 34 was an important part of the safeguards provided to ensure that applicants continued to be in the DFT only if that was where they should be. The same is true in my judgment of Rule 35(3). Of course, a mere concern based on no more than a repetition of the applicant's claim cannot be independent evidence. The mere fact of a Rule 35(3) report expressing concern does not mean either that the detainee is not fit for detention, or that he should be released.

124. The Detention Service Orders and Asylum Instructions, DSO, relating to Rule 35 have been changed on a number of occasions; the relevant one for these purposes is DSO 17/2012. Paragraphs 20-25 explain what questions the report should address and how, so that it is of greater value than a mere repetition of what the detainee said, and can amount to independent evidence. I see nothing amiss in that.

125. The Instructions do not specifically require the Rule 35(3) report to be assessed for the continued suitability of the case for fair determination in the DFT; they are general to all detainees and focus on suitability for detention, though of course release from detention in consequence brings release from the DFT timetable. Mr Simm's evidence in his first witness statement, paragraphs 80-81, was that the Rule 35 report is considered by the case-owner with the other available information to see whether it amounts to independent evidence of torture, and for its impact on the application for protection.

126. There have been persistent criticisms of the Rule 35(3) process. Its operation was considered by Burnett J said in *EO and Others*. In paragraph 3 he commented that the general evidence was "disturbing" but the general issue of unlawfulness was not before him. He defined "torture" in paragraph 82, in a way which the SSHD then adopted, to include non-state agents as torturers.

127. I was referred to other criticisms in the evidence on behalf of the Claimant, much of which overlapped and repeated other evidence. The 2011 Report of the

HM Chief Inspector of Prisons and the 2012 Joint Report by him and Sir John Vine highlight the poor quality of the reports and the formulaic, resistant nature of the response, and their tardiness, leading to the conclusion that they were ineffective safeguards. These criticisms pre-date changes to the DSO intended to make the Rule 35(3) more useful if it were to be capable of providing independent evidence of torture.

128. Mr Simm comments on the work, based on 2011 data, in paragraph 29-31 of his first witness statement. The relevant sample for Rule 35(3) purposes was very small, and does not demonstrate that the procedure was ineffective, merely that the report did not lead to release. It precedes the changes as well to the DSO and Instructions.

129. Dr Cohen of Freedom from Torture pointed out that Rule 35(3) reports were still being rejected post *EO and Others* on the grounds that they did not identify any state actors as the torturers, whereas torture by a third party was by then within the scope of "torture" in the policy. Between April and September 2013, only 4 people were released from detention on all Rule 35 reports, and not all would have been Rule 35(3) reports, and so far as I can tell that figure covered all detainees and not just those from the DFT. This was far fewer than were released upon obtaining an appointment with either of the Helen Bamber or Freedom from Torture Foundations. A Home Office audit of the outcomes of Rule 35 reports showed that in only 9% of cases did it lead to release from detention, again covering all reports and all detainees.

130. To the EHRC, the inadequacies of the screening process were not remedied by the operation of safeguards, where Rules 34 and 35 were ineffective and insufficiently monitored. The Rule 34 medical examination, which ought to take place within the first 24 hours of detention, should be capable of identifying those with a history of torture, mental illness or other health related reasons for not being detained. There were insufficiently detailed guidelines on the operation of Rule 35. The changes after *EO and Others* had not demonstrably led to an increase in the number of detainees released from detention or from the DFT.

131. Ms Ghelani gave evidence of three cases in which the medical information obtained, with consent, during the induction process after entry into the DFT was used to undermine the credibility of the asylum applicant at the substantive interview: the applicants had denied being tortured when asked in the induction medical; this was used to undermine their later claims to have been tortured. She said that she and others were aware of medical information, obtained by the HO on the basis of the consent forms, being used against the applicant. The interviewers did not, at least in those three cases, ask the applicants why they had given those contradictory answers. The lawfulness of that particular use of the information is not before me, but if unlawful it is a point which can readily enough be raised in the specific instances where it occurs. It could however mean that some applicants may be less willing to disclose information at the Rule 34 stage, weakening it as a safeguard against unsuitable cases remaining in the DFT.

132. It is important to understand the nature of a Rule 35(3) report. It may or may not be regarded as amounting to "independent evidence of torture." That depends on the content and quality of the report. The making of such a report does not of itself mean that person is unfit for detention, nor that his case is not suitable for the DFT. Nor does non-release involve over-ruling doctors. The evidence of releases from the DFT on Rule 35(3) reports does not show that the DFT itself is operated unlawfully. I do not accept that the December 2012 Joint Report by Sir John Vine and HM Chief Inspector of Prisons shows that the DFT is unlawful because the policy assumes the effectiveness of a safeguard which appears too often ineffective in operation.

133. But, in my judgment, the evidence as a whole does show that Rule 35(3) reports are not the effective safeguard they are supposed to be. The contrast with releases on the obtaining of an appointment with the Foundations is a strong indicator that Rule 35(3) cannot be regarded as removing from the DFT at least some of whom one would expect to be removed. Anecdotal evidence backs that judgment. The ineffectiveness of this safeguard may be caused by the quality of the reports, the quality of the response as to whether they amount to independent evidence of torture, and in particular whether the continued suitability of the case for fair determination in the DFT is also fully considered. I recognise the limitations of this evidence, and the efforts made to monitor and improve the system, which may yet bear greater fruit. But I am persuaded that Rule 35 (3) reports do not work as intended, either by themselves or with Rule 34 to remove from the DFT those with independent evidence of torture, or whose case is no longer suitable for fair determination on the quick DFT timetable, as a result of evidence of torture.

134. The issue for the case-owner, upon receipt of a Rule 35(3) report, is not only whether the evidence is independent evidence, but also whether what is said shows that the claim remains suitable for fair determination in detention in the DFT timetable. There may not in reality be much of a difference, but the correct focus is required for the consideration of a DFT Rule 35 report. That may be what the rather vague statement, at the start of paragraph 81 in Mr Simm's first witness statement, is meant to convey. But all of this should be explicit, if Rule 35 is to perform the DFT safeguarding function which it is meant to do. If the Rule 35 report contains new material which would have led to further questions at the screening interview, even if short of being independent evidence at first blush, or if simply a new claim to have been tortured, the SSHD should consider pursuing the questions which would have been asked at the screening stage in order to confirm or change the conclusion as to the suitability of the claim for determination fairly in the DFT. New material should not mean that, in reality, the applicant has to demonstrate error in the original decision, or prove the unsuitability of the claim for the DFT. It is the SSHD, exercising the power of executive detention, who must be able to show that the claim, on all the available information, remains suitable for fair determination in the DFT.

135. I shall deal later with how the Rule 35(3) safeguard operates in relation to the instruction of legal advisers for the substantive interview, and the timetable for the substantive interview, because its seeming ineffectiveness puts greater

emphasis on the way in which other safeguards operate through the instruction of lawyers and flexibility in timetabling.

