Asylum Aid's submission of evidence to the Independent Asylum Commission

27th July 2007

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About Asylum Aid

Asylum Aid is an independent, national charity working to secure protection for people seeking refuge in the UK from persecution and human rights abuses abroad. We provide free legal advice and representation to asylum seekers, with a particular emphasis on the most vulnerable and excluded, and lobby and campaign for an asylum system based on inviolable human rights principles.

We have had a contract with the Legal Services Commission to provide publicly funded advice and representation as a not for profit provider since 2000. In 2005 we were awarded devolved powers status. In the financial year 2005/2006 our casework services provided legal advice or representation to 2,110 individuals who contacted us for assistance. We achieved a successful outcome in 60% of the cases in which we either provided representation at, or prepared the case for, appeal tribunal hearings. This is over three times the national average.

The Refugee Women's Resource Project (RWRP) at Asylum Aid strives to obtain protection, respect and security for women seeking asylum in the UK by providing specialist advice, research and resources on asylum issues for women. RWRP has observer status on the Home Office Advisory Panel on Country of Origin Information. In 2006 the RWRP won the Emma Humphreys Memorial Prize Group Award, in recognition of its groundbreaking work supporting women seeking protection in the UK.

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Further information about Asylum Aid and RWRP's policy work is available from our website: www.asylumaid.org.uk

Executive Summary

In line with our areas of expertise, Asylum Aid is confining its submission to the following areas:

- Operation of the asylum determination process
- Operation of the asylum appeals process

We consider that asylum seekers' experiences of the asylum determination process and the quality of decisions they receive are inextricably linked to issues relating to their access to legal representation, and have therefore highlighted these throughout our submission as well.

Summary of Recommendations

Operation of the Asylum Determination Process

- Responsibility for asylum issues should ultimately lie with the Ministry of Justice rather than the Home Office. *(Paragraph 1, page 6)*
- If the NAM fails to restore the credibility of the asylum determination process and achieve a clear improvement in the quality of decision-making, a more radical reform of the UK's asylum determination process should be undertaken, such as by creating a fully independent decision-making body, and/or an inquisitorial rather than adversarial determination process. *(Paragraph 2, page 6)*
- All NAM case owners should undergo the new training course, regardless of whether they used to work as asylum caseworkers under the previous system. *(Paragraph 5, page 7)*
- The quality of outgoing refusal decisions should be closely scrutinised in order to promote sustainable decision-making amongst case owners. *(Paragraph 7, page 8)*
- Detained fast track processes should be abolished. *(Paragraph 8, page 8)*
- Whilst it continues to be used, procedures should be put in place to ensure that women whose claims raise gender-based issues are not placed in the fast track detention system, or are removed from this system as soon as such issues are identified. For example, pre-detention health screening may provide an opportunity for women to disclose rape or sexual violence. *(Paragraph 9, page 9)*
- Formalised protocols for considering requests for flexibility should be drawn up, following consultation between the BIA and its external stakeholders. Requests for flexibility or consideration of additional evidence should be considered according the individual circumstances of the claim, and responded to, with reasoning for the decision, in writing. *(Paragraph 10, page 9)*
- The BIA should collect and publish, as part of its quarterly asylum statistics, information on the number of requests for flexibility made by asylum applicants and their representatives, and the outcome of such requests. *(Paragraph 10, page 9)*
- All asylum staff should receive appropriate training on the Asylum Policy Instruction on gender issues in the asylum claim, and its

implementation should be continuously monitored. *(Paragraph 12, page 10)*

- A member of the Senior Management Team in the BIA should take responsibility and be accountable for gender issues in relation to asylum claims, in a similar way to the role of the existing Children's Champion. *(Paragraph 13, page 10)*
- The BIA Policy Adviser with responsibility for gender issues should have no additional areas of responsibility. *(Paragraph 13, page 10)*
- When deciding to adopt new procedures for processing asylum applications, a gender impact assessment should always be undertaken. *(Paragraph 13, page 10)*
- The BIA should ensure that there is a sufficient gender mix of case owners and interpreters to be able to meet all applicants' requests for gender-specific staff. Decisions about where to accommodate asylum seekers should be informed by the availability of gender appropriate staff and interpreters in each of the NAM regions. *(Paragraph 14, page 12)*
- There should be a ratio of at least 60-70% female residential staff in immigration removal centres and any other residential accommodation for female asylum seekers, in line with the staffing ratios at women's prisons in the UK. Medical and social work staff in female residential establishments should be female in order to meet the needs of the residents. *(Paragraph 15, page 12)*
- Dependents should be made aware that they can claim asylum in their own right. They should be interviewed alone, without relatives present. *(Paragraph 16, page 12)*
- We welcome the introduction of childcare arrangements by the BIA in Cardiff. Arrangements should be made for the provision of childcare during interviews in all regions, either through the BIA paying the costs of childcare, or by providing on-site childcare. *(Paragraph 17, page 12)*
- Services should be carried out in accordance with BIA policies on pregnant and breastfeeding women in detention. *(Paragraph 17, page 12)*
- Asylum seekers should not be interviewed about their claim before they have been able to access independent legal advice. Decision-making timescales should be altered in cases where there has been a delay in referral to the legal representative or instructions being taken, in order to ensure that this happens. *(Paragraph 19, page 13)*
- The Legal Services Commission should ensure that there is a sufficient gender balance of publicly funded legal representatives in order to meet demand, and take this into account in its contracting arrangements. *(Paragraph 20, page 13)*
- The Home Office and Legal Services Commission must work together to ensure that there is sufficient capacity and funding so that all asylum applicants (regardless of whether they are NAM applications, fresh claims or case resolution cases) are able to access quality assured legal advice. *(Paragraph 22, page 14)*
- It is unacceptable that people are being asked to wait up to 4 more years for a resolution of their case. The BIA should clarify how it intends to resolve the case resolution cases that do not fall within the 4 priority categories identified by the former Home Secretary, as a matter of urgency. *(Paragraph 25, page 15)*

