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Accelerated Procedures for Asylum in the European Union

Fairness Versus Efficiency

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Abstract

The belief that certain asylum seekers do not deserve a full consideration of their claim first arose in Europe in the 1980s. At the time, many refugee-receiving countries were being overwhelmed with applications for asylum. Popular opinion had it that the majority of these applications were not from individuals fleeing persecution and seeking protection, but were from people fleeing economic hardship and seeking a better life. This situation was regarded as problematic for two reasons. First, applications from 'bogus' asylum seekers placed extreme pressure on asylum systems and led to increased administration costs. Second, 'genuine' asylum seekers suffered as the resultant backlog of applications meant that it took longer for them to receive refugee status. Therefore, it became accepted that certain asylum applications should be processed in an accelerated procedure. While there is no standardized definition of an accelerated procedure, it is generally understood that an accelerated procedure processes asylum applications at a significantly faster rate than does the normal asylum system. Accelerated procedures can either be classed as 'inclusionary' or exclusionary. While the main objective of an inclusionary accelerated procedure is to speedily grant an individual refugee status, the main objective of an exclusionary accelerated procedure is to speedily deny an individual refugee status. It is widely held that the accelerated procedures currently in operation in Member States of the European Union are examples of the latter. This paper examines whether or not it is possible for accelerated procedures to be both fair *and* efficient. The case for speedier decision-making needs to be balanced against the requirement of States to fulfill their obligations under international human rights and refugee law. Research findings from the first independent assessment of the accelerated procedure (fast track procedure) in the United Kingdom are presented. On the basis of this and comparative

secondary data the paper suggests that some States may be in danger of violating the principle of *non-refoulement* and returning refugees to places where their lives or freedoms could be threatened.

Introduction

The belief that certain asylum seekers do not deserve a full consideration of their claim first arose in Europe in the 1980s. At this time, many refugee-receiving countries were being overwhelmed with applications for asylum (Boswell 2000, p.541). Popular opinion had it that the majority of these applications were not from individuals fleeing persecution and seeking protection, but were from people fleeing economic hardship and seeking a better life. This situation was regarded as problematic for two reasons. First, applications from 'bogus' asylum seekers placed extreme pressure on asylum systems and led to increased administration costs. Second, 'genuine' asylum seekers suffered as the resultant backlog of applications meant that it took longer for them to receive refugee status. Therefore, it became accepted that certain asylum applications should be processed in an accelerated procedure. While there is no standardized definition of an accelerated procedure, it is generally understood that an accelerated procedure processes asylum applications at a significantly faster rate than does the normal asylum system.

Manifestly Unfounded Claims, Safe Countries and Accelerated Procedures

The acceptance of the notion that some asylum applications can be processed more rapidly than others is connected to the idea that certain applications are manifestly unfounded. The United Nations High Commissioner for Refugees (UNHCR) first recognized the need to address the issue of manifestly unfounded or abusive applications in 1982 (UNHCR 1982). In its EXCOM Conclusion No. 30 (XXXIV), UNHCR recognised that applications for refugee status from individuals who clearly have no valid claim are burdensome to the affected countries (UNHCR 1983, c). Conclusion No. 30 allowed that,

...national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees

nor to any other criteria justifying the granting of asylum. (d)

UNHCR qualified this by recognizing the need for appropriate precautions to guard against erroneous decision-making; namely, that the applicant is given a complete personal interview, that the manifestly unfounded or abusive nature of an application be established by the competent authority, and, that the applicant is given the right of appeal against a negative decision (e).

The rapid assessment of asylum claims was given further impetus at a 1992 meeting of the Ministers of the member states of the European Communities responsible for immigration. The Ministers released a resolution entitled *Resolution on Manifestly Unfounded Applications for Asylum*, which has become known as the 1992 London Resolution (The Council 1992)¹. The Resolution sets out 14 grounds under which member states may process an application in an accelerated procedure, the first being where the claim is deemed manifestly unfounded. An application is regarded as manifestly unfounded if,

...it is clear that it meets none of the substantive criteria under the Geneva Convention and the New York Protocol for one of the following reasons: there is clearly no substance to the applicant's claim to fear persecution in his own country (paragraph 6 to 8); or the claim is based on deliberate deception or is an abuse of asylum procedures (paragraphs 9 and 10). [original emphasis] (para. 1)

The Resolution gives two other circumstances whereby member states may consider an application in an accelerated procedure: first, where an applicant transited through a country that has ratified the 1951 Geneva Convention, and that country is responsible for processing the claim (the 'safe third country' rule); and second, where an applicant is from a country where in general there is no serious risk of persecution (the 'safe country of origin' rule). These grounds are not exhaustive and, where national procedures for the determination of refugee status allow, other types of applications may be processed in an accelerated procedure.

Safe Countries

The 1992 London Resolution invites member states to process 'manifestly unfounded' claims,

¹ The Ministers note that the Resolution was inspired by EXCOM Conclusion No. 30.

'safe countries of origin' claims and 'safe third countries' claims (among other types of claims) in an accelerated procedure. The 'safe country' concepts require further explanation. Although the 'safe country of origin' concept is often traced to the 1992 London Resolution, it was first implemented one year earlier by Belgium in 1991. Böcker & Havinga (1998) explain:

According to this rule, which became known as the '2 x 5 per cent rule', asylum seekers from a country which accounted for more than 5 per cent of the applications of the previous year but for which the refugee recognition rate was lower than 5 per cent, would be refused entry unless they were able to prove that deportation to their country of origin would constitute a threat to their lives. (p.245)

The Constitutional Court did not uphold this rule; however, versions of the 'safe country of origin' concept have come to be adopted by every EU member state. Some member states maintain official lists of countries of origin that are thought to be safe, while others do not. A nuance to the 'safe country of origin' rule is the 'internal flight argument' (IFA) whereby it is argued that persecution is often limited to a specific geographical area within a country, and that effective protection is readily available in another part of the country (The Council 1992, para. 7). In other words, an individual who is being persecuted in one part of his or her country should seek protection *within* the country (by relocating) rather than seek protection *outside* the country (by crossing an international border and claiming asylum).

Although the safe third country concept is usually traced to the 1990 Dublin Convention², it was first implemented four years earlier in Denmark. The Danes legislated the concept amidst what was perceived as an uncontrolled flow of asylum seekers entering the country from the German Democratic Republic and the Federal Republic of Germany. Byrne *et al* (2004) explain the cascading effect that this had within the sub-region: "Its implementation by one state within a sub-region, gave impetus for neighbouring jurisdictions to follow suit, inspiring the fear within states of becoming a 'closed sack' from which asylum seekers and migrants could not be removed" (p.359). The concept was elevated to the level of supra-national law, albeit 'soft law', in 1990 with the implementation of the Dublin Convention, and later the Dublin II Regulation.

² The Dublin Convention determining the State responsibly for examining applications for asylum lodged in one of the Member States of the European Communities. Effective 1 September 1997.