136. This issue is closely linked to the effective operation of the policy, or strictly concession, which amounts to a further and seemingly more effective safeguard, that a detainee is released from the DFT, or not put into it, if he or she has obtained an appointment with either the Helen Bamber Foundation or Freedom from Torture. That is undoubtedly a safeguard, though one which should be a back-up to the effective operation of Rule 35 rather than, as appears, the other way round, with the Foundations making up for the inadequacies of Rule 35 reports in relation to torture. Mr Rhys Jones of the Helen Bamber Foundation also pointed to the increase in the number of asylum seekers in the DFT: a near doubling to 2288 for the middle 6 months of 2013 from 2483 for the whole of 2012. The increase in referrals to the Helen Bamber Foundation had increased in line with that increase, putting immense strain on it.

137. But the further question raised by the Claimant is whether the shortened timetables of the DFT, and the stage at which lawyers are instructed, permit the effective operation of that further safeguard. I discuss that later.

138. However, I am not persuaded that the deficiencies in the operation of the safeguards makes detention in the DFT unlawful or its operation to carry inherently an unacceptably high risk of unfairness, whatever may be the effect in individual cases.

139. **Trafficked applicants.** These are predominantly women. Mr Rhys Jones points out that many trafficked women will first come into contact with immigration officers as a result of police or other enforcement action, because escape is not easy and regularisation of their immigration status is usually not possible while under the control of the trafficker. Mr Rhys Jones also said, pertinent in the trafficking context, that his experience was that the fact that someone had been in the UK for a long time did not mean that their claim was straightforward. Their asylum claim is likelier to be complex, often raising issues of safety on return - and for them detention, if they had been trafficked, is likely to be traumatic.

140. The Claimant, with the support of the EHRC, submits that such applicants are inherently unsuitable for inclusion in the DFT, because the complexity of the case allied to detention makes that inappropriate. That is not at issue. The question which, as with other potentially vulnerable groups, both were inclined at times to overlook, is whether the mere fact of a claim to have been trafficked of itself and regardless of any other evidence makes the claim and applicant unsuitable for the DFT. I do not think that a lawful policy has to exclude an applicant from the DFT because of the mere fact of claiming to be a trafficked person. The policy set out in the June 2013 "Detained Fast Track Processes" document, above, is a lawful one in relation to this sensitive issue.

141. As Mr Simm says, the history of such applicants can make the disclosure of the basis of claim difficult. "Competent Authorities" make the assessment as to whether there are "reasonable grounds" for believing that someone is a victim

of trafficking. "Reasonable grounds" in this context means "suspect but cannot prove". The Competent Authorities use trained specialist staff; one authority is based in the UK Human Trafficking Centre, part of the National Crime Agency, and another is based in UK Visas and Immigration. The target is for that decision to be made within 5 working days from referral. The "reasonable grounds" decision is always referred to the National Referral Mechanism, which enables various governmental and non-governmental bodies to share information and potential victims and help access to their advice. A "reasonable grounds" decision would lead to an applicant either not entering or being removed from the DFT. This is covered in his first and third witness statements. The referral can be made on the basis of what the victim says, or if staff in an immigration process suspect that a person is a trafficking victim.

142. Mr Rhys Jones says, paragraph 38 of his first witness statement, that screening officers do not in fact make a referral if the applicant has not herself claimed to be a victim of trafficking, even if they are concerned that she is one, from "trafficking indicators". The Point of Claim leaflet was expressed in language too technical and complex for most to understand it, even if well translated. The Chief Inspector of Prisons reported in 2013, in relation to Yarl's Wood, that even women found by enforcement operations in a brothel, had not been referred to the NRM.

143. I cannot resolve that conflict of evidence. But an obvious concern about referral without the applicant identifying herself as trafficked is the risk of reprisals to her or her family. Fear, and a very soundly based fear it may be too, may prevent a person identifying herself as trafficked, and the consequences of referral would need to be considered with that in mind. That may account for what happens, and the different views about it.

144. I accept, as the Claimant says, that it is very unlikely that a "reasonable grounds" decision will have been made before the screening process, that a referral will only be made by the DFT team if it considers that the applicant is a potential victim of trafficking and that the DFT time frame is unlikely to enable a "reasonable grounds" decision to be made before the substantive interview. I accept Ms Hewitt's point that this sort of case can take time in which trust is built up between asylum seeker and representatives, and then a case is prepared, and that the DFT timetable is too short for such a case. They make numbers of referrals because of trafficking concerns. The fact of referral does not bring removal from the DFT.

145. If only those who have had a "reasonable grounds" decision are excluded from the DFT, the screening process, or subsequent swift and effective safeguards are required to identify those persons so that a "reasonable grounds" decision referral can be considered for them. The pro forma questionnaire and the June 2013 policy do not resolve the issues because they are not designed to elicit relevant information for the purpose of establishing whether a referral is appropriate. I accept that Mr Jones makes what on the face of it are sound points about failings in what the questionnaire should ask to elicit trafficking indicators by reference to the Guidance to Home Office Competent Authorities, and that it is insufficient to rely on screening officers to remember to ask ad hoc questions.

And it ought to be clear to screening officers that they should refer a case on the basis of trafficking indicators, and other concerns which they may have, unless there is good reason not to do so, sanctioned with reasons by a senior officer.

146. These deficiencies notwithstanding, the policy of detention in the DFT is not unlawful, nor do I see the process on that account as of itself creating an unacceptable risk of an unfair determination. There are obvious limits to what can be done where the relevant basis for the claim is not put forward, even perhaps denied. However, this does yet again put the focus on the point at which the applicant receives legal advice from someone with whom she can build up trust.

147. **FGM**. Ms Hewitt gave evidence that those who feared FGM came from a patriarchal society in which women were disempowered. These claims were in her view "inherently complex", requiring a careful individual analysis and expert evidence about, for example, internal relocation. All such cases should be removed from the DFT.

148. Mr Paramesvaran, a partner at Wilsons LLP, contended that the question, often contested, of whether a woman was from a country or area where there was a real risk of such treatment, required resolution with expert evidence, for the provision of which the time allowed in the DFT was too short. Mr Simm said, in his third witness statement, there is sufficient reliable evidence about the practice and prevalence of FGM in most countries, and the options of internal relocation, for a general exclusion from the DFT to be unnecessary for the fair determination of the claim. I accept as lawful the SSHD approach that the fact that a claim is based on having undergone FGM or on facing the risk of it, does not mean that it is inherently too complex for fair determination in the DFT. Mr Simm's evidence does not reveal an unlawful approach to detention or an unacceptable risk of unfairness. Nor do I accept that if a genuine fear and real risk of it in part of the country of nationality is established, the applicant should be removed from the DFT because detention is unlawful or the claim unlikely to be capable of fair determination in the DFT.