- Where cases are not found to meet the legal criteria for protection, other compelling factors such as length of residence in the UK should be taken into account when considering how to resolve them. *(Paragraph 26, page 15)*
- The same training and recruitment standards should apply to the BIA's case resolution case owners as for NAM case owners. *(Paragraph 27, page 16)*
- The policy of making refused asylum seekers destitute prior to their removal from the UK should be abolished and alternative ways of engaging with refused asylum seekers should be explored as a matter of priority. *(Paragraph 28, page 16)*
- A pre-removal risk assessment would provide a final safeguard against flawed decision-making and unsafe returns. *(Paragraph 28, page 16)*

Operation of the Asylum Appeals Process

- The LSC should be more proactive in monitoring legal representatives' merits test grant/refusal rates and taking follow-up action with providers with unusually high refusal rates. *(Paragraph 32, page 17)*
- Within the legal aid funding regime, there should be a presumption in favour of asylum seekers' eligibility for legal advice and representation at the initial decision and appeal stages. This would complement the NAM's objectives of 'end to end case ownership', and achieving sustainable outcomes for cases through the frontloading of resources. *(Paragraph 34, page 18)*
- As an immediate priority, all applicants who go through detained fast track processes should be entitled to publicly funded legal representation for their appeals as well as pre-initial decision stage, given the difficulties of making an informed assessment of merits within such short timescales. *(Paragraph 34, page 18)*
- The Ministry of Justice should regularly publish detailed statistical bulletins on the operation of the asylum appeals process, for example figures on the number of requests for reconsideration of appeal determinations made by Immigration Judges, and how many are remitted to the Asylum and Immigration Tribunal by the Court of Appeal for reconsideration, and the outcome of such reconsiderations. *(Paragraph 37, page 19)*
- Individual Immigration Judges should be informed of the outcome of reconsideration appeals arising from their appeal determinations. *(Paragraph 38, page 19)*
- All Immigration Judges should undergo training on gender and related issues. Decisions taken by the AIT should not contradict the API on gender issues in the asylum claim. *(Paragraph 40, page 21)*

1. Operation of the asylum determination process

i) The New Asylum Model

1. Political rhetoric and public policymaking on asylum issues continues to be overwhelmingly hostile and negative. We are concerned that this has a knock-on effect on the working culture and practices amongst asylum decision-makers and undermines applicants' trust in the perceived fairness of the asylum determination process. We question whether the Home Office is the appropriate Government department to have overall responsibility for asylum issues, considering its explicit focus on terrorism, crime and anti-social behaviour. The right to claim asylum is enshrined in international law, and asylum determination is essentially a legal process. We consider it would be more appropriate for the Ministry of Justice to oversee the asylum determination process.

Recommendation: *Responsibility for asylum issues should ultimately lie with the Ministry of Justice rather than the Home Office.*

2. Since March 2007, all new asylum applications have been dealt with by the New Asylum Model (NAM). The NAM has been presented as a means of addressing longstanding concerns about the quality, efficiency and effectiveness of the UK's asylum determination process[1]. We welcome the Border and Immigration Agency (BIA)'s commitment to undertaking a continuous quality audit of NAM case owner's decisions, and consider that information gathered from these assessments should be included in the regular asylum statistical bulletins published by the Home Office.

Recommendation: *If the NAM fails to restore the credibility of the asylum determination process and achieve a clear improvement in the quality of decision-making, a more radical reform of the UK's asylum determination process should be undertaken, such as by creating a fully independent decision-making body, and/or an inquisitorial rather than adversarial determination process.*

3. The NAM is still in its early days and it is difficult to make generalisations about the impact it will have on the asylum determination process at this stage. At the time of writing, statistical information about cases dealt with by NAM processes, such as average case lengths, recognition rates and variation of grant rates at appeal stages, has not been made publicly available. In addition, further significant changes to the asylum determination process will take place if the current pilot for early and interactive legal advice for NAM cases in Solihull, and the proposed 'pre-screening information service' are fully implemented.

[1] Baroness Scotland of Asthal: "The whole point of introducing the new model is to heighten and improve the quality of the decision-making…We believe that that is a much better system, which will develop high quality." HC Hansard, 2 May 2007: Column 1060

4. There are aspects of the NAM, many of which have been advocated by asylum organisations including Asylum Aid for many years, that we consider have the potential to improve asylum seekers' experiences of the determination process and the quality of decision-making on asylum claims. In particular, we welcome:

    - The 'end to end' case owner approach, which ensures that each asylum application is the responsibility of a named decision-maker within the BIA throughout all stages of the asylum process
    - The recruitment of new asylum case owners at a higher grade and with higher level qualifications
    - The enhanced training programme provided to asylum case owners and proposed case owner accreditation scheme
    - The objective of frontloading resources, including access to legal advice, in order to maximise the prospects for sustainable decision-making and the early resolution of cases
    - The potential for more appropriate handling of individual cases (e.g. decisions relating to applicants' accommodation/financial support needs), due to the case owner having a greater awareness of the applicants' individual circumstances

5. However, our experience of representing NAM clients so far suggests that these potential benefits are yet to consistently materialise. We understand that some staff who worked on asylum claims under the previous process are not required to participate in the same NAM training that is given to new recruits to the BIA, in spite of the Home Office's recognition that the quality of decision making under the previous system was not satisfactory.