The Convention rests first on the assumption that Member States must pool their responsibility for asylum seekers, and second on the assumption that "...even though each Member State is separately a signatory to the Geneva Convention a decision on an asylum application by one of them absolves all the others of any duty to consider an asylum application by the same individual" (Guild 2004, p.206). The practice of allowing one member state to return an asylum seeker to have his or her application processed by another member state through which he or she transited hinges on the assumption that there is a common European Union asylum policy. However, this is not the case. Among Member States there are varying practices over processing applications and even differences of opinion over who qualifies for protection. Where a 'safe third country' does not recognize persecution from non-state actors, for example, the risk of *refoulement* is very real³.

The Problem: Efficiency versus Fairness

The problem to be examined is whether or not it is possible for accelerated procedures to be both fair *and* efficient. An accelerated procedure processes asylum applications at a significantly faster rate than does a normal asylum procedure. One can make the argument that this is a win-win situation for both States and asylum seekers. The rapid processing of asylum applications allows States to demonstrate that they are taking a proactive stance on the issue of 'bogus' asylum seekers. In theory accelerated processing also allows States to clear their backlog of asylum cases, thereby minimizing the associated costs of administrative delay. Byrne (2002) explains, "...the greater the backlog on these systems, the greater the delay in rendering decisions, the greater the cost to the social welfare system, and the greater the likelihood of failure to effect deportation orders at the end of the process". Long processing times can have a detrimental impact on asylum seekers themselves. It is common for an asylum seeker to have to wait months or even years for a final decision to be made on his or her claim for asylum. In the meantime, many asylum seekers may be excluded from the labour market and dependent upon the State for housing and social welfare. Long waiting times can mean "...a period of insecurity that may impede the task of coming to terms with a new

³ Article 31.1 of the 1951 Geneva Convention Relating to the Status of Refugees sets out the principle of *non-refoulement*: "No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

environment" (Summerfield 2001, p.161). It seems that a compelling case can be made for speedier decision-making.

The case for speedier decision-making needs to be balanced against the requirement of States to fulfil their obligations under international human rights and refugee law. For certain asylum applications to be processed more quickly than others, procedural safeguards are reduced (Lavenex 1998, p.131; van der Klaauw 2001, p.180). In other words, applications processed in an accelerated procedure are denied the complete examination allowed within the normal asylum system. An asylum seeker whose claim is processed in an accelerated procedure may not have access to free legal advice or non-government organisations (NGOs), may not have the opportunity to put forth his or her case in a personal interview, and may not have the right of appeal. When the right of appeal exists it may be non-suspensive, meaning that an asylum seeker whose claim is rejected as 'manifestly unfounded' may be deported while the appeal process is ongoing. UNHCR has expressed concern that procedures that are designed to substantially reduce processing times may be "so accelerated that an asylum-seeker does not get an adequate hearing" (Berthiaume 1995, p.7). This suggests that States may be at risk of compromising their international obligations. In particular, it raises concern that some States may be in danger of violating the principle of *non-refoulement* and returning refugees to places where their lives or freedoms could be threatened.

Aims

The paper is informed by the author's contribution to field research undertaken by Bail for Immigration Detainees (BID) at Harmondsworth Immigration Removal Centre during a one-week period in March 2006. The subject of the research is an accelerated procedure (known as the fast track procedure) that is currently being piloted in the United Kingdom. Since the introduction of the fast track procedure, asylum seekers have been contacting BID and complaining about the injustice of the procedure. The organisation was concerned that safeguards built into the system were not being followed. Further, it was felt that those safeguards that were in place were inadequate. The research had three main objectives: (1) To test the assumption that the safeguards that are built into the system are inadequate, and in any case, not being followed; (2) To provide a useful campaigning tool for those individuals and organisations who are challenging the rapid assessment of asylum claims, and; (3) To provide a forum for the voices of immigration detainees and their legal representatives. The

final report, *Working against the Clock: Inadequacy and Injustice in the Fast Track System*, presents the first independent evaluation of the fast track procedure in the United Kingdom (Oakley & Crew 2006).

The aim of the paper is to place the findings from this earlier research into a wider geographical and conceptual framework. The United Kingdom is not alone in its desire to rapidly process certain asylum applications in an asylum system with minimized procedural safeguards. Since the early 1990s there has been an alarming proliferation of the use of accelerated procedures in asylum-receiving countries, particularly among European Union Member States. It was felt that geographical contextualization would allow a greater understanding of the accelerated procedure in the United Kingdom. Second, the paper is able to explore in greater detail than was permitted in the BID report the problem of whether or not it is possible for refugee determination systems to be both fair *and* efficient. This by necessity requires a comparative analysis of accelerated procedures as they are implemented by other Member States of the European Union. Lastly, the earlier report was written with a view toward the campaigning objectives. It was felt that it was important to translate the report into an academic context to reach a wider audience. This aim is supported by Harvey (2000) who writes, "If there is a problem with the current legal literature in refugee law it is in the failure to acknowledge the work and importance of social movements struggling within 'the Fortress'" (p.367).

Methodology

The research methodology involved observation and interviews and was carried out in four phases. The first stage of the research — court monitoring — collected quantitative data through passive observation. During this stage, fast track asylum appeal cases were monitored over a one week period in March 2006 and basic details about the proceedings were recorded. The second and third stages of the research — asylum seeker interviews and legal representative interviews — collected qualitative data with the use of a structured interview. During these stages, asylum seekers whose cases were observed during the court monitoring stage, and their legal representatives, were interviewed about their experience within the fast track procedure. The final stage of the research — the tracking exercise — collected data on the progression of the sample cases through the asylum system. Detainees who remained in immigration detention sixty days after BID observed the last appeal hearing were

interviewed again and asked about removal barriers.

Accelerated Procedures in the European Union

Accelerated procedures can either be classed as 'inclusionary' or exclusionary. While the main objective of an inclusionary accelerated procedure is to speedily grant an individual refugee status, the main objective of an exclusionary accelerated procedure is to speedily deny an individual refugee status. It is widely held that the accelerated procedures currently in operation in Member States of the European Union are examples of the latter. The view that accelerated procedures that have been implemented by Member States are exclusionary is supported by Frelick (1997): "In Western Europe, states quickly re-erected the Berlin Wall not with cement but with legal barriers, visa restrictions and fast track [accelerated] procedures designed to keep out the unwanted" (p.12). Additionally, the European Council on Refugees and Exiles (ECRE) has noted that "...many European states have established expedited or accelerated procedures that appear to be based not only on speed but also on "a culture of disbelief" whereby most asylum seekers are presumed to be abusing the system" (ECRE 2005, p.5). The assertion that accelerated procedures that have been implemented by Member States are exclusionary is a serious charge. It is premised on two main points of contention that will be examined in this section. They are: (1) The grounds used by Member States to channel certain asylum applications into accelerated procedures, and; (2) The broad criteria used by Member States to identify 'manifestly unfounded' claims. It is first necessary to provide a brief overview of the introduction of accelerated procedures into the asylum systems of Member States.