149. Mr Paramesvaran also said that those who raised the issue of FGM were often required to undergo, in detention, a medical examination to show that they had not already been subjected to it, which he thought inappropriate for someone in detention. Appropriateness is not an issue of lawfulness of detention or fairness, nor is that part of the claim before me. It does not seem to me in principle unlawful. For those who have undergone FGM, the experience may be equivalent to torture by non-state agents; that rather depends on the circumstances. The asylum claim will be based on something other than or additional to that past event, of its nature not repeatable. I am not prepared to hold that the only lawful policy is to remove them from the DFT.

150. **Rape and domestic violence**. The contrast with the position in relation to women who claimed to be the victims of domestic violence in Pakistan in earlier versions of the DFT was highlighted by Claimant and EHRC. Rape may of course be a form of torture or persecution of a group, as well as the

consequence of forced marriage. I do not think that a lawful screening process requires a question to be asked specifically in relation to those possible bases for a claim. The mere fact of such a claim does not mean that it is necessarily unsuitable for fair determination within the DFT, and that a lawful policy must exclude them. If the claim is not made then but later, because of trauma and circumstance at the screening interview, the question of continued suitability of the claim for the DFT has to be considered. Likewise, Rules 34 and 35(3), and what I have said about their operation should apply to those cases where the claim or the independent evidence of sexual violence is of or is akin to torture.

151. I do not regard the policy as unlawful or as itself creating an unacceptable risk of unfairness in determination. As with other forms of torture, the problems of building up trust, the delays which arise in putting forward this basis of claim, and the problematic operation of the safeguards, put the spotlight on the stage at which the applicant receives legal advice.

152. **Women in the first and second trimesters of pregnancy.** It is policy normally not to detain women in the third trimester of pregnancy. The question of whether women in the first and second trimesters of pregnancy should be excluded from the DFT is a different issue. Ms Hewitt makes the perfectly sound point that this, and especially the first trimester, may well be a very stressful time, which could affect the ability of the asylum seeker to present her case effectively in the DFT timetable. Detention is not comparable to women continuing to work in those trimesters. UNHCR Guidelines oppose their detention.

153. Of course, the difficulties which those early stages of pregnancy can create should be considered when judging suitability for detention, and suitability for a quick and fair decision. Both aspects need to be considered. But I do not regard it unreasonable as a matter of policy for the SSHD to treat those as potentially suitable for detention and a quick and fair decision in the DFT. Individually, they may not be on either aspect, but that is a matter for judgment case by case. But that judgment would be assisted by a specific question as to whether there were any reasons why the applicant says that her claim is not suitable for quick decision and a quick decision in detention. The final trimester is reasonably seen as quite different at least from the detention aspect.

154. **Those with mental health problems.** Ms Hewitt appeared to contend that those with mental health problems should not, save most exceptionally, be detained at all, regardless of the scope for treatment in the IRC. That is a broader issue than the lawfulness of their detention in the DFT, which is the issue raised by this claim.

155. The screening process, however, needs to assess the ability of someone suffering from mental disability to present his case properly within the timetable of the DFT and within detention. The question is not simply whether the nature of the claim makes it suitable for quick decision; nor is it simply whether the mental disability makes the applicant unsuitable for detention: the question is whether detention in the Fast Track creates a real risk that his claim will not be decided fairly.

156. The same point applies to Rule 34. Whatever may be the other limitations on the Rule 34 and Rule 35 process, it does not encompass explicitly the question of whether a person who is suffering from a mental disability can understand and communicate sufficiently for the DFT timetable to enable his claim to be determined fairly. The question is not answered by the fact that someone is fit to be detained, though it is resolved in practice if someone is unfit to be detained, absent other circumstances which mean that release is not appropriate. It may be that the Rule 34 process cannot be used for the purpose of that particular assessment, but if so it means that there is no safeguard until the legal representative can make an application, the outcome of which should not be determined by the mere fact of fitness for detention.

157. At both the screening stage and later in the consideration of any Rule 34 report, the officials must explicitly consider whether any mental problems may prevent the applicant presenting his claim in the accelerated timetable of the DFT as fairly as would be the case for someone not suffering from such problems. That deficiency in the analysis does not mean that the policy of detention is unlawful, but if the issue is not addressed, there is in my judgment a higher risk of an unfair determination by the SSHD. It is a problem which is inherent in the process. The higher risk is readily reduced by explicit consideration of that particular point. I do not conclude that the level of risk is so great as to make the DFT unlawful, because the lawyers are in a position to make appropriate representations and to inform the interviewer at the substantive interview, and the FTT Judge on appeal, of the difficulties.

158. **Learning difficulties.** Ms Hewitt also contended that the DFT screening process did not seek to identify those with learning difficulties which could impede the fair handling of their cases in the DFT timetable. In my view, the screening process may suffer from this deficiency in practice since, as with mental disabilities, it does not explicitly consider, though it may happen in obvious cases, the effect of detention on the ability of the applicant fairly to present his case within the timetable and detained facilities of the DFT. I repeat my observations above.

159. **Timetables, flexibility and legal representation**. I take these together as they are closely related. Entrants to the DFT are given an induction process, which includes asking whether they will need publicly funded legal representation, and whether they have any medical conditions which could affect their detention or the progress of their case. It explains the progress of their case through the DFT process, including appeal. Six firms have contracts with the Legal Aid Agency, LAA, to supply legal representation to applicants in the DFT. They are the main source of legal advice and representation for those in the DFT. The Home Office allocates them to individuals on a rota. 65% of DFT applicants choose publicly funded representation, 30% are privately represented; a very small number choose to represent themselves. Some already have legal representation.

160. There is also a Detention Duty Advice scheme in operation in the IRCs. This provides up to 30 minutes with a legal caseworker or solicitor, for those without current representation. A second appointment is possible but not necessarily with the same adviser. Depending on location this service is available one, two, three or, now at Harmondsworth, four days a week, 9am-5pm. It is not a facility exclusive to the operation of the DFT. The increased availability of these "surgeries" led to the suspension of the Fast Track Information and Advice Office at Harmondsworth and Yarl's Wood.

161. Sir John Vine in his report on his thematic inspection of July to September 2011 found that 107 out of 114 files examined showed an average wait of 11 days to interview and 13 to decision, with no reason assigned for this. Ms Alger of the Claimant gave evidence of its sample in the first three months of 2011 that 43 percent were detained for more than 3 weeks before a decision. Sir John Vine said that entry to the DFT had been suspended temporarily in March 2011 as the waiting times had become "unmanageable".

162. Mr Simm accepted that the average period of detention before the substantive asylum interview is 7.5 days at Harmondsworth and 9.2 days at Yarl's Wood. The Defendant recognised that there was a "period of inactivity", criticised by the Claimant in view of the purpose of the DFT. Obviously some periods of detention before substantive interview are longer but Mr Simm can point to an average compliance with the target timetable of 7-10 days.