Recommendation: *All NAM case owners should undergo the new training course, regardless of whether they used to work as asylum caseworkers under the previous system.*

6. The UNHCR Handbook and the EU Qualification Directive call for a proactive approach and shared duty between the asylum claimant and the decision maker when determining asylum applications, but in our experience, the burden of 'proving' their claim is still firmly with the asylum applicant, and case owners are continuing to expect a higher standard of proof than the law requires. We are concerned that the measures taken so far have failed to demonstrate having any significant impact on the underlying 'refusal culture' that has been deeply rooted within the Home Office. The NAM cases that we have seen have also given us cause for concern in relation to the case owners' level of knowledge and the standard of their application of the law.

7. One of the objectives of the NAM was to 'frontload' resources in order to promote sustainable initial decisions and avoid unnecessary appeals, however in several cases we have dealt with we have encountered a reluctance amongst NAM case owners and supervisors to reconsider refusal decisions in advance of the appeal hearing, in spite of strong objective evidence that the decision would be unsustainable. Instead

the BIA maintain the refusal decision and place responsibility for the eventual outcome of the case onto the appeals process. In effect, the appeals tribunal is therefore acting as the decision-maker in many cases. It is also unclear whether case owners have the authority to concede cases at the appeal stage.

Recommendation: *The quality of outgoing refusal decisions should be closely scrutinised in order to promote sustainable decision-making amongst case owners.*

The New Asylum Model – Case Study 1

M claimed asylum in the UK, fearing persecution in Iran after his family reported his homosexuality to the authorities.

M's asylum application was refused on the grounds that he could live in Iran without drawing attention to his homosexuality and if he felt under threat of persecution in his area he could relocate to another part of Iran where the local people would be unaware of his sexuality. In Asylum Aid's experience these reasons for refusal are commonly cited in Iranian claims which are based on sexual orientation, there is however a Court of Appeal case ('J' (Appellant) v SSHD [2006] EWCA Civ 1238) and a country guidance case (HS (Homosexuals: Minors, Risk on Return) Iran [2005] UKAIT 00120) which state that a claimant should not be required to suppress a fundamental human right such as sexual orientation, and that it would not be possible for people in M's position to relocate to another part of Iran without coming to the attention of the authorities. The Immigration Judge found that M would be at risk in Iran, and upheld his claim for international protection.

8. We note that the NAM is described as building on the "success" of the detained fast track process. We consider that the detained fast track processes are inherently unfair, and question why there is a need to maintain them, since the NAM allows for faster decision-making and closer contact management than the previous process did, and without the need for detention.

Recommendation: *Detained fast track processes should be abolished.*

9. We are aware of cases involving complex issues, such as those involving gender-based issues, being routed to the detained fast track, in spite of the fact that the suitability criteria state that it is only supposed to be used for claims that are straightforward. Home Office research into the intake of cases to Yarl's Wood fast track in February 2006[2] showed that 22 out of the 45 cases referred during that month were subsequently found to be unsuitable for the fast track process and dropped out either before the initial Home Office decision or before the appeal was determined. The research also highlighted an additional

[2] *Yarlswood Detained Fast-Track Compliance with the Gender API. A Report by the NAM Quality Team* Home Office, August 2006

4 cases that were not removed from the fast track in spite of involving complex gender issues, and concluded that:

> *"The [referral mechanism to the detained fast track] does not appear to be sufficiently robust or substantive to enable it properly to identify complex gender related claims"*

***Recommendation**: Whilst it continues to be used, procedures should be put in place to ensure that women whose claims raise gender-based issues are not placed in the fast track detention system, or are removed from this system as soon as such issues are identified. For example, pre-detention health screening may provide an opportunity for women to disclose rape or sexual violence.*

10. We have concerns about the rigidity of the fast track process and timescales, and are similarly concerned that many decisions about the conduct of a non-detained case, such as whether to defer making a decision on a claim until further evidence has been submitted, are at the discretion of the NAM case owner, or their supervisor. We are concerned that pressures to maintain decision-making targets and maintain a balance with the rest of their caseload may affect how requests for flexibility are responded to. There should be greater transparency about how case owners respond to requests for flexibility from asylum applicants or their legal representatives or advocates.

***Recommendation:** Formalised protocols for considering requests for flexibility should be drawn up, following consultation between the BIA and its external stakeholders. Requests for flexibility or consideration of additional evidence should be considered according the individual circumstances of the claim, and responded to, with reasoning for the decision, in writing.*

***Recommendation:** The BIA should collect and publish, as part of its quarterly asylum statistics, information on the number of requests for flexibility made by asylum applicants and their representatives, and the outcome of such requests.*

11. In 2004 the Home Office incorporated an Asylum Policy Instruction (API) on Gender Issues in the Asylum Claim (gender guidance). This provides guidance to its staff on how to interpret the Geneva Convention appropriately in women's asylum cases and details practical and procedural issues that they must take into account when dealing with asylum claims involving gender issues. In addition, the Gender Equality Duty came into force on 6th April 2007. This policy places a legal obligation on public authorities not just to eliminate unlawful gender discrimination and harassment, but also to promote equality of opportunity between women and men. The Duty provides a positive obligation on the public authority to identify issues for sex equality in their services, employment and policy making. The authority will need to consider what the priority issues for women and men in the services they provide are, and then whether they have significantly different

needs within some services. The gender API is one way of ensuring the different needs of women asylum seekers are met.