The Introduction of Accelerated Procedures in European Union Member States

The 1992 London Resolution urged Member States to incorporate its principles into their national laws no later than 1 January 1995 (The Council 1992, para.12). By the end of that year, just over half of the then 15-member strong European Union had incorporated accelerated procedures into their national asylum policies⁴ (Table 1).

⁴ Denmark, Finland, France, Germany, Portugal, Spain, The Netherlands, and the United Kingdom.

Table 1: Accelerated Procedure (AP) for asylum in EU states

Member State	Legal framework of AP	Year AP started
Austria	1997 Asylum Act	1998
Cyprus	2002 amendment to Refugee Law	2003
Czech Rep.	Asylum Law (also known as the 1999 Asylum Act) ⁵	2000
Denmark	1994 amendment to Aliens Act	1994
France	1992 amendment to Law on Foreigners	1992
Germany	1993 amendment to Asylum Procedure Act	1993
Greece	1996 amendment to the Aliens Act	1999 ⁶
Hungary	Asylum Law	1998
Ireland	Procedures for Processing Asylum Claims	1997
Italy	Bossi-Fini Law (Law 189/2002)	2005
Latvia	National Law on Asylum Seekers and Refugees	1998
Lithuania	Amendment to Law on Refugee Status	2000
Netherlands	1993 amendment to Aliens Act	1994
Poland	2001 amendment to 1997 Aliens Law	2001
Portugal	1993 Asylum Law	1993
Slovakia	Refugee Law (no. 283/95)	1996
Slovenia	Law on Asylum	1999
Spain	1994 amendment to Refugee Law 5/1984	1995
UK	1993 Asylum and Immigration Appeals Act	1993

Source: Author's compilation

⁵ Czechoslovakia was split into the Czech Republic and Slovakia on 1 January 1993. Until 1999 asylum procedure in the Czech Republic was governed by the 1990 Refugee Act of the former Czech and Slovak Federal Republic (CSFR) and its 1993 and 1996 amendments. The 1993 amendment introduced an AP for manifestly unfounded claims in the Czech Republic. The author has chosen to highlight the AP introduced in 1999 simply because is the first AP introduced by Czech Republic. However, it is understood that an AP introduced by the CSFR was in operation in the Czech Republic from 1993 to 1999.

⁶ The 1996 amendment was brought into force in June 1999, under the Presidential decree 61/1999.

By 2005 the remaining countries had introduced accelerated procedures into their asylum systems⁷. All of the 10 new Member States who joined the European Union in 2004 had an accelerated procedure in place prior to accession⁸. Slovakia introduced an accelerated procedure in 1996, Estonia in 1997, Hungary and Latvia in 1998, Slovenia in 1999, Czech Republic and Lithuania in 2000, Poland in 2001, and Cyprus in 2003. Malta was the only state to introduce an accelerated procedure after accession in 2004. France was the first Member State to introduce an accelerated procedure in 1992, while Italy was the last to introduce an accelerated procedure in 2005.

The grounds under which an accelerated procedure is activated vary between countries (Table 2). The decision to process an asylum claim in an accelerated procedure may be made on the basis of one or more of the following five grounds: (1) the applicant's claim is 'manifestly unfounded'; (2) the applicant is from a 'safe country of origin'; (3) the applicant transited through a 'safe third country'; the applicant has a 'first country of asylum', and; (5) the applicant has no documents, or has forged documents⁹. The grounds for accepting or rejecting an asylum application — or for channelling an asylum application into an accelerated procedure — can be more generally organized into 'procedural and formal grounds' or 'grounds related to merit'. Procedural and formal grounds involve a purely technical consideration of the asylum claim and may include 'safe country of origin' grounds and 'safe third country' grounds.

The grounds listed in Table 2 can all be classed as procedural and formal grounds. Grounds related to merit, on the other hand, require an examination of the substance of the asylum claim. Establishing whether or not an asylum claim is based on merit is a more time-consuming process than establishing whether or not technical rules have been 'broken' in making the claim. This explains the high prevalence of procedural and

⁷ Belgium, Italy, Luxembourg, Ireland, Greece, Austria, and Sweden.

⁸ Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

⁹ The Committee on Migration, Refugees and Population (Agramunt 2005) notes that there are other grounds under which EU member states activate accelerated asylum procedures. These include "...repeat applications (Austria), flagrantly failing to comply with obligations (Cyprus), failure to fulfill reporting obligations (Poland)... and the applications of exclusions under the 1951 Refugee Convention (Spain)"

formal grounds in activating accelerated procedures.

Table 2

Member State	Grounds				
	1	2	3	4	5
Austria					
Cyprus					
Czech Republic					
Denmark					
France					
Germany					
Greece					
Hungary					
Ireland					
Italy					
Latvia					
Lithuania+					
Poland					
Portugal+					
Slovakia+					
Slovenia+					
Spain					
Netherlands					
UK					

Note: + In these cases the author was unable to learn the Member State's definition of the term 'manifestly unfounded'. It is possible that the State's definition of the concept 'manifestly unfounded' includes one or more of the other grounds included in the Table.

Source: Author's compilation

UNHCR has noted its concern with this state of affairs by recommending that "...the determination of the credibility of the asylum-seeker's claim or evidence" should not be determined in an accelerated procedure because "...issues of credibility are so complex that they may more appropriately be dealt with under the normal asylum procedure" (UNHCR 1999, p.5, as cited by Bryne 2002). UNHCR emphasized that applications that raised the issue of the "internal flight alternative", and applications dealing with exclusion clauses under Article 1F of the 1951 Geneva Convention should only be processed in the normal asylum procedure (UNHCR 1999, pp.5-6)¹⁰. The rejection of an asylum seeker simply because he or she is not able to validate their identity or establish their travel route ignores that

¹⁰ The clauses in Article 1F allow for persons who have committed very serious crimes outside of the asylum state to be excluded from consideration for refugee status.

fact that asylum seekers who are fleeing persecution are sometimes forced to travel with forged documents or with no documents. That an asylum seeker does not have a valid passport has no bearing on the merits of his or her claim for asylum — nor does it satisfy the presumption that such a claim is unfounded or abusive (van der Klaauw 2001, p.180). The presence of a technicality does not alleviate a State of its obligations under international law.

