



## **Briefing note on NSA and Gender for the Office of the Chief Inspector of UKBA**

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## **Briefing to the Chief Inspector's Office on the treatment of gender issues in the Non-Suspensive Appeals system**

Asylum Aid welcomes the opportunity to comment on gender with regard to the forthcoming "mini-inspection" of the NSA system and detained non-suspensive appeals system (DNSA). In order to facilitate matters, the headings employed are taken from the Chief Inspector's description of the remit of his office.

Reference has been made to the UNHCR 5<sup>th</sup> Quality Initiative Report<sup>1</sup>, which comments in detail on the Detained Fast Track (DFT). This is because DNSA cases have been transferred from Oakington to Yarl's Wood and other IRC's since the end of 2008. As such, women whose applications are processed through the DNSA system now have their applications scrutinised by decision makers operating both DFT and DNSA systems in parallel. Asylum Aid recommends the 5<sup>th</sup> Report as a useful benchmark when assessing UKBA performance with regard to NSA files.

It is of concern to Asylum Aid that DFT case owners who were subject to such wide-ranging criticisms by UNHCR are deemed able to assess DNSA cases.

### **Overall performance**

It is to be hoped that decision makers are able to approach women's applications for international protection informed by an over-arching understanding of gender issues and of the specific issues pertinent to women seeking international protection, with a clear understanding – as a minimum of the Asylum Policy Instruction on Gender. There should be evidence of this as best practice in the manner in which case files are annotated and in which cases are managed.

There is a concern that where "women" as a class are not excluded from NSA categorisation, but, on being routed into DNSA are found to have meritorious cases, they are being transferred to the detained fast track (DFT) and not considered for removal from the accelerated process<sup>2</sup>. Where a woman has alleged gender persecution, her case can only rarely be regarded as sufficiently straightforward to be suitable for DFT. Where a case raises issues of gender-specific persecution and especially where that persecution emanates from non-State actors, there is no reason to suppose that it is suitable for the accelerated process.

Asylum Aid believes that most women experiencing gender specific persecution such as bride burning, dowry deaths, forced or early marriage (India); violent sexual assault to "correct" their homosexuality (South Africa) will always present with complex cases. This is because their persecution will almost always be from non-State actors and thus the issues of sufficiency of State protection and internal flight alternative will arise. Expert evidence will be required – both academic and medical, none of which can easily be obtained within the time limits imposed by the accelerated procedure.

As such, where women have been transferred from DNSA, it is to be hoped that the substantive reasons for so acting are noted in detail on the file by the decision maker. This omission is remarked upon in the UNHCR report with regard to DFT

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<sup>1</sup> *UNHCR Quality Initiative Report, Fifth Report to the Minister*, UNHCR Representation to the UK in London, March 2008.

<sup>2</sup> Discussion with solicitor working at Yarl's Wood, April 2009 and discussion with case worker who worked at Yarl's Wood, April 2009.

cases<sup>3</sup>, and it is to be hoped that similar malpractice has not occurred with regard to DNSA.

### **Practice and procedure in decision making**

With regard to the detention of women with NSA certified cases (DNSA), Asylum Aid is concerned that since the transfer of responsibility for DNSA from Oakington to Yarl's Wood, women's cases will be undertaken by decision makers who were the subject of detailed criticism from UNHCR in their 5<sup>th</sup> QI Report. Errors being made by decision makers included failure properly to apply Refugee Convention law; failure to undertake the duty to gather and assess information – especially with regard to medical evidence; applying too high a test with regard to the assessment of evidence and the failure properly to annotate files<sup>4</sup>.

In addition, UNHCR noted that decision makers did not approach women's applications from a gender-sensitive viewpoint<sup>5</sup>. This failure has serious consequences when dealing with aspects of women's claims such as ability to disclose (no all female environment is provided as standard at interviews<sup>6</sup> (although UKBA policy is that all women should be given the option of a female case owner)), examination of the possibility of internal flight; sufficiency of State protection with regard to non-State actors of persecution and so forth.

### **The treatment of claimants and applicants**

Women routed into DNSA at Yarl's Wood are at risk of being transferred into the DFT – this has occurred in the past with regard to Jamaican women<sup>7</sup>. There is a concern that where a case is not suitable to be resolved within DNSA, such as on the grounds of its complexity, the file should be noted so as to reflect the reasons why the decision was not made to transfer it into NAM – resulting in the release of the applicant – instead of deciding that it would be suitable for the accelerated procedure.