12. In 2006, Asylum Aid's Refugee Women's Resource Project published research[3], based on analysis of our own caseload and interviews with other legal professionals, which demonstrated that Home Office staff were failing to adhere to the gender guidance. We are concerned that since this time, staff are still not being trained or monitored on their adherence to the gender API in a consistent manner, and that the gender API is still not being consistently applied.[4]

Recommendation: *All asylum staff should receive appropriate training on the Asylum Policy Instruction on gender issues in the asylum claim, and its implementation should be continuously monitored.*

13. We are concerned that this reflects a lack of ownership of the gender guidance policy at all levels within the BIA and failure to attach sufficient importance to the need to ensure a gender sensitive asylum process. For example, the UK Government's 6th periodic report to the Committee of the UN Convention for the Elimination of all forms of Discrimination Against Women failed to mention the API on gender issues in the asylum claim, in spite of it being the major policy that is of benefit to women asylum seekers. Since Asylum Aid's Refugee Women's Resource Project intervened, the policy has now been added to the annex of the UK's report to the CEDAW committee. The BIA's Gender Equality Scheme and Action Plan, produced as part of its Gender Equality Duty, also failed to mention the gender API.

Recommendation: *A member of the Senior Management Team in the BIA should take responsibility and be accountable for gender issues in relation to asylum claims, in a similar way to the role of the existing Children's Champion.*

Recommendation: *The BIA Policy Adviser with responsibility for gender issues should have no additional areas of responsibility.*

Recommendation: *When deciding to adopt new procedures for processing asylum applications, a gender impact assessment should always be undertaken.*

[3] *'Lip Service' or Implementation? The Home Office Gender Guidance and women's asylum claims in the UK* Refugee Women's Resource Project at Asylum Aid, March 2006

[4] For example, the research undertaken by the NAM Quality Team into the February 2006 intake of cases at Yarl's Wood detained fast track identified 10 cases that raised issues relating to the gender API, 4 of which were particularly badly handled by case owners.

The New Asylum Model - Case Study 2

Our client was a Sudanese lawyer who had established a human rights NGO. She had been raped and tortured in detention and forced to sign a document denouncing her religion. She feared persecution if returned to Sudan on the basis of her imputed political opinion and religion.

Her asylum interview lasted for over 5 hours without a break, during which time she was asked 300 questions, none of which pursued the allegation of rape in detention that the client had previously disclosed to her NAM case owner. The client was given a male interpreter for her asylum interview (a medical report subsequently obtained described her intense fear of men due to her experiences in detention). Her claim was refused on the grounds that it was not accepted that the client had established an NGO, and subsequently all other aspects of her claim were disbelieved. The reasons for refusal letter did not make any reference to the client's account of being raped by state officials whilst in detention.

Asylum Aid took on the case before her appeal. The client had recently had a mental health breakdown and was not fit to give evidence at her appeal hearing. The Immigration Judge was disturbed by the conduct of the asylum interview and the lack of questions about the allegation of rape. He was also critical of the efforts the case owner had made to verify the existence of the human rights NGO the client was working for and several other supporting aspects of her claim.

Asylum Aid's caseworker raised the case owner's failure to follow the API on gender issues in the asylum claim at the appeal hearing. The NAM case owner stated that she did not consider that the gender instructions were relevant to this case and appeared to be unaware that they have been compulsory since being introduced in 2004. She also stated that, because she had worked as an asylum caseworker before the NAM was introduced, she had not done the 55-day NAM training course, but had merely taken the final assessment.

The Immigration Judge found our client's statements to be credible and plausible and supported by the objective evidence. He overturned the refusal decision on asylum and human rights grounds, stating that *"the appellant's evidence clearly displays the characteristics of someone who is in need of international protection because they face a real threat of persecution..."*.

14. In the criminal justice system it is recognised that women are more likely to disclose experiences of rape or sexual violence to other women. In the cases of women claiming asylum, disclosure of any such experiences at an early stage in the asylum process is essential for the fair determination of their case. We welcome the BIA's recent confirmation that it is going to change its procedures in order to directly inform applicants at the outset of the asylum determination process of their right to request a gender-specific case owner and

interpreter. This comes after extensive lobbying by Asylum Aid and other external stakeholders.

Recommendation: *The BIA should ensure that there is a sufficient gender mix of case owners and interpreters to be able to meet all applicants' requests for gender-specific staff. Decisions about where to accommodate asylum seekers should be informed by the availability of gender appropriate staff and interpreters in each of the NAM regions.*

15. There is a similar need to ensure an appropriate gender ratio of staffing in immigration removal centres.

Recommendation: *There should be a ratio of at least 60-70% female residential staff in immigration removal centres and any other residential accommodation for female asylum seekers, in line with the staffing ratios at women's prisons in the UK. Medical and social work staff in female residential establishments should be female in order to meet the needs of the residents.*

16. The BIA should also be more proactive in informing the dependents of asylum applicants at the start of the asylum process that they can apply for asylum in their own right.