Competing Definitions of 'Manifestly Unfounded' Claims

Since the UNHCR first defined 'manifestly unfounded' claims there has been a proliferation of successive (and broader) definitions of the concept. A brief glance at Table 2 highlights the prominence of the concept of 'manifestly unfounded' claims in connection to accelerated procedures. This has previously been noted by Husbands (2001): "The concept of a "manifestly unfounded" claim for asylum, justifying some form of so-called "fast track" procedure, is now a quite general one throughout Europe, though operationalised somewhat differently in various countries". The accelerated procedure first introduced by Ireland (in 1997) and the Czech Republic (in 2000) both processed 'manifestly unfounded' claims, however, Ireland listed 12 grounds¹¹ for rejecting a claim as 'manifestly

¹¹ Ireland introduced an AP for 'manifestly unfounded' claims in 1997. Applications can be considered 'manifestly unfounded' on one of the following 12 grounds: "The application does not show any grounds in support of the claim that the applicant is a refugee; The applicant gave insufficient details or evidence to support his/her claim; His/her reason for leaving his/her country of nationality does not relate to a fear of persecution; He/she did not reveal, without reasonable cause, that he/she was traveling with false identity documents; He/she, without reasonable cause, made deliberately false or misleading representations in relation to the application; He/she, without reasonable cause and in bad faith, destroyed identity documents, withheld relevant information or obstructed the investigation of the case; He/she deliberately failed to reveal that he/she had applied for asylum in another country; He/she applied for asylum with the sole purpose of avoiding removal from Ireland; He/she has already lodged an application for asylum in another State party to the Geneva Convention, which was rejected, and he/she has not showed any material change of circumstances; He/she is a national or a resident from a country party to the Geneva Convention in respect to which he/she has not showed any evidence of persecution; After submitting the application for asylum, he/she without reasonable cause has left Ireland without permission; He/she has already been granted asylum in another country, and his/her reasons for not returning to that country are not related to a fear of persecution" (ECRE & DRC 2000).

unfounded' whereas Czech Republic listed only three^{12, 13}. The implications of the lack of a common set of criteria to identify 'manifestly unfounded' claims are dealt with here. As noted above, UNHCR conditionally approved manifestly unfounded procedures on the understanding that the concept was narrowly defined and its use was supported by appropriate safeguards (UNHCR 1983). The Office defined 'manifestly unfounded' claims as those that are "...clearly fraudulent or not related to the criteria for the granting of refugee status" (para. d). The 1992 London Resolution's definition of 'manifestly unfounded' is, by contrast, significantly more expansive. It includes applications that are totally "lacking in substance" whereby "the applicant provides no indications that he would be exposed to fear of persecution or his story contains no circumstantial or personal details", or if it is "manifestly lacking in credibility" whereby "his story is inconsistent, contradictory or fundamentally improbable" (The Council 1992, para. 6(a), 6(b)). Among other criteria, the Resolution also defines claims based on "deliberate deceit" or that are "an abuse of asylum procedures" as manifestly unfounded (para.9). This can include instances where as asylum seeker has destroyed his or her passport and other travel documents while in transit. The Resolution also suggests 'safe country of origin' claims (including where there is an internal flight alternative), and 'safe third country' claims be processed in an accelerated procedure. The Resolution simply *invited* Member States to adopt accelerated procedures, the EU has now *codified* many of the suggestions of the Council in the *Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Receiving Refugee Status* (hereafter Proposal for a Council Directive) (CEU 2004). The Proposal outlines more than 15 grounds under which an application can be considered as 'manifestly unfounded' and examined in an accelerated procedure (art. 29, art. 23(4)(a) to (o)). Accordingly, criteria for

¹² Czech Republic introduced an AP for 'manifestly unfounded' claims in 2000. Applications can be considered 'manifestly unfounded' on one of the following 3 grounds: if "applicants provide[d] false information, file[d] repeat applications, or state[d] economic reasons as their ground for leaving their country" (USCRI 2002; USCRI 2001; USCRI 2000).

¹³ The United Kingdom's usage of the concept of 'manifestly unfounded' is particularly vague. The 1993 Asylum and Immigration Appeals Act introduced an accelerated procedure for claims 'without foundation'. Section 5(3) of the Act states that a claim is 'without foundation' if "it does not raise any issue as to the United Kingdom's obligations under the Convention; or it is otherwise frivolous or vexatious".

considering a claim as 'manifestly unfounded' include situations where the safe country of origin or safe third country concepts apply, where "the applicant has not produced within a reasonable degree of certainty his/her identity or nationality...", and where "the applicant has made inconsistent, contradictory, unlikely or insufficient representation which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution..." (art.23(4)(c), (f) and (g)).

So far we have discussed competing definitions of 'manifestly unfounded' claims at the international and supranational level. Guided by the 1992 London Resolution most EU countries have adopted a much broader definition of 'manifestly unfounded' criteria that goes far beyond the more narrowly defined UNHCR understanding of the concept. That the concept is quite commonly used throughout Europe but operationalised very differently has already been generally discussed above; however, some of the more extreme examples are more relevant to the argument here. In Latvia, for instance, under the National Law on Asylum Seekers and Refugees (effective 1 January 1998), one criteria for considering a claim 'manifestly unfounded' is if an asylum seeker has been residing illegally in the country for more than 72 hours before he or she claims asylum (ECRE 2001, p.182, see also *Appendix A*). The decision to deem such a claim 'manifestly unfounded' is made within 5 days and the asylum seeker has no right of appeal. In the Czech Republic one criterion for considering a claim as 'manifestly unfounded' is if it is based on the desire to "avoid a situation of war" (see Bryne 2002). In this situation an asylum seeker loses his or her right to an appeal with suspensive effect if he or she does not lodge an appeal within three days of this initial decision. Similarly, in Germany under 1993 amendments to the Asylum Procedure Act (effective 1 July 1993), one criteria for considering a claim 'manifestly unfounded' is if it is based on the desire to escape from a "warlike conflict" (ECRE & DRC 2000). In this situation applicants whose claims are deemed 'manifestly unfounded' are required to leave the country in one week¹⁴.

The contrast between the UNHCR and the EU definition of 'manifestly unfounded' claims — and the way in which Member States have chosen to operationalise the concept — represents

¹⁴ During this one-week period, applicants may lodge an appeal with the administrative court. According to ECRE "the court bases its decisions solely on the evidence of written material - no hearing is held" (ECRE & DRC 2000).

significant cause for alarm. Johannes Van der Klaaw of UNHCR cautions,

If the term "manifestly unfounded application" were to be reserved to those claims which have no relation to the refugee definition, the notion would be applicable only in a limited number of asylum claims such as those lodged for reasons of economic deprivation, flight from prosecution or immigration purposes. Assessing whether the claim is lacking in credibility generally requires a material examination (2001, p.180)

In other words, a claim that is deemed 'manifestly unfounded' according to criteria established by a Member State, may, upon further examination be revealed to have merit.