163. Delays may occur for a variety of reasons, he says, such as an applicant's unfitness to attend for interview, late change in legal representation before the interview, difficulties in obtaining interpreters for certain languages, referral to the Third Country Unit, and requests for interviewers of the same gender. There may also be instances where errors by the SSHD contribute to delay: absence of a particular interviewer on a particular day, a failure in relation to a movement order for an applicant. Delay can be caused by the number of interviews which can be booked for a single day, because only 14 slots can be booked daily under the LAA contract. I am not sure that the impact of that is readily quantifiable from the data he exhibited. The delays which he is talking of are not the delays within the target timetable but delays which cause a case to fall outside that 10 day target, as I understand his evidence and read the data.

164. Ms McKinney of Duncan Lewis, which is one of the largest providers of publicly funded advice and representation to immigrants and asylum seekers, with about half of the duty slots in the DFT, and representing around 1200 asylum seekers a year in the DFT, took issue, in her second witness statement, with what Mr Simm said were causes of delay. Those instructing private solicitors were given 48 hours to instruct them, which was far more than the time permitted to other legal representatives. There was no need for ill-health of the client to cause delay in the appointment of the legal representative. She could not understand why Mr Simm said that delays were experienced in booking interviews while representatives responded to the referral and booked an interview: the experience of Duncan Lewis was that the interviews were already booked, and the question was whether they could make that date. It was rare, given the 5pm end of day for the DFT team, for a referral to be made after

about 4.30, and if made after 5pm, the interview could not be until the day after next. There was rarely a change of language between screening and substantive interviews, with the effect that the interpreter noted as required at the former would not be right for the latter. Mr Paramesvaran, endorsed her points, and complained that the HO failed to cancel bookings of rooms it no longer needed, yet criticised legal representatives for doing the same.

165. On the LAA allocation scheme, the lawyer was allocated to the applicant, on Mr Simm's evidence in his second witness statement, on average 4.7 days after entry to the DFT at Harmondsworth and 1.7 working days after entry at Yarl's Wood. Mr Simm also thought that the Legal Aid Agency expected that there would be between 24 and 48 hours between the instruction of the legal representative and the asylum interview. He produced some figures for July and August 2013: 2 days between instruction and substantive interview at Harmondsworth and 3.7 days at Yarl's Wood. The underlying data shows that the large majority of cases were allocated 1-2 days before interview, whether working or non-working days. The first meeting would therefore usually be only on the day of interview. As the DFT timetable envisaged 3-4 days between the appointment of a legal representative and the decision on the application, that timetable was met as well.

166. The Claimant puts the emphasis differently although the basic timings are not at serious issue. Applicants may spend on average a week in detention without actual access to lawyers instructed to prepare their application. The allocations come at the timetabling of the SSHD. Once the case has been accepted by the publicly funded solicitors, they are notified of the time and date of the interview. Allocation and notification is usually no more than one or perhaps two days before interview. It is often less than 24 hours when the interview is scheduled for 10am on the day after the referral. It was not possible to keep fee–earners available so that they could go to a IRC upon referral of an applicant to them. They sometimes were able to go after meal time at 7pm but that was often not enough, and for many reasons was far from satisfactory. An hour or two for interview was, and was recognised by the SSHD, as inadequate where the applicant was from a country where there was a general risk of persecution. Multiple referrals can also be received.

167. Ms McKinney said that legal representatives received several days' notice of interviews at Yarl's Wood, so instructions could be taken well in advance of interview, and at least on the day before. Access to clients there was easier. But at Harmondsworth, Colnbrook and Eaton House, they usually only had 24 hours' notice. She experienced the problems of late referrals, including less than 24 hours notice of the referral before interview, for what the LAA described as operational reasons. Standard documents requested upon referral in advance of the interview were hardly ever provided before they first met their client.

168. Mr Simm said that UKBA tried to give at least 24 hours' notice of the substantive interview, but that might not always be possible if there were a late change of representation for example. Mr Simm suggested in his second witness statement that duty legal representatives often chose to attend to take instructions only on the day of the interview even if instructed several days

ahead, although they had the opportunity to take instructions earlier. There can be difficulties over which of two firms represent the applicant where a firm is already assigned and another is assigned from the rota on entry to the DFT. Those who already have representation or use private representatives, 30%, or choose not to be represented, experience no delay attributable to the SSHD.

169. Ms Mckinney did not think that legal representatives chose to attend only on the day of interview; rather it was the difficulty of booking interview rooms in advance which led to the problem, and when the HO booked rooms further in advance than the time of referral made it possible for the representatives to do, the latter should not have to ask to use a HO room. Even if they did receive 48 hours' notice, securing a booking was problematic because the HO block - booked the available rooms, although the representatives were told that the rooms would not be used by the HO before the start time of the interview.

170. Mr Simm did not agree: after acceptance of the referral and knowing of the date and time of interview, the solicitor can normally book up to two hour slots for consultation with the client between 9am and 9pm, but not always at a time of their choosing. The slot period, in the absence of special request, was one hour because the Home Office had found that bookings were not always used or were cancelled leading to problems at times of high demand. Mr Simm said that IRCs had been instructed to allow representatives to use legal visit rooms before the start of the interview. Complaints about the difficulty of the room booking process had led to changes whereby rooms could be booked by email. The IRC allowed the asylum interview rooms to be used for legal visits when not booked for interviews or where an interview has been cancelled.

171. Ms McKinney disputed this: the HO continued to book rooms with the result that they were not available for representatives when they rang to make bookings. Mr Paramesvaran agreed with her description of the difficulties in booking rooms. There had been changes in response to complaints but Mr Blakely, a partner at Wilsons LLP, said that the availability of a room was not guaranteed but depended on the number of representatives making requests at any particular time. Ms McKinney acknowledged improvements but said that it was still difficult to get a slot exceeding an hour, which was often inadequate. There are "stakeholder" meetings where this sort of difficulty can be raised.

172. Mr Simm said that the "case-owner" who did the interviewing was trained in the process. They were usually allocated interviews the day before the interview. The Home Office "case-owner" could be contacted by the applicant by telephone or in a visit. The interviews were held in specific interview rooms, with more rooms provided as the DFT expanded in recent years. The interview slots are booked for 10am or 2pm each day. Their start may be delayed if the legal representative needs more time to take instructions or is late. "Significant levels of flexibility" were exercised by the interviewing officer to delay the start of the interview, especially where the need for instructions at that stage was not the fault of the representative. This included rescheduling where there was a last minute change in representation.

173. Mr Blakely gave evidence of his practice. He tried to take basic instructions over the telephone, often via an interpreter, usually to see if the case required consideration of a referral to one of the two Foundations for an appointment, which, if obtained, leads to removal from the DFT. He described a "race against time" to obtain, at considerable effort, a referral to one of the two Foundations. An application for a referral did not suffice. Ms McKinney said that they had less than 24 hours, following disclosure by the client in interview, to the decision in which to obtain the referral. The attempt could not be made before the interview finished and it would often be after office hours. Such a referral post decision does not lead to removal from the DFT either as a matter of policy nor, later, as a matter of FTT practice. Ms McKinney said that in 8 years her firm had represented only one person who had been removed from the DFT on torture grounds who had not had a referral to one of the Foundations, and that had required the commencement of judicial review proceedings. Only two had had the time of decision postponed by 24 hours so that the referral might be made. The process works better at Yarl's Wood than at Harmondsworth because they have longer notice of interviews. The absence of flexibility in reality applied to issues other than torture as well.