Recommendation: *Dependents should be made aware that they can claim asylum in their own right. They should be interviewed alone, without relatives present.*

17. Although the BIA recommends that applicants do not bring dependent children with them to their asylum interview, it does not consistently provide any assistance to applicants who need to arrange childcare. As a consequence, asylum applicants are faced with disclosing sensitive information about their experiences in front of their children or other dependents, or refraining from such disclosure, which could affect their asylum claim.

Recommendation*: We welcome the introduction of childcare arrangements by the BIA in Cardiff. Arrangements should be made for the provision of childcare during interviews in all regions, either through the BIA paying the costs of childcare, or by providing on-site childcare.*

Recommendation: *Services should be carried out in accordance with BIA policies on pregnant and breastfeeding women in detention.*

18. Country of origin information (COI) is required within the asylum decision-making process because it provides 'objective' evidence to help assess and determine asylum and human rights applications. Particular difficulties arise in substantiating women's cases due to a lack of research in the field and consequently a lack of awareness of issues affecting women amongst COI practitioners. We are concerned that as human rights reports fail to document the status of women and the forms of persecution that they experience, women's cases may be refused, due to lack of supporting objective evidence making it easier

for their claims to be 'not believed' and their credibility challenged. Therefore women are further discriminated against because there is less information available to support their testimony.

ii) Access to legal advice and representation

19. Asylum Aid welcomes the fact that the Home Office now recognises the value of asylum applicants having access to legal representation from the outset, although further changes to the asylum process are needed in order to ensure that this happens in practice.

Recommendation: *Asylum seekers should not be interviewed about their claim before they have been able to access independent legal advice. Decision-making timescales should be altered in cases where there has been a delay in referral to the legal representative or instructions being taken, in order to ensure that this happens.*

20. Rota arrangements and 'exclusive' contracts, set up by the Home Office and Legal Services Commission, are increasingly being used in order to facilitate new asylum seekers' access to legal advice within the context of fast decision-making (particularly in the detained fast-track). Restricting asylum seekers' choice of representative further reinforces the importance of having rigorous quality control mechanisms in place, in order to monitor the quality of advice being given. It is also vital that rota systems and exclusive contract arrangements are able to accommodate asylum seekers with particular needs, for example those who have a preference regarding the gender of their legal representative. This may be particularly the case for women who have experienced sexual violence who might find it easier to disclose this to a female legal representative.

Recommendation: *The Legal Services Commission should ensure that there is a sufficient gender balance of publicly funded legal representatives in order to meet demand, and take this into account in its contracting arrangements.*

21. The level of demand from asylum seekers across the country for Asylum Aid's legal advice services suggests that many are still experiencing difficulties in accessing publicly funded legal representation. The number of publicly funded legal representatives operating in the asylum and immigration category of law shrunk from 644 in 2003, to 367 in 2006[5]. We believe this is related to the successive restrictions on the legal aid funding available for asylum cases that have been introduced in recent years.

    The restrictions, designed to control costs and address concerns about the quality of legal representation, have had the perverse effect of making it harder to maintain best practice standards, whilst enabling mediocre, 'one-size fits all' provision – or worse – to thrive. For example, under the new legal aid funding contract for asylum and

[5] Written Answer, HC Hansard 6 February 2007: Column 880W

immigration work to be introduced in October 2007, legal representatives will be paid a fixed fee for each case they take on, rather than reimbursed for the actual amount of work that the case requires. We do not think that the fixed fees have been set at a realistic level considering the range of work that can be required in preparing asylum claims, and we are concerned that they will compromise adherence to standards of best practice and client care. We are concerned that fixed fees will act as a disincentive for legal representatives to take on those vulnerable clients who have time consuming or complex cases, or increase the pressure to cut corners in preparing cases, in order to maintain profitability. We are also concerned that the LSC's calculations for identifying the likely demand for acts of assistance by asylum and immigration legal aid providers have been based on Home Office projections of the number of new asylum applications to be made in the coming years, and have failed to take account of the additional demand for legal advice that is likely to come from asylum seekers already present in the UK who are seeking to pursue a fresh asylum claim or who are due to be considered under the case resolution programme.

22. We are alarmed at the prospect of an asylum determination process based on faster decision-making and rigid targets for serving and enforcing decisions, operating against a backdrop of insufficient capacity and funding of legal representation. Both the Home Office case owner and the applicant's legal representative are being exposed to pressure to complete individual applications within increasingly short timescales, which could undermine the prospect of each case being given the time and attention it requires. This is likely to result in real or perceived unfairness in the eyes of the asylum applicant, and undermine efforts to restore the credibility of the asylum determination process.

Recommendation: *The Home Office and Legal Services Commission must work together to ensure that there is sufficient capacity and funding so that all asylum applicants (regardless of whether they are NAM applications, fresh claims or case resolution cases) are able to access quality assured legal advice.*

iii) 'Case Resolution' cases

23. The Home Office's recognition that the asylum determination process pre-NAM was in need of fundamental reform raises the obvious question of what should happen to those asylum seekers who were subject to the discredited former determination process, but who are still present in the UK. In our view it is unacceptable for the Home Office to seek credit for introducing a new system explicitly tasked with improving the quality of decision-making, without accepting any responsibility for those asylum seekers who reached the end of the line under the previous system – many of whom are likely to have had an incorrect decision made in relation to their case.