### **Consistency of approach**

Asylum Aid's concerns stem from the matters raised by UNHCR in the 5<sup>th</sup> QI Report<sup>8</sup> with regard to the lack of expertise and proficiency displayed by decision makers and their inability properly to apply COIS information (see the section on COIS).

There is additional concern that the recommendations made in cross-cutting or thematic reports to the (now defunct) APCI with regard to the treatment of gender issues (Nina Allen 2007) and children (Kohli and Mitchell 2008) in COIS have not properly been adopted thus exacerbating the problems inherent in defective decision making.

### **Discrimination in the exercise of functions**

The QI Report found that in addition to the failure to assess women's claims with a gender-sensitive approach, decision makers at Yarl's Wood failed to have due

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<sup>3</sup> Page 24, paragraph 2.3.93, *UNHCR Quality Initiative Report, Fifth Report to the Minister*, UNHCR Representation to the UK, in London, March 2008.

<sup>4</sup> Pages 9-24

<sup>5</sup> Page 15-16

<sup>6</sup> Page 30

<sup>7</sup> Discussion with case worker who had worked at Yarl's Wood, April 2009 – and confirmed in discussion with a solicitor currently working with Yarl's Wood clients, April 2009.

regard to their own guidance in the form of the API on Gender. UNHCR cited the failure of a decision maker to appreciate that where a woman had had to resort to prostitution in her country of origin to survive, it was not reasonable to expect her to survive internal relocation by resuming sex work in order to avert destitution. Taken in addition to general failings outlined above, this placed women seeking international protection at a substantial disadvantage. A failure to understand the position of women and girls in their countries of origin leads to failures in the ability to explore the basis of the claim and to appreciate the particular problems that arise with regard to internal flight, non-State agents of persecution

### **Enforcement powers**

The UKBA needs to be made more aware of the duties and responsibilities that it has towards applicants under the Gender Equality Duty. It may prove sufficient to ensure that decision makers are appropriately trained and updated so as to provide them with a platform of awareness and knowledge from which to approach women's claims for international protection based upon the Gender API. Alternatively, consideration may need to be given to incorporating the Gender Guidelines previously used by the Tribunal as the basis for Best Practice guidance.

### **The handling of complaints**

DNSA cases may find it problematic to access a complaints mechanism due to the speed with which their claims are processed – and as refused applications attract no in-country appeal. Asylum Aid has seen no evidence that women in the DNSA are informed of their right to complain and of the procedure for so doing. In general, many asylum-seekers are loath to complain as they believe that this may have an adverse impact upon the outcome of their application. It is possible that detained applicants are even less likely to want to challenge the status quo when they are disempowered through detention and may have no conception of what rights they have as detainees.

Asylum Aid notes that there is likely to be a differential impact upon women who may come from countries which culturally and socially discourage and disempower them, negating their ability to challenge authority figures.

### **Country information**

A report into the functioning of Yarl's Wood DFT decision makers prepared by the NAM Quality Team and published in August 2006 may prove instructive to inspectors preparing to inspect the NSA process as will the 5<sup>th</sup> QI Report from UNHCR. The UNHCR report demonstrates that with regard to COIS, decision makers have either ignored or misunderstood their content in a way which is detrimental to women seeking protection. For example, UNHCR cited the COIS report on Pakistan which stated that "Pakistani authorities are unable to provide sufficient protection to victims of domestic violence"<sup>9</sup>. Despite this, decision makers came to contrary conclusions and refused the protection application. UNHCR found that decision makers lacked an appropriate understanding of Convention law, applied too high a test with regard to key issues such as credibility; the weight to accord medical evidence; the relevance of previous persecution; and the correct test to apply when considering the possibility of

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<sup>9</sup> Page 16, paragraph 2.3.45,

internal relocation. In addition they had a lack of awareness of the need for a gender perspective<sup>10</sup>.

Such failures must necessarily infect the use of COIS when carrying out the decision making process. Asylum Aid is concerned that the incorrect approach to, and application of COIS, will cause a protection gap for women in the DNSA process who have the added disadvantage of no in-country right of appeal.

Shirin Sethna  
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<sup>10</sup> Pages 15, 16, 22 and 30, UNHCR 5<sup>th</sup> Quality Initiative Report