174. The timetabling of interviews now often meant that they only had 30 minutes for meeting the client the first time to take instructions before interview. Much time could be taken up between 9am when the IRC opens and the conclusion of security checks, and the arrival of the detainee in the interview room; this often meant that the tine for interview ran out as the interview was due to begin at 10am. So a postponement for an hour or so was vital. Ms McKinney said that mobile phones were rarely available, and camera phones were not permitted. They often had only an hour, at best two, in which to take instructions before the interview, and an hour or two preparing the first appeal; the response to their common request for a postponement of the interview by an hour or an hour and a half was mixed: they were usually allowed an hour, but even that was commonly not enough, and the interviewer would come along every 20 minutes to see if they were ready. Mr Paramesvaran agreed with her.

175. Ms McKinney gave an example of the sort of problems which arise: the NAIU may rely on "intelligence" in its screening decision. When that is made known during the asylum interview, she asks for the material in order to take instructions, but it is a hurried, pressurised consideration. Material is often not disclosed until that stage. She gave a specific instance of where the volume and nature of the material handed in by the asylum seeker to the screening officer, but not revealed by the SSHD to her, should have shown that the claim was wholly unsuited to the DFT. The interviewer showed no flexibility over the timing of interview or of representation, although temporary admission was eventually granted.

176. At the end of the interview, the legal representative is asked if they have any further comments to make; it is common for them to request further time in which to make further representations, or raise concerns about the suitability of the case for the DFT. Where a request for flexibility is refused, the case-owner is required to explain why to the applicant or his representative; if granted, the reason has to be recorded, and requires senior authorisation if it affects the

overall case timetable. The Tribunal can consider the explanation for the refusal as part of its consideration of any Rule 30 application. The obligation to consider a flexible timetable was added after the *RLC* decision. The policy on flexibility had to be considered whenever further time was asked for, since the "DFT and DNSA processes are built on an overriding principle of fairness"; Mr Simm's first witness statement, paragraph 67.

177. Mr Simm said that this policy was applied, a claim which was disputed on the basis of the number of occasions on which applications for a more flexible timetable were refused. Mr Blakely said that requests were generally refused, since case-owners applied it in such a way that it did not delay the DFT timetable. Part if not all of the explanation for that difference lies in Mr Simm's view, expressed in paragraph 67, that most requests for more time: "are unsupported by a valid explanation or a reasoned argument. For example it is routinely suggested by a legal representative that a case should be removed from the Fast Track process because it is too complex or that an expert report is needed. Similarly vague assertions are made about the need to obtain documents to support the claim (even though many applicants will have been in this country for considerable periods of time), however no attempt is made to identify what documents are needed and no explanation is given about the provenance of the documents or why they have not already been obtained if they can be obtained as easily as applicants often suggest."

178. The Claimant complained of the considerable latitude the process gave in this respect to the SSHD. It needs to be borne in mind that this is the stage at which the difficulty of dealing with issues about the availability of documents, experts and other evidence can more readily be judged than at the screening interview stage, because by now the whole basis of claim would have been explored in some detail, and with the benefit of legal advice as to what would be required.

179. Although in the DNSA, two full days are allowed for further representations after the interview, and the decision follows five days after interview, in the rest of the DFT, Mr Simm said that such "flexibility has not been necessary" in most cases. There, they are allowed till midday on the day after the interview in which to submit further representations. The decision is served the next working day, and faxed to the legal representative. The legal representative is not usually present when the decision is served on the applicant, with the assistance of a telephone interpreter. If a refusal, the accompanying paperwork includes a further IS91R explaining the reasons for continued detention, which will be or include the reason that the case is still suitable for the DFT.

180. Post interview instructions were also difficult to obtain in view of the mere half day given for further representations, according to Mr Blakely. Time was short, rooms were not always available. The alternative use of the telephone was again unsatisfactory, especially via an interpreter. Ms McKinney said that after a four hour interview, which was not uncommon, it was often not practicable to book an interview room. Common problems arose with interviews overrunning to the next day, with a client being or becoming unfit, or in obtaining the right interpreter. It was not desirable for the representatives to have to ask the SSHD for the use of her rooms, although it happened. They

often had to submit post interview representations without further instructions. They sent letters threatening judicial review in order to obtain the facilities or time required, which they regarded as a waste of limited time. Mr Paramesvaran echoed her points: short notice of interview, short time to take instructions, limited means to assemble evidence, constant pressure and rush against the clock, and only a very short time, often unsatisfactorily over the telephone, to consider and deal with issues after interview.

181. A refusal rate by the SSHD of 99% compared to 74% in the non-detained track was seen by her not, as the Claimant contended, as showing the severe procedural difficulties under which DFT entrants laboured but as showing that cases suitable for fast determination were being selected, with a higher proportion lacking merit than outside the DFT. The SSHD regarded the fact that 93% of decisions were upheld on appeal as evidencing the quality or at least correctness of her own decisions, and the reality of fair decision-making in the DFT. On this score, she was comforted by Sir John Vine's judgment that it showed that the quality of decision-making was "on the right lines". The UNHCR had been very critical in a report in 2008 of the quality of decision-making which, submitted Ms Lieven, went to the importance of the corrective qualities of the appeal process. Ms McGahey submitted that no decision on the lawfulness of the policy could be reached on the basis of that evidence. Errors in individual cases could be challenged by judicial review.

182. The Fast Track appeals process gives the appellant two days after service in which to lodge notice of appeal. Ms McKinney noted that the refusal letters were often served at 6pm, leaving in reality only one of the two working days in which to seek instructions. That meant that appeals were often lodged on a protective basis. Mr Paramesvaran gave evidence that the period of two days rarely permitted taking instructions face to face, because of the difficulties in booking rooms. Appeals were always lodged on a rushed basis. Time to take a statement was very much less than in a non-detained setting; reading the statement back to the client to get his approval had to be done over the telephone usually. It was impossible in Harmondsworth to obtain a full day slot in which to see the client, something which was not uncommon in the non DFT cases. Witnesses could not be proofed, and experts could not be instructed, and their availability at short notice was a problem. Counsel could not see the client often until the day of the hearing.

183. Extensions of time are permitted under the Rules, said Mr Simm, and he said that it was rare for an appeal out of time to be rejected by the FTT. But that is not the whole picture: Rule 8(2) requires an extension to be refused unless the FTT is satisfied that "because of circumstances outside the control of" the appellant or his representative, "it was not practicable for the notice of appeal to be lodged in time." There was only a further two working days for service of the SSHD's core bundle and two more to the appeal hearing itself. An adjournment of a maximum of 10 days might be granted, under Rule 28. This contrasted with the non-Fast Track process; the appellant in non DFT detention had 5 days in which to lodge notice of appeal; the whole process took at least 35 days, and often more before the appeal; adjournments of up to 28 days in the first instance could be granted.