24. Asylum Aid's legal advice services are subject to a significant level of demand for assistance from refused asylum seekers who have already exhausted the asylum process, but who feel that the incorrect outcome was reached on their case, either due to previous poor quality legal advice or Home Office decision-making, or after experiencing a change in circumstances or caselaw. The criteria for having a fresh claim accepted for consideration by the Home Office are limited, and the nature of the legal aid funding arrangements makes it particularly difficult for this client group to access further legal advice or representation.[6]

25. The former Home Secretary committed the BIA to resolve the estimated 400,000 - 450,000 asylum 'case resolution' (also known as 'legacy') caseload by July 2011, and identified 4 categories that will be prioritised in this work[7]. Fresh claims submitted by refused asylum seekers will also fall to be considered as part of the case resolution caseload. However, many people who contact Asylum Aid for advice and assistance do not easily fit into any of these categories, and the Home Office has not yet given any indication of when their cases will be dealt with, or what criteria decision-makers will use in order to decide how to resolve them. In the meantime legislation denies these applicants an entitlement to public funds or to undertake paid employment.

Recommendation: *It is unacceptable that people are being asked to wait up to 4 more years for a resolution of their case. The BIA should clarify how it intends to resolve the case resolution cases that do not fall within the 4 priority categories identified by the former Home Secretary, as a matter of urgency.*

26. The case resolution caseload developed over several years as a consequence of cumulative administrative failures by the BIA and its predecessor IND. Whilst it may be the case that not all of these cases meet the criteria for international protection, it is in nobody's interest to have a population of people living in the UK without legal status, and pragmatic policies should be pursued in order to resolve their situation without further unnecessary delay or distress. Many of the people in this situation have been living in the UK for many years, and built up considerable ties here. It is unrealistic and disingenuous for the government to imply that it has the capacity to enforce the removal of all those who do not meet the legal criteria for being granted protection within the next 4 years. A more viable policy for this particular caseload might be to take a broader range of factors into account when considering whether they may be granted permission to remain in the UK.

Recommendation: *Where cases are not found to meet the legal criteria for protection, other compelling factors such as length of residence in the UK should be taken into account when considering how to resolve them.*

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[6] See *Access to Asylum Advice in London: A scoping study* Asylum Aid October 2006 p.6
[7] HC Hansard 25 July 2006: Column 735

27. It is further concerning to note that the same pre-NAM recruitment standards and training packages are being used for the BIA case owners who are dealing with case resolution cases. We would suggest that many of these cases are likely to be particularly complex to deal with, for example due to the variety of legislation, concessions and caselaw or the changes in the applicants' circumstances that have taken place since the case was last considered, and complex human rights considerations that must be taken into account.

Recommendation: *The same training and recruitment standards should apply to the BIA's case resolution case owners as for NAM case owners.*

28. Even where an asylum applicant has been found not to meet the legal criteria for granting international protection, they may still have a very strong fear of returning to their country of origin, for example due to ongoing instability and human rights abuses taking place there, or because the applicant continues to believe they met the criteria for refugee status. Applications found not to meet the criteria for asylum, according to the UK's narrow interpretation, can still have been made in good faith. The asylum determination process must give applicants confidence that their case has been fully and fairly considered, and should engage with their ongoing fears in a more constructive and supportive way than simply making them destitute and liable to a forced removal – which is often only initiated a considerable time after the case was last considered.

Recommendation: *The policy of making refused asylum seekers destitute prior to their removal from the UK should be abolished and alternative ways of engaging with refused asylum seekers should be explored as a matter of priority.*

Recommendation: *A pre-removal risk assessment would provide a final safeguard against flawed decision-making and unsafe returns.*

2. Operation of the Asylum Appeals Process

i) Access to the appeals process and legal representation

29. The vast majority of asylum applications are refused at initial decision stage[8]. Access to a quality assured appeals process is essential to the credibility of the asylum determination process. We have concerns that the exceedingly tight timescales for appeal cases are undermining asylum seekers' access to the appeals tribunals and the adequate preparation of their cases. An initial appeal must be lodged within 10 days of receipt of the Home Office refusal decision, and be heard within 28 days of being lodged, unless there are 'exceptional circumstances'.

[8] 83% of initial decisions made in 2005 were to refuse any form of international protection (source: Home Office Statistical Bulletin, Asylum Statistics United Kingdom 2005, 22 August 2006)

An application for a Review of a decision by the first level Immigration Judge must be lodged within 5 working days.

30. The impact of the appeal deadlines has been particularly powerful when coupled with the ever higher standards of evidence required by case law developments. The past year has seen a significant increase in the number of Country Guidance cases handed down by Senior Immigration Judges. These cases are legally binding on the lower court, and issue guidance on determination of matters commonly arising in appeals relating to particular countries. The majority of these cases have served to narrow those able to claim protection. Last year saw a marked increase in the need for Asylum Aid's caseworkers to commission expert reports in order to address specific credibility points taken against the applicant by the Home Office and to establish clearly how a case falls within or outside the parameters of a Country Guidance case.

31. Last year also saw a number of cases handed down by the Court of Appeal which further narrowed interpretations of UK obligations in relation to claims under Articles 3 and 8 of the European Convention on Human Rights based on mental health and on suicide risk on return. Many asylum applicants, falling foul of established case law, have found themselves unable to obtain legal aid to lodge an initial application or an appeal, due to the poor prospects of success.