Working Against the Clock: An Assessment of an Accelerated Procedure in the UK

There has been an alarming proliferation of the use of accelerated procedures in asylum-receiving countries, particularly among European Union member states. Despite this there have been few independent assessments of accelerated procedures. This section presents the findings of a small-scale study on an accelerated procedure currently being piloted in the United Kingdom. The report, *Working against the Clock: Inadequacy and Injustice in the Fast Track System*, is the first independent study of the fast track procedure in the United Kingdom (Oakley & Crew 2006)¹⁵. It is one of only a handful of similar country-specific studies on this issue. In 2001, the Irish Refugee Council published a substantial report entitled *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations* (Mullally 2001). The report discusses the gradual erosion of procedural safeguards in the Irish asylum system and examines the use of accelerated procedures in Ireland, Denmark, Canada and the United States. The report concluded by saying, "[a] desire for speed and efficiency has won out over our commitments to natural justice and fair procedures" (p.43). A 2003 report of an accelerated procedure in operation in The Netherlands was similarly scathing. In 2003 Human Rights Watch released a report entitled *Fleeting Refuge: The Triumph of Efficiency Over Protection in Dutch Asylum Policy* (HRW 2003). The report, based on three months of in-depth research into Dutch asylum policies, identifies the use of an accelerated procedure as an area of

¹⁵ The complete report can be downloaded at www.biduk.org

major concern. The report concluded that the accelerated procedure presented "...an unnecessarily high risk that the procedure will result in violations of the Netherlands' non-refoulement obligations" (p.31). A common thread amongst these reports is the active part taken by refugee and similar organisations in commissioning or even undertaking the research.

The Fast Track Procedure in the United Kingdom

The accelerated procedure in the United Kingdom is known as the 'fast track' procedure. The fast track procedure was first piloted at Oakington Immigration Reception Centre which opened on 20 March 2000¹⁶. Prior to the opening of the centre, Minister Barbara Roche announced that Oakington would "strengthen our ability to deal quickly with asylum applications, many of which prove to be unfounded" (Great Britain 2000). She explained that asylum claims that may be certified as "manifestly unfounded" would be assessed within the fast track pilot scheme. The facility processes those asylum claims that can be "decided quickly" (Great Britain 2006). It enables an initial decision on an asylum application to be made in 7 to 10 days (Great Britain 2004, p.71). Individuals are detained and have legal advice from on-site representatives throughout the process. If it is not possible for a claim to be decided within approximately 7 to 10 days, the applicant is moved to another detention facility or is granted temporary admission. Initially the fast track facility at Oakington was limited to single male applicants from countries that were believed to be those where in general there is no serious risk of persecution.

In 2003, Home Office Minister Beverly Hughes announced a new fast track pilot scheme, extending the process to Harmondsworth Immigration Removal Centre. Minister Hughes declared that a much faster appeals process would be used on "straightforward claimants", making for a quick decision and removal (Great Britain 2003). The fast track procedure at Harmondsworth, which has been operational from 10 April 2003 onwards, is sometimes referred to as the "super fast track"¹⁷. Although it is

¹⁶ As noted in Table 1, the United Kingdom first introduced an accelerated procedure under the 1993 Asylum and Immigration Appeals Act (effective 26 July 1994). It allowed 'claims without foundation' to be processed in an accelerated procedure (see *Appendix A*). However, it was only in 2000 that a significant number of claims began to be processed in the accelerated procedure under the pilot programme discussed here.

¹⁷ An identical fast track procedure has been in operation at Yarl's Wood Immigration Removal Centre

modelled after the fast track procedure at Oakington, the Harmondsworth fast track is a significantly quicker process for making an initial decision on asylum claims. The "super" fast track facility at Harmondsworth enables an initial decision on an asylum application in 2 to 5 days (see *Appendix B*). Unlike the fast track procedure in operation at Oakington, the 'super' fast track procedure does not certify claims and as such all cases have a right of appeal.

The Harmondsworth fast track procedure applies to single male applicants who are from countries that the Secretary of State deems there to be, in general, no serious risk of persecution (see *Appendix C*). With the introduction of the 2004 Nationality, Immigration and Asylum Act, the criteria for inclusion into the super fast track procedure was expanded to include a category of "clearly unfounded claims". This applies to applicants who "fit a description of persons" coming from a country or part of a country where there is generally no risk of persecution to people fitting that description¹⁸. However, any "straightforward" application can be fast tracked, regardless of country of origin.

Safeguards of the 'Super' Fast Track Procedure

The rapid assessment of asylum claims under the fast track system has been widely criticized for placing severe time constraints on asylum applicants and their legal representatives. One leading legal and human rights organisation believes that the timescales are "...not sufficient to enable the asylum seekers to make their case, document their need for protection, receive meaningful advice from a lawyer, or effectively challenge a negative decision on appeal. In sum, the process is not one that can deliver fair decisions" (JUSTICE 2003, p.10). The Medical Foundation for the Care of Victims of Torture has expressed concerns that the speed of the super fast track procedure at Harmondsworth may mean that allegations of torture are not dealt with appropriately. In a Statement released in 2005 the Foundation explained "...we have found cases where allegations of torture have been made and no one has referred them to us. We have been told that the process was just 'too quick' for a referral" (Medical Foundation 2005). Proponents of the fast track procedure have pointed out that the following safeguards are built into the system: (1) Only those cases that are 'straight-forward'

since 11 May 2005, the only difference being that the Harmondsworth facility processes claims by single men while the Yarl's Wood facility processes claims by single women.

¹⁸ Section 27.

are included in the fast track procedure; (2) the Detained Fast Track Process Suitability List ensures that individuals who are unsuitable for the fast track are not included in the pilot scheme; (3) the duty solicitor scheme ensures fast track detainees have access to legal representation throughout the process; (4) the timeframe of the fast track procedure is "flexible", and; (5) legal representatives may make three types of legal applications at appeal, including an application to transfer the claim from the fast track system to the mainstream system. The Home Office believes that these safeguards "...enable appellants who may not be suitable for the fast track process to be transferred from the pilot scheme to the main appellate system" (Great Britain 2004, p.75).

Bail for Immigration Detainee's Concerns about the Fast Track Procedure

Bail for Immigration Detainees (BID) is a small charity that works with asylum seekers and migrants detained under Immigration Act powers, in removal centres and prisons in the United Kingdom. BID exists to improve access to bail for asylum seekers and migrants detained under Immigration Act powers. In May 2003, approximately one month after the fast track pilot scheme was expanded to include Harmondsworth Immigration Removal Centre, BID submitted written evidence to the Select Committee on Constitutional Affairs Inquiry into Asylum and Immigration Appeals (BID 2003). BID used this opportunity to formally outline its concerns that "...the criteria for detention may be ignored in favour of other criteria (that may not be published) and that victims of torture and rape and other trauma will be subjected to the pilot scheme" (BID 2003, para. 4.D). Additionally, BID observed, "no evidence has been presented which supports the suggestion that it is possible to identify a "straight-forward" claim" (*ibid.*).

In December 2005, BID participated in the Home Affairs Inquiry into Immigration Control (BID 2005). At this time the fast track pilot scheme at Harmondsworth had been in operation for more than two years and BID had begun to receive an increasing number of communications from fast track detainees who were complaining about the injustice of the procedure. In particular, detainees were complaining about the lack of time to prepare for the asylum interview or appeal (including gathering supporting evidence), poor quality legal representation, frequent withdrawal of publicly funded legal representation prior to the appeal, and lack of access to bail (Oakley & Crew 2006, p.5). BID used the inquiry as an opportunity to raise concerns about the speed, fairness and scrutiny of detained fast track

processes. In the submission to Home Affairs BID argued "...there must be an automatic review of detention provided to detainees in the fast track, and that the speed of the procedure should be balanced by automatic representation at appeal, without the applications of a merits test for public funding" (p.4).