184. In the non-Fast Track process, the Case Management Review Hearing, CMRH, would determine the timetable for service of the SSHD's documents, but the disadvantage of having no CMRH in the DFT appeal process was that there was no opportunity before the date of the hearing to explain orally what time was needed and why to obtain further evidence. Mr Simm did not agree that the CMRH which is a feature of the non-Fast Track appeal system was required. The Rules do not require a CMRH, and in my view cannot be regarded as ultra vires or unfair on that account, nor am I persuaded that that difference between the DFT and non-DFT makes the DFT process creates an unacceptable risk of unfairness.

185. The Tribunal judiciary in the FTT can remove an appellant from the DFT, pursuant to Rule 30 of the Fast Track Procedure Rules 2005. This provides for removal from the DFT where all parties consent, if the respondent has failed to comply with a rule or direction to the prejudice of the appellant, or, Rule 30 (1)(b): "If it is satisfied by evidence filed or given by or on behalf of a party that there are exceptional circumstances which mean that the appeal or application cannot otherwise be justly determined". The words "in exceptional circumstances" must be disregarded since they imply that cases may be unjustly determined in the absence of exceptional circumstances.

186. Rule 30 applications or applications for an adjournment made before the hearing were not responded to or granted, according to Mr Blakely. Wilsons generally instructed Counsel to renew the pre-appeal applications for removal from the DFT. This was dealt with in the day of the hearing, likewise if there had not been time to consider the applications in advance. By this time there was great reluctance on the part of FTT judges to make a direction which led to the adjournment of the appeal or its removal from the DFT, when all parties were present; there was "a procedural momentum at work", even where evidence was served on the day by the SSHD time to consider it would be given on the day and the case would stay in the DFT. The appellant's need to obtain further information or evidence was rarely accepted as a reason for removal from the DFT by the FTT. Mr Blakely thought that adjournments under Rule 28 were more likely than a transfer out of the Fast Track. If funding for the appeal was refused, the appeal would not be adjourned while the LAA appeal process was pursued.

187. Six percent of appeals were removed from the DFT by the FTT under Rule 30 of the Fast Track Procedure Rules, although Mr Simm said that it was "not uncommon" for such applications to be made. Mr Simm thought that removals took place largely because of the submission of new evidence on or immediately before the day of the appeal hearing, or because time was needed to instruct an expert or for a witness to attend.

188. Mr Blakely's experience was that the SSHD rarely herself took cases out of the DFT appeal relying on the content of her adverse determination, even in the face of a reasoned justification, for time to obtain further evidence, including expert evidence. Although there are detention reviews, and bail or temporary admission can be sought from the Chief Immigration Officer or Higher

Executive Officer or from the First Tier Tribunal, they do not reach a judgment based on an assessment of the suitability of the case for determination in the DFT.

189. Mr Blakely pointed to the continued effect of the speed of the Fast Track appeals on the time to take instructions, or to obtain medical or country expert evidence. Adverse credibility findings could require corroborative evidence but the time table made that very hard. The latter was almost impossible to obtain within the Fast Track timetable. It was unrealistic to regard judicial review as a practicable remedy because of time and the limit on public funding. Sir John Vine thought that the appeal process worked, for those cases in the DFT at that stage, since 93 percent of appeals were dismissed. As these are judicial decisions, in my view it cannot be said that the policy itself is unlawful on account of what may be and sometimes are erroneous decisions that appeals should be maintained in the DFT.

190. Not all appellants were represented at their appeals: the Claimant said that many were unrepresented at Harmondsworth, and around a third at Yarl's Wood, on the evidence of Mr Blakely, a partner at Wilsons LLP. Ms Alger, a Manager of the Claimant, said that between October and December 2012 64% were represented at appeals at Yarl's Wood; 2% of appeals were successful; 48% were represented at appeals at Harmondsworth; 9% of appeals were successful. An FoI request covering the period January to March 2013 showed 69% represented at Yarl's Wood and 58% represented at Harmondsworth. Mr Simm, based on August to October 2013, said that 76.9% were represented at the First Tier Tribunal. Some of those who were unrepresented would have been advised that their claim could not properly be pursued by the legal representative.

191. The FTT decision followed two working days after the hearing, contrasting with 10 days in the non-Fast Track. Two days were allowed for the application for permission to appeal from service of the determination, contrasting with five in the non-Fast Track, with the same disparity for the renewal of an application for permission to appeal.

192. If permission to appeal were granted there was only a day's notice of the Upper Tribunal hearing, compared to 14 days' in the non Fast Track, but all the witnesses had to attend and all the evidence necessary had to be brought. The upshot of the speed with which the appeals process was undertaken, and the limited opportunities for obtaining the necessary evidence, or to remove someone from the Fast Track, meant, as Mr Blakely put it, that the appeal work was carried out in parallel with the preparation of a fresh claim.

193. Ms Harvey of the Immigration Law Practitioners Association, ILPA, supported the solicitor's points. The Law Society's Director of Legal Policy, drawing on the evidence in the case, and his own conversations with immigration lawyers supported the concern that the DFT system meant that clients did not always have the access to justice which their case required. Legal advice was not available on site in the same way as it had been at Oakington; Ms Farrell of the Refugee Legal Centre explained her experience of this at

Oakington. I accept that legal advice was available more rapidly there than now in the DFT, a rapport with clients was developed earlier and more easily, and interviewing them was simpler.

194. I accept Ms McGahey's point that individual case histories where something has gone wrong do not show that the system is so unfair as to be unlawful or that there is an unacceptable risk that cases will be processed unfairly. They show individual error, where some error is bound to arise at times. But the difference between the practical experience of the Claimant's witnesses and the picture of generally sound performance presented by the SSHD is real. And Ms Lieven is right that the more general picture such as UKBA statistics may paint depends on what is collected, how it is collated and then publicised, and that is up to the SSHD. However, it is not possible to read the case studies produced by Ms Ghelani of the Claimant's solicitors, and the statement from Mr Blakely of Wilsons LLP, a very experienced firm of immigration solicitors, without real unease about the cases which may go through the DFT system when they should not have done so.

195. I have accepted that the basic criterion for entry to the DFT, namely the suitability of the case for a quick and fair decision has not been changed, but the focus on the basic criterion and the lesser focus on specific types of claim, has meant a greater prospect that some enter the DFT who should be not have entered it or should be removed as more of their claim becomes known. As I have gone through the various stages of the DFT process, I have commented on what appear to me to be remediable deficiencies which together fall short of showing that the detention is unlawful or that the process contains so high a risk of an unfair decision that it is inherently unlawful. At each stage, however, it has been the prospective use of lawyers, independent, giving advice, taking instructions having gained the client's confidence, which has seemed to me to be the crucial safeguard, the crucial ingredient for a fair hearing, whilst maintaining the speed of the process, but which can protect against failings elsewhere, and avoid an unacceptably high risk of an unfair process. I also appreciate that in the *RLC* case, the Court of Appeal accepted that three days between entry and substantive interview was not inherently unfair.