32. Asylum Aid frequently takes on cases under legal aid after the client has been refused public funding by other representatives, or been advised to pay for private representation rather than seek legal aid. Asylum seekers are only entitled to publicly funded legal representation at the Asylum and Immigration Tribunal (AIT) stage if their case is deemed to have a 50% or greater chance of success. We are concerned that some legal representatives are erring on the side of caution in deciding whether a case has sufficient merits to proceed under legal aid.

Recommendation: *The LSC should be more proactive in monitoring legal representatives' merits test grant/refusal rates and taking follow-up action with providers with unusually high refusal rates.*

33. Making an informed assessment of the relative merits of a case in the context of fast track decision-making is particularly problematic given the extremely short timescales involved. Furthermore, the mechanisms for asylum seekers to challenge a legal representative's decision to withdraw legal aid funding are of limited assistance and accessibility to asylum applicants seeking representation for their appeal considering the evidence that must be presented in support of such a challenge, and the short deadlines for submitting an appeal against the refusal of their asylum claim.

34. We are concerned that the Legal Services Commission's intended requirement that publicly funded legal representatives maintain a success rate of 40% in AIT appeals will exacerbate these problems of

"cherrypicking" and flawed applications of the merits test.[9] In our experience, appeal determinations are frequently made on the basis of subjective assessments by Immigration Judges and outcomes are difficult to predict.

Recommendation: *Within the legal aid funding regime, there should be a presumption in favour of asylum seekers' eligibility for legal advice and representation at the initial decision and appeal stages. This would complement the NAM's objectives of 'end to end case ownership', and achieving sustainable outcomes for cases through the frontloading of resources.*

Recommendation: *As an immediate priority, all applicants who go through detained fast track processes should be entitled to publicly funded legal representation for their appeals as well as pre-initial decision stage, given the difficulties of making an informed assessment of merits within such short timescales.*

Access to the appeals process – Case Study

Mr S was born in a Gulf state and is of Bidoon ethnicity. After many years of persecution from the state authorities, including several periods in detention, he claimed asylum in the UK because he feared further persecution on account of his ethnicity.

Mr S was refused asylum and his legal representatives refused to grant him legal aid for his appeal against this decision, because they assessed his prospects of success as less than 50%. Mr S contacted Asylum Aid for a second opinion, 2 days before his appeal was due to be heard.

Our caseworker looked at Mr S' papers and spoke to a country expert about his case, and considered that Mr S had a 60% chance of success in his appeal. Our caseworker asked for his appeal hearing to be adjourned, and applied to the Legal Services Commission for permission to grant legal aid, stating the reasons why it was felt that the appeal had a greater prospect of success than the original assessment stated.

The Legal Services Commission granted this request and granted funding for instructing a country expert to prepare a substantive report for Mr S's appeal. Mr S has now had his appeal hearing and we are waiting for the Immigration Judge's decision. Mr S is not entitled to work, and would have been unable to pay for private representation at his appeal if he had been unable to access publicly funded representation.

[9] The 40% target is in spite of the fact that in 2005, the overall success rate in AIT appeals was 17%, and also appears to overlook that one of the Home Office's anticipated outcomes of the NAM is that fewer decisions will be overturned at appeals stage.

35. Furthermore, a legal representative will only be paid under legal aid for work beyond the first level of appeal if the Tribunal grants a Funding Order. However, the Tribunal will only do so if it deems that the appeal had sufficient prospect of success at the time of the reconsideration application. Asylum Aid has found that many legal representatives are erring heavily on the side of caution and are declining to lodge further appeals. Since the deadline for lodging an appeal is only 5 days, this poses considerable difficulties for asylum seekers who need to find another representative to assist them instead. Since these new arrangements were introduced Asylum Aid's advice line has experienced a noticeable increase in the number of clients contacting us for help with lodging an application for Review after the first level Immigration Judge has refused their case. In some cases Asylum Aid has lodged late applications for review and taken on cases in which clients have lodged their own appeals without legal assistance.

ii) The quality of the appeals process

36. As previously stated, the vast majority of asylum applications are refused by BIA decision-makers at initial decision stage, and in our experience, it is not uncommon for BIA decision-makers to maintain a flawed refusal decision in advance of an appeal hearing, thereby placing the onus of determining an application onto the appeals process.

37. Considering that the appeals process is of central importance to the asylum determination process, we consider that it should be doing more to ensure its openness and accountability to its service users and stakeholders. For example, regular statistical bulletins detailing the outcomes of appeal and reconsideration requests (possibly for each individual Immigration Judge), appeal outcomes broken down by tribunal hearing centre and by applicant nationality, and details of the proportion of appellants who were legally represented could help to identify issues needing to be addressed and enhance confidence in the asylum appeals process amongst its service users and stakeholders.

Recommendation: *The Ministry of Justice should regularly publish detailed statistical bulletins on the operation of the asylum appeals process, for example figures on the number of requests for reconsideration of appeal determinations made by Immigration Judges, and how many are remitted to the Asylum and Immigration Tribunal by the Court of Appeal for reconsideration, and the outcome of such reconsiderations.*

38. We have concerns about the quality of some Immigration Judge's decisions and the level of scrutiny that Immigration Judges' conduct and decisions are subject to. In our experience there is a considerable deal of inconsistency between how Immigration Judges approach cases.