The fast track procedure at Harmondsworth Immigration Centre was evaluated by the government in September 2003. The results of the evaluation were not made available to the public, however BID was able to obtain a copy of the evaluation by filing a Freedom of Information (FoI) disclosure request¹⁹. Unfortunately, a significant amount of the report was blacked out. BID therefore felt it was necessary to undertake an independent review of the fast track procedure. The research had three main objectives: (1) To test the assumption that the safeguards that are built into the system are inadequate, and in any case, not being followed; (2) To provide a useful tool for those individuals and organisations who are challenging the rapid assessment of asylum claims, and; (3) To provide a forum for the voices of immigration detainees and their legal representatives.

Following discussion with fast track detainees and with key informants working within the fast track procedure, Bail for Immigration Detainees was concerned that safeguards built into the fast track procedure were not being followed. Further, it was felt that those safeguards that were in place were inadequate. BID gathered information from three sources in order to test these assumptions: (1) Fast track asylum appeal hearings at Harmondsworth Immigration Removal Centre were monitored over a one week period in March 2006; (2) Fast track detainees whose cases were observed during this period were interviewed, and; (3) Legal representatives of these detainees were interviewed. BID also suspected that due to removal barriers (for example, difficulties in obtaining travel documents and non-cooperation from the country of origin), unsuccessful applicants continued to be detained well after they had been served with a removal order. Sixty days after BID observed the last appeal hearing a follow-up exercise was conducted to find out how many of the detainees remained in immigration detention.

To find out how asylum seekers and their legal representatives are being affected by the rapid assessment of asylum claims, researchers were required to interview a vulnerable and institutionalized population, ask questions of a

¹⁹ A copy of this document is available on the BID website at www.biduk.org

personal and emotional nature, and handle confidential legal information. The project therefore raised ethical issues. The many ethical questions raised in conducting research with vulnerable populations, in particular refugees and asylum seekers, has led to the development of a number of 'refugee-specific' research guidelines (see Jacobsen & Landau 2003; RSC n.d.; SHUSU 2004; Zetter 1991). Jacobsen and Landau (2003) argue that in refugee studies there is a general failure to address the ethical problems related to researching vulnerable communities. They note "[o]ne largely unacknowledged problem is the issue of security breaches arising from confidentiality lapses by the researcher, other problems relate to the impact of researchers' presence" (p.2). For this reason special attention is paid here to these issues.

The nature of the fast track procedure in the United Kingdom, where asylum seekers are detained throughout proceedings, meant that researchers would be approaching institutionalized subjects for the purposes of collecting data. The conditions of conducting research in an institutionalized environment are far from ideal. Face-to-face communication can be difficult to achieve and often requires the permission of the institution. Apparent complicity of researchers with those in charge of the institution may mean that potential participants may not wish to be involved in the research. If researchers are seen as acting in an official capacity it could mean that participants' answers will not be as honest or forthcoming as desired. These risks have been noted previously: "There is a risk that those held in detention will either not cooperate with research at all, or will misunderstand the nature of the research process, providing answers to questions that are aimed at securing their release rather than presenting honest and unbiased accounts of their situation" (Black *et al* 2005, p.6). Even access to those in immigration detention can be extremely difficult to secure. The detention centre may not be easily accessible through public transport links, making it time-consuming and expensive for researchers to travel to in the first place. More importantly, conditions within a detention centre are not ideal for conducting research of a personal and sensitive nature. Interviews may have to take place within set time limits that are dictated by visiting hours, and may not be held in a private place. Where the research has not been granted official approval by the detaining authorities, participating in such research may adversely affect participants. These challenges have meant that few empirical studies have been carried out on asylum seekers in immigration detention (for UK-specific examples see Black *et*

al, 2005; Cook & Hargreaves 2004; Cole 2003; Cutler & Ceneda 2004; Mcleish, Cutler & Stancer 2002; Owers 2006; Owers 2005; Salinsky & Dell 2001. For examples of studies from other countries see Mares *et al* 2002; Nachman 1993; Sultan & O'Sullivan 2001; Yoxall & Boyd 2004).

Bail for Immigration Detainees (BID) works to influence detention policy and practice by publishing research, and by campaigning to influence asylum policy in the United Kingdom. BID also provides free information and support to detainees to help them exercise their right to liberty (see BID 2006; BID 2004a; BID 2004b). Under certain circumstances the organisation also prepares and presents legal applications in order to secure the release of detainees. BID is therefore well known to the detained population in the United Kingdom as a legal service information provider and advisor. It was therefore immediately apparent that potential research subjects must be made aware that BID's role for the purposes of the research project was not one of legal service information provider/advisor and that their participation in the study would have no impact on their application for asylum. The need to ensure a clear demarcation of this kind was recognized by an earlier UK-based study that conducted a series of in-depth interviews with asylum seekers and migrants being held in three immigration detention centre (Black *et al* 2005). Black *et al* (2005) developed a formal ethical statement that "...concentrated on procedures to eliminate risk (ensuring anonymity, and a clear demarcation for legal processes affecting respondents) and to ensure informed consent (involving a process of explanation, understanding, and agreement to participate)" (p.7). Similarly, our study developed a Project Consent Form that researchers read to potential participants (see *Appendix F*). The form explained the purposes of the research project and the confidentiality measures that would be taken. It was made clear to potential participants that researchers were not interviewing them to help get them out of detention. They were told "[t]aking part in BID's research will not help your individual case to stay in the UK, but BID hopes that in the long-term this report will help others who are locked up in the fast track" (*ibid.*). Researchers did not proceed with the interview until it was clear that participants fully understood the remit of the project. Similarly, before legal representatives were interviewed researchers clearly explained the purposes of the study, explained the confidentiality measures that were in place, and secured informed consent²⁰.

²⁰ Permission to contact legal representatives was sought and granted by detainees.

Interviews with detainees and legal representatives took place over the telephone. This is not ideal, and particularly in the case of the detainee interview, it raises questions about informed consent. Piper and Simons (2005) explain the concept of informed consent thusly, "...those interviewed or observed should give their permission in full knowledge of the purpose of the research and the consequences for them of taking part. Frequently, a written informed consent form has to be signed by the intending participant" (p.56). Because interviews took place over the telephone, subjects did not sign the Project Consent Form. Instead, researchers read the form to subjects over the telephone and, with their understanding and permission, signed on their behalf. The reasons that face-to-face interviews are preferable to telephone interviews are clear. Had interviews taken place at the immigration removal centre however, privacy may have been compromised. First, it is likely that interviews would have taken place in a visiting room where conversation between researcher and subject may have been overheard. Second, this would have alerted officials to the fact that detainees were participating in the study. The decision to conduct interviews over the telephone ensured that the privacy of the subject was protected (subjects spoke to researchers over the telephone in their private room), and that the subject's participation in the study was not general knowledge. While it is true that a consent form could have been posted to detainees, mail is monitored and, as such, this may have alerted staff to the subject's involvement in the study. Interviews were conducted in a language chosen by the detainee and the research team is confident that detainees fully understood: (a) that their involvement in the study was voluntary, and; (b) that their involvement in the study would have no bearing on their asylum application. All data was collected and stored in accordance with data protection standards to ensure confidentiality²¹.