196. The operation of the DFT over the greater range of cases which now enter it, with its deficiencies and tight timetables for the operation of safeguards as I have described, puts a premium for the fairness of the quick process on the availability of legal advice and representation early rather than late. I have seen no justification for the "period of inactivity", between induction and the allocation of lawyers. It is difficult to see why legal representation should not be organised the day after induction for those requiring it. The system of quick but fair determinations does not permit the SSHD to run it quickly only when it suits, and slowly when it does not. I am satisfied that the period in detention before they are allocated and the proximity of allocation to the substantive interview means that in too high a proportion of cases, and in particular for those which might be sensitive, the conscientious lawyer does not have time to do properly what may need doing.

197. It is not the problem of booking rooms, although that adds to the problem, or the attitude towards flexibility, which could warrant re-examination by the SSHD. It is the timing of the allocation of the lawyer after induction and before the substantive interview. I am satisfied that all the evidence taken together shows that the need for time for proper advice with time to act on it, beyond what the DFT allows, and the need for time for the effective safeguards properly to operate, is not fully appreciated at all stages and levels, partly through a desire to keep a case on track once it is in the DFT. The upshot is that the DFT as operated carries an unacceptably high risk of unfairness, but one which I judge can be removed by the earlier instruction of lawyers.

198. It will be for the SSHD to organise the system so that the period of inactivity is better utilised in the allocation of lawyers. If that requires changes to the LAA system, that is for the Government to organise. If that requires further rooms, the same applies. This would then assist in the identification and removal of torture, trafficking and other potentially vulnerable cases, which the screening process is not well equipped to do for the range of cases not now excluded by other criteria, and for which other safeguards do not work, as in the case of Rule 35, or work as they should, in the case of referrals to other bodies. It is those who may be vulnerable applicants, rather than other applicants, to whom this applies because of their potential greater difficulties in presenting their claim fully without greater care and consideration from lawyers, and for whom safeguards are of greater importance. It appears less likely to apply to women in view of the greater time available to lawyers at Yarl's Wood. But I judge that there is an unacceptably high risk of unfairness in a sufficient number of cases that remedial action is required beyond what is available in the individual case through the decision of the FTT. I do not think that this requires the exclusion in principle from the DFT of particular categories of claims or applicants currently not excluded in principle.

199. Although the decisions of the FTT judiciary on whether or not to keep a case in the DFT cannot be used to show that the policy is unlawful, the fact that so many are kept in does not show that there is no prior unfairness since what is available at the substantive hearing affects that decision and what is then available for an appeal.

200. The unacceptably high risk of unfairness may be resolved in a number of ways; it would not have to be by changing the instruction of lawyers, although that seems the obvious point to start given the seemingly indefensible period of inactivity. However, if the screening process were improved or if Rule 35 became an effective safeguard or if greater time were more readily allowed, the change to the way in which lawyers are instructed might not be necessary. It is the failings elsewhere which lead to the allocation of lawyers as the point at which something has to change.

Conditions in detention

201. Ms Farrell of the RLC concluded, from the evidence produced by the Claimant and to which I have referred, that the Oakington Fast Track worked in many ways differently from the current operation of the DFT. Part of the

circumstances which mark a change from the Oakington Fast Track, and a change from part of the reasoning of the House of Lords and ECtHR for accepting detention on the Fast Track as lawful are the conditions in which detainees are now held, according to the Claimant. The changes now experienced in the current regime, to which the Claimant points, are the end to the more relaxed and spacious environment at Oakington, and its replacement by what the Claimant describes as a "highly restrictive regime which more closely resembles a prison", "fairly comparable to a Category B prison," in which foreign prisoners awaiting deportation are held along side DFT detainees. This was to be seen with the changes to the accessibility of legal advice and representation which disadvantaged those in the DFT markedly in comparison with what permitted the Oakington process to be found lawful.

202. Mr Blakely said that the conditions could not be described as "relaxed with minimal physical security"; there were limited hours in which detainees could move around, with "inappropriate use of handcuffing" when detainees went to outside appointments, according to the Chief Inspector of Prisons. Ms Alger of the Claimant said that DFT conditions now bore "little resemblance " to those of Oakington: she too drew on a report of the Chief Inspector who said that Colnbrook housed ex-offenders, vulnerable and disruptive individuals, highly frustrated long-term detainees, in austere higher security conditions designed for short stays. The new units were like a prison in design and unsuitable for the detention of those held under immigration powers.

203. The Harmondsworth Independent Monitoring Board, in a report of March 2013, described the accommodation as built to Category B prison standard, cells with heavy doors and an observation window, bunked beds, washbasin, toilet without seat, partial screening, three-quarter doors on showers, and detainees locked in between 10pm and 7am. Older sections were said to be in a dirty, even appalling condition. There was overcrowding with three people in two man cells. There were problems with bed sheets. Access to recreational facilities was limited to between 1 and 3 hours a day. Security was disproportionately high, with unduly restricted movement off the unit especially on B wing. The galleries and cells were like a secure prison. The induction unit there had inadequate outside space. The use of dogs to search for drugs aroused anxiety among detainees.

204. At Yarl's Wood the Chief Inspector thought that the restriction on the ability of detainees to move around the unit to 9 hours a day was too tight. Male officers were present during some rub down searches of women, and some entered detainees' rooms immediately after knocking.

205. Mr Simm's evidence was different. Oakington had not been as secure as other IRCs and a number of detainees had absconded from it. A more flexible form of accommodation had been required to cater for detention priorities including the DFT. This led to a higher level of security generally than at Oakington. There were some similarities in the new part of Harmondsworth, where DFT detainees were held, to a Category B prison but with fewer security features, and operated more along the lines of a Category C prison: free flow movement in parts, a relaxed security regime, detainees permitted to have a mobile phone so long as

it did not have a camera, whether their own or one supplied by the DRC, and to have fax and internet access.

206. The facilities for the detainees were as suitable as those at Oakington. Facilities at Harmondsworth, Yarl's Wood and Colnbrook included cafeteria, sports hall, fitness centre, cinema, IT room, library and shop. Harmondsworth has a games room, internet room, facilities for various faiths, five a side football, barber's shop, and educational classes. There is a timetable for the work and education programmes. Yarl's Wood has a similar mix but adjusted to cater for the women detainees, including kitchen and dining area where detainees can cook, and en-suite bathrooms for all rooms. Detainees could move around the IRC for more than the nine hours available for supervised activity, such as gym, arts and crafts, and music. They could "roam around" between 7.30 am and 10pm, including in the outside courtyards and, after 10pm, freely within their wings provided they did not disturb the sleeping. They had keys to their rooms, and only had to be back in them for roll call. At Harmondsworth and Colnbrook, visiting hours were from 2pm to 8.30pm, and a little different at Yarl's Wood. Each had 24 hour health care facilities.

207. The toilets and showers in the older units in Harmondsworth had recently been refurbished; they were cleaned daily. Clothing was issued to the destitute, and bedding was changed weekly.