Recommendation: *Individual Immigration Judges should be informed of the outcome of reconsideration appeals arising from their appeal determinations.*

39. Whilst the Home Office has adopted guidance on dealing with gender issues in an asylum claim, no such guidance is available to Immigration Judges. The Immigration Appellate Authority (the predecessor to the Asylum and Immigration Tribunal) adopted gender guidelines in recognition of the fact that:

> *" … the dominant conception of the refugee in Western jurisprudence has been of a man and today, women may not benefit equitably from [the 1951 Geneva Convention's] protections... procedural and evidential requirements of the domestic asylum determination process are not equally accessible to both women and men."*[10]

In addition, the EU Qualification Directive states that acts of persecution can take the form of acts of physical or mental violence including acts of sexual violence[11] and that "member states shall take into account the specific situation of vulnerable persons such as … persons who have been subjected to …sexual violence" [12].

40. However, the Asylum and Immigration Tribunal does not consider itself bound by its predecessor's guidelines[13], and the Equal Treatment training that is currently provided to judges and tribunals makes no detailed reference to asylum seekers, or specifically, women asylum seekers. Asylum Aid is concerned that as a result, women's asylum cases may not be treated in an equal and fair manner.

For example, we have seen appeal determinations where asylum applicants' allegations of rapes are dismissed by Immigration Judges on account of their late disclosure. One Immigration Judge, when confronted with asylum seekers who have alleged rape at a late stage in the asylum process, regularly states in his determination:

> *"We regard rape as a most horrendous crime which is capable of having a traumatic and long lasting effect on the victim. However we deprecate the attempt to utilise the crime of rape when it has not taken place and we find that the appellant has materially undermined her credibility by falsifying this aspect of her story."*

Such an attitude leads to a lack of confidence as to whether cases that involve gender issues are going to be considered appropriately by Immigration Judges, and can cause re-victimisation by the court process as the asylum seekers involved do not feel that they have been heard or that the traumas they have experienced have been

[10] N. Berkowitz and C. Jarvis, *Asylum gender guidelines* Immigration Appellate Authority, 2000
[11] EU Qualification Directive Chapter 3, Article 9, para 2(a)
[12] EU Qualification Directive Chapter 7, Article 20, para 3
[13] AIT Legal Research Unit, Issue 17/2006, p.25

acknowledged. It is inconsistent with the way that rape is dealt with by the criminal justice system, where we understand the police, prosecution and judiciary have a better understanding of why women may delay reporting rape and recognise that this does not mean that the allegation is untrue.

***Recommendation**: All Immigration Judges should undergo training on gender and related issues. Decisions taken by the AIT should not contradict the API on gender issues in the asylum claim.*

41. The following case study demonstrates the importance of having access to the higher courts in order to challenge the decisions of the Home Office and Immigration Judges.

Operation of the Appeal Process - Case Study

C is a female orphan from a West African country who came to the UK as an unaccompanied asylum seeking child. She had been picked up by the Police in her country of origin for working as a prostitute and kept in detention for several weeks, during which time members of the Police raped her. One of her clients subsequently secured her release from detention and paid an agent to arrange for her to leave the country. C's asylum claim was refused within a couple of months of being submitted. After her previous legal representative withdrew public funding Asylum Aid took on her appeal, arguing that as a female orphan she is vulnerable and there is no effective state protection for C in her country of origin.

The Immigration Judge (IJ) did not find C's account credible and did not consider that C would be at risk of persecution if returned to her country of origin. (Without legal aid funding) Asylum Aid appealed to a Senior Immigration Judge for a reconsideration of this determination, citing the following errors:

- The IJ did not support their findings against C's credibility with evidence or detailed reasons
- The IJ did not fully consider the supporting country evidence and the evidence C had provided in her witness statement
- The IJ had made findings on issues that C had not been asked about at her appeal
- The IJ had disbelieved C's account of being raped by state officials, citing her failure to report the rape to the state authorities or undergo an HIV test following the rape. The IJ had failed to take sufficient account of the difficulties associated with reporting rape and the objective country evidence of the situation of women and girls who suffer rape and sexual violence in her country (particularly when the perpetrator is an agent of the state, to whom the report would have to be made)
- The IJ had failed to follow the judiciary's gender and minors guidelines, including on how to deal with discrepancies in accounts, and UNHCR guidelines on assessing credibility of minors

- The IJ had failed to apply the correct legal test when considering whether C would be at risk upon return to her country of origin

The Senior Immigration Judge agreed that the IJ had made an error of law in assessing whether C would be at risk upon return, however he refused the request for reconsideration on the grounds that the legal error was not so significant to have resulted in a different decision. Asylum Aid submitted a further reconsideration application to the High Court, again, without a guarantee of legal aid funding. The High Court agreed that there had been a material error of law that was likely to have resulted in a different decision and remitted the appeal to the Asylum and Immigration Tribunal.

In the meantime C became unwell and needed hospital treatment. She was released from hospital two days before the new hearing date and the hospital consultant said she was not fit to attend the hearing. Asylum Aid contacted the hearing centre to request an adjournment. This request was refused, and it was not until the day of the hearing that the panel of Immigration Judges changed their minds after hearing an explanation of her condition from our caseworker and C's social worker.

C's fresh hearing is now due to take place next month. The Home Office Presenting Officer has informed us that they will be maintaining that it is safe to return C to her country of origin, and they will rely on a country report which contains a list of women's organisations in C's country from which she could get support. The report, which was not compiled for asylum determination purposes, does not give any details of the functions of any of these groups or what services they may provide and to whom. In addition, the report was compiled seven years ago, and the Home Office has not provided any evidence of whether any of the organisations it refers to are still in existence.