The first stage of the research — court monitoring — collected quantitative data through passive observation. Court monitors were given a simple 2-page Court Monitoring Form (see *Appendix E*) and were asked to observe court proceedings and note basic details about the hearing (for example, whether the applicant had legal representation or whether a request for adjournment was made). Court monitors had the option to record observational notes; however, the emphasis here was on the collection of quantitative data. The second and third stages of the research — detainee interviews and legal representative

interviews — collected qualitative data with the use of a structured interview. The Detainee Interview Form (see *Appendix G*) was designed to gather qualitative information on how asylum seeker's felt about the rapid assessment of their asylum claim. The emphasis here was on the presentation of their asylum claim at the appeal hearing (so for example individuals were asked to describe what happened at their appeal and how they felt about the Judge's decision). Individuals were also asked to comment more generally on the fast track procedure. Similarly, the Legal Representative Interview Form (see *Appendix H*) was designed to gather qualitative information on how legal representatives dealt with the inherent pressures of arguing for an asylum claim that was being processed within the fast track procedure. Here, the emphasis was on the particular case that was observed by BID and so legal representatives were asked if they knew why their client's case was being processed in the fast track procedure, what types of applications (if any) they had made, and if they were given enough time to adequately prepare the case. Legal representatives were also asked to comment more generally on the procedure. The final stage of the research — the tracking exercise — collected data on the progression of the sample cases through the system. Detainees who remained in immigration detention sixty days after BID observed the last appeal hearing were interviewed again (see *Appendix I*) and asked about removal barriers.

Conducting the Research

The first phase of the research — court monitoring — took place during a one-week period in March 2006. During this period researchers acting on behalf of Bail for Immigration Detainees observed all Super Fast Track asylum appeal cases that were heard before the Asylum and Immigration Tribunal (AIT) at Harmondsworth Immigration Removal Centre (IRC). The Super Fast Track Facility at Harmondsworth IRC has 3 on-site court facilities that can each process 2 asylum appeal hearings a day. Depending upon the volume of cases, a maximum of 30 appeals can be heard each week. During the week that BID was monitoring cases, the AIT heard 22 cases. A preliminary visit to the court facilities by the author and the Executive Director of BID ensured that researchers would gain full access to the court proceedings. Although the courts are open to the public, it was felt that cooperation with the court clerks would be essential for the success of this phase of the research project. The court clerks were agreeable to monitoring taking place, and offered to give researchers the information necessary to fill out

²¹ Additionally researchers signed a confidentiality form to protect the privacy of research participants.

the 'Basic Information' section of the Court Monitoring Form (see *Appendix E*) before the court was in session. 11 researchers (with one researcher assigned to one hearing) monitored all of the fast track asylum appeal cases that were heard before the AIT during this one week period (22 cases).

The second phase of the research — detainee interviews — took place shortly after appeal hearings were observed. In all but one of the 22 cases, an interpreter translated court proceedings to the detainee. This information was recorded on the Court Monitoring Form and the research team was able to assign detainee interviews to researchers with the appropriate language skills. Researchers contacted detainees whose cases had been observed over the telephone and asked if they would agree to be interviewed about their experience²². Interviews took place over the telephone and lasted approximately 10 to 15 minutes. In total, 16 of the 22 detainees participated in these interviews²³. The third phase of the research — legal representative interviews — took place after the detainee interviews. With limited success, researchers contacted legal representatives of the 22 detainees whose cases were observed and asked if they would agree to be interviewed about their experience working within the fast track procedure. In total, seven legal representatives participated in these interviews²⁴.

²² As noted previously, detainees spoke to researchers over the telephone in their private rooms. Researchers phoned the switchboard at Harmondsworth and were given the extension number of the detainee's telephone.

²³ Researchers were unable to contact six of the detainees whose cases were observed. In three of these cases this was because of a language barrier (this research was unfunded and BID was unable to find volunteer interviewers who would be able to conduct the detainee interview in the necessary language). In the other three cases the detainee had been released from immigration detention and BID was only able to learn of the (temporary) address for one of the detainees (this detainee was sent a letter but unfortunately BID received no reply). BID was able to interview the legal representatives that worked on two of these cases. All of the detainees with whom researchers made contact agreed to participate in the study.

²⁴ Researchers attempted to contact all of the legal representatives that were involved in the 22 cases, but had only limited success in contacting legal representatives who were working under strict deadlines and were often away from the office or preparing a client's case. However, all the legal representatives with whom researchers made contact agreed to participate in the study.

The fourth and final phase — the tracking exercise — took place sixty days after the last appeal hearing was observed. The 'Super' fast track facility at Harmondsworth enables an initial decision on an asylum application in 2 to 5 days and aims to shorten the entire process — from assessment to removal — to just 4 weeks. However, difficulties in obtaining travel documents and non-cooperation from the country of origin may mean that unsuccessful applicants are detained well after they have been served with a removal order. The research team learnt about the location of an individual (whether they had been released to a UK home address, removed from the UK, or remained in immigration detention) through the IRC switchboard. Where possible researchers contacted individuals who were still in detention and conducted a further interview (see *Appendix I*). The tracking exercise revealed that 6 of the detainees were still in immigration detention 60 days after BID observed the last appeal hearing²⁵.

An early concern that arose during the planning stages of the study was whether or not the presence of researchers in court would have an impact upon court proceedings. The impact of the observer on the observed has been discussed by Jones (2005): "Observers always have some kind of impact on those they are observing who at worst, may become tense and have a strong sense of performing, even of being inspected" (p.140). In order to make researchers as unobtrusive as possible, BID instructed researchers on appropriate dress and behaviour in court. Although the courts at Harmondsworth are open to the public, in most instances the researcher was the sole outside observer present. Comments from some of the Immigration Judges during proceedings made it obvious that the presence of researchers during the week did not go unnoticed by the judiciary. However, it is impossible to determine if the presence of researchers impacted upon court proceedings.

Most of the detainees in the study spoke two or more languages, however many did not speak English or were not comfortable enough with their English language skills and the interview took place in another language. Fortunately, BID was able to access its network and find researchers who had a demonstrated interest in asylum and immigration issues, and who had a wide array of language skills. Researchers who conducted telephone interviews with detainees in a language other than English later translated the interview

²⁵ Researchers were able to interview 4 of these 6 detainees. We were unable to interview 2 of these detainees because of a language barrier.

form for the research team at BID. In some cases researchers submitted a form with the both the interview language responses and the English translation underneath (although this was not standard procedure).