208. Foreign offenders might enter the DFT after completion of their sentences, but whether in the DFT or not, those at Harmondsworth underwent a risk assessment which affected the wings to which they were sent. The DRC operators held monthly meetings with detainee representatives to discuss their needs and any grievances. A few detainees had to be held in prison, but the DFT detainees with which this case is concerned would not come into that category. Handcuffs at Yarl's Wood were applied when a risk assessment showed a high risk of escape or harm.

209. I am not persuaded that the change in conditions contributes much to the argument about lawfulness of detention or its effect on the fairness of decision-making in the DFT. I see nothing unlawful in detention for those purposes in the conditions described or affecting the fairness of the process.

210. **The position of women generally**. This was the particular concern of the EHRC: women who were vulnerable as victims of gender specific forms of persecution and violence, victims of trafficking who were largely women, pregnant women, the mentally ill and physically disabled, and victims of torture. It thought that the DFT disadvantaged women disproportionately. Ms Harrison submitted that the general DFT policy was incompatible with Article 14, both when read with Article 5 and when read with the investigatory obligations in Article 3. Their particular needs and the differential impact on them had not been taken into specific account in the formulation and operation of policy. Apparent neutrality of language failed to treat those who were substantially disadvantaged differently from those who were not. The very different were treated alike. If kept in the DFT, adjustments should be made.

211. The EHRC referred to UNHCR Guidelines to the effect that asylum seekers should have the choice of having interviewers and interpreters of their own gender, automatically so for women. The guidelines pointed to the inhibitions which women may feel in answering an interviewer who is not neutral, compassionate and culturally sensitive; they should be told that information would be treated with the strictest confidence. Male-oriented questions about political activity could fail to elicit a response, and questions about torture or other forms of violence might fail to elicit answers. DFT procedures were not sensitive enough to these problems for a fair hearing in the DFT. Women might face specific disadvantages answering questions if they came from a male-oriented society, or in communicating with strangers, or dealing with types of harm which they might regard as involving shame. In combination this meant that their claims were less likely to be identified as requiring non-DFT consideration and as unsuitable for detention anyway. There had been, when women were first included in the DFT, a routine exclusion of certain claims related to women: all Pakistani women, FGM claims from Ghana, Nigeria and Kenya, and one-child policy related claims from China.

212. The particular consequence which concerned the EHRC was that vulnerable groups in detention in the DFT were disproportionately disadvantaged in the preparation of their cases and of their appeals, by comparison with others in the DFT. This differential impact had been ignored. These problems arose from the following: the need to understand the asylum and DFT process, to disclose sensitive and distressing events to a stranger or strangers, including interviewer and interpreter and representative, without time to build up rapport or trust, to give a full and coherent account to their lawyers, to identify supporting material in the time available, for their lawyers to acquire an informed understanding of the case, and to assess the need for expert evidence, with all this arising again in the appeal process.

213. I have considered groups of vulnerable applicants, some of which are exclusively women and others which are predominantly women; yet others are mixed in unknown proportions. I accept the difficulties which may inhibit making or presenting claims based on torture, trafficking, sexual violence and FGM, and the need for confidence, trust, and time for some claims to be advanced. But the predicate for the argument about entry into the DFT is that the claim has been made and is true. That predicate simply is not warranted. The making of the claim of that nature is admitted to be potentially difficult. The claim cannot be assumed to be true just because it is made. And such claims do not mean that the decision on international protection is itself necessarily complex.

214. A policy that includes women applicants in the DFT is lawful. They may not have made claims on one of those bases, and there may be no cause for concern that they may have been trafficked or the victim of sexual violence. The possibility that at a later stage they may make a claim on one of those specific bases could not warrant exclusion from the DFT if otherwise suitable for it. Where a claim is based on torture or trafficking or sexual violence, although women predominate in the latter categories, what is required for both men and women who make such a claim is essentially the same. The problems of fear,

shame, cultural background, trauma and reluctance to talk have not been shown to differ as between men and women; there is no evidence that a man who claims to have been raped or tortured or trafficked is by reason of his gender less requiring of time and sensitivity than a woman. Indeed I did not understand that to be Ms Harrison's point. The difference lies in the proportions of women to men in certain categories. But those categories are treated differently, which is where the differences should lie.

215. I also note that the troublesome period of inactivity between induction into the DFT and allocation of legal representative is markedly greater on average at Yarl's Wood where women are detained, and the period therefore between allocation and interview is correspondingly greater. This important safeguard of fairness, as I see it, is therefore more strongly present where the greater proportion of potentially vulnerable applicants are detained.

216. I reject the submission that the process is incompatible with Article 5 and Article 14, and with the investigatory obligations in Article 3.

217. I would accept that if male interviewers and interpreters predominate, so that a woman who has such a claim to make is more likely to have to deal with men but rather would wish to be interviewed by and interpreted for by women, there would be a risk of disadvantage to such female applicants, and one inhibiting the presentation of their claim, and a disadvantage which male applicants would not experience to the same extent. If the female applicant seeks a female interviewer and interpreter at the screening stage, before she has received legal advice, that request should be met if at all possible. This may very well happen already. I do not know to what extent this is a problem at all at the screening stage. Mr Simm's evidence on the reasons for delay in substantive interview suggests that, at that stage, the SSHD does try to accommodate such requests from either gender. I support the point as a means of increasing the chances of a fair assessment of the suitability of a claim for the DFT. I do not see the absence of this as of itself breaching Article 3 or 5, nor either with Article 14.

218. The EHRC went further, with UNHCR, saying that female applicants should be offered the choice of female interpreters and interviewers, rather than making the request themselves. There is sense in that; the existence of the option could be in the Points of Claim booklet. But I do not see it as necessary for a lawful DFT policy.

Overall conclusions

219. I draw the threads together. The DFT policy is not unlawful in its terms. It does not contradict the provisions of statute or Directive, nor is it in breach of the ECHR. The inclusion of the appeal process in the DFT is lawful. The overall test in relation to a quick but fair decision is lawful. I do not accept the arguments that particular claims should of themselves be excluded. The period of detention overall is not unlawful in general. I do not consider that there is discrimination against women applicants in the process.

220. The screening process for and safeguards once in DFT require officials to consider explicitly at all stages not just the suitability of the claim for quick determination or of the applicant for detention but also the effect on the fair presentation of the claim which the timetable and the fact of detention may have for that applicant. I have made a number of comments to that end throughout. The process is not as focussed on that as it should be throughout. But the various shortcomings which I have identified do not show the process to carry an unacceptable risk of unfairness, save in one respect.

221. I am satisfied that the shortcomings at various stages require the early instruction of lawyers to advise and prepare the claim, and to seek referrals for those who may need them, with sufficient time before the substantive interview. This is the crucial failing in the process as operated. I have concluded that it is sufficiently significant that the DFT as operated carries with it too high a risk of unfair determinations for those who may be vulnerable applicants.

222. I will hear Counsel on the terms of any Order.