The language barrier was one factor that contributed to a small sample size. The research was unfunded and in some instances BID was unable to find volunteer researchers who would be able to conduct detainee interviews in the necessary language. BID observed 22 asylum appeal hearings and interviewed 16 of the 22 detainees whose cases were observed. 4 of these 22 detainees were unable to be interviewed because of a language barrier. During the tracking exercise the language barrier meant that BID was able to interview only 4 of the 6 detainees who remained in immigration detention²⁶. The language barrier was not the only, or even the most significant, factor that contributed to the small sample size. First, although it is likely that BID would have been able to find researchers with appropriate language skills, the speed of the fast track procedure meant that the research team was not afforded the necessary time to do so (by the time a researcher was found it is likely that the detainee would no longer be in immigration detention). The fast pace of the fast track procedure also made it difficult to contact legal representatives who were often away from the office or preparing a client's case²⁷. Second, the research was unfunded and, as such, it was decided that asylum appeal hearings would only be monitored for a one-week period. The resultant sample size of 22 cases is nonetheless respectable, and, given that the research was unfunded, it is remarkable that so many detainees were able to be interviewed. The research team is confident that the sample is representative and this small-scale study illustrates a number of serious injustices and inefficiencies in the fast track procedure.

²⁶ The other 2 detainees were released from immigration detention before the second phase of the research began. One individual was granted asylum and the other individual had his case removed from the fast track procedure and he was released from immigration detention. Unsuccessful efforts were made to contact these individuals through a letter.

²⁷ At first glance the number of legal representatives who participated in the study seems small. However, the number of potential subjects from the legal representative pool *was* extremely small. Of the 22 detainees whose cases were observed, only 9 had legal representation. 7 legal representatives, two of which worked on the same case, participated in the study.

The following section presents the results of the study²⁸. In general, the findings dispute the government's argument that safeguards are built into the fast track procedure.

Lack of Time to Gather Evidence Risking Breaches of Detention Policy

The decision to place an asylum claim in the fast track procedure is made on the basis of the screening interview when an applicant claims asylum (either at a UK port, an Asylum Screening Unit or at a local enforcement office). Immigration officers who conduct these screening interviews are not expected to engage in any analysis of asylum claims (Great Britain 2006b). According to the *Fast Track Process Instructions* these Officers must however "...be alert to asylum claimants who may be suitable for the Detained Fast Track (DFT) process," and, in cases where a claimant is not referred to the process they must "...enter a note of the reasons for non referral" (Great Britain 2006b). Based upon the limited information gathered at the screening interview, the National Intake Unit (NIU) decides if the case is suitable for the fast track procedure.

Government policy on detention, contained in the OEM, states that certain categories of people should be detained "in only very exceptional circumstances". Among them are survivors of torture (Great Britain 2006a, para. 38.3). However, court observation data gathered during this study suggests that survivors of torture are being detained at Harmondsworth. In four of the 22 cases, allegations were made that the applicant had been a victim of torture (Cases F, G, T and S). When asked "Do you know why your client was chosen for the fast track procedure?", the legal representative of Case T replied, "No. They thought they could complete the matter quickly... He was a torture victim. I don't really know why he was in the fast track as [the applicant's country of origin] is not on the White List"²⁹. Case E provides an example of a case where an allegation that the applicant had been a victim of torture and was suffering from mental health problems was made, but was not considered by the Immigration Judge. In her request for the case to be taken out of the fast track, the legal representative informed the Judge

²⁸ The following section is an excerpt from the report *Working against the clock: Inadequacy and Injustice in the Fast Track System* (Oakley & Crew 2005). The author was responsible for analyzing the data collected from the study and presenting the findings in the final report.

²⁹ The 'White List' refers to countries that the Secretary of State deems there to be, in general, no serious risk of persecution (see *Appendix C*).

that a medical and psychological assessment appointment had been made for the appellant on a date that was outside of the fast track timeframe. While the Judge did allow for the case to be removed from the fast track it was not on this basis but rather on the grounds of a large amount of supporting documentation that could not be dealt with within the fast track time frame. Neither the appellant's claim that he was a torture victim nor his current mental state was considered in court. Yet it was only once the applicant's case had been removed from the fast track procedure that the torture allegation could be (and was) substantiated.

The Merits Test and Crisis in the Funding Regime

All fast track detainees are entitled to publicly funded legal representation during the initial stages of their asylum application and at interview. This is known as Legal Help. However, they may not be entitled to publicly funded legal representation for any appeal against refusal of asylum depending on the merits of the case as perceived by their legal representative. Fast track detainees at Harmondsworth and Yarl's Wood are offered representation under a duty solicitor scheme that is run by the Legal Services Commission (LSC). Representation by a duty solicitor at the appeal stage (known as Controlled Legal Representation – CLR) is subject to satisfying the merits test for public funding. This means that only those cases that can be identified as having a moderate or better chance of succeeding in court are awarded public funding. Those cases where the chances of success appear to be borderline or unclear may also be awarded public funding (see ILPA 2005, p.250). If the prospects of success are considered poor (less than 50%) the representation for the appeal is to be refused. In a recent letter from the LSC to all fast track duty solicitors, legal representatives are reminded that:

In many fast track cases the prospects of success will be unclear because you will only have had a very limited amount of time to take instructions and prepare the case. You should grant CLR where the prospects are unclear or borderline. They may remain unclear until you have taken full instructions from your client on the reasons for refusal, applied the law to the facts, obtained any expert evidence or objective country material relevant to your case, interviewed any witnesses and had full disclosure of relevant documents from the Immigration Service/Home Office. (ibid.)

BID found that the merits test for public funding for legal representation represents a significant

obstacle to fast track detainees' being able to obtain representation for their appeal in court. Many representatives are deciding that the prospects of success are less than 50%, leaving the detainee with no legal representation – whereas the Home Office is always represented.

Court observation data showed that approximately 77% of the sample was deemed not to qualify for public funding at the time of their appeal. As a consequence, 13 of the 22 fast track detainees (approximately 60%) were not legally represented at their asylum appeal hearing³⁰. The following exchange from the court proceedings of Case D also demonstrates that the concept of the merits test is sometimes not adequately explained to applicants:

Applicant: I want to get in touch with an organisation to find out why I don't have a representative in this case because in the forms that were read to me it does state I am entitled to a lawyer.

Immigration Judge: You had a representative in the interviews. You are not entitled as a right to have a lawyer here out of public funds and I did assure you that not having a lawyer would not prejudice your case. Lawyers are not charities.

Legal representatives on the duty solicitor scheme must strictly apply the merits test to all their cases. Representing a case that does not merit public funds can result in severe penalties for legal representatives and their firms. Under new rules soon to come into force, they could lose their contract to do asylum work if they do not win at least 40% of the asylum appeals they grant public funding to. Some solicitors who feel that their success rate will be lessened if they grant public funding for a fast track appeal may refuse to grant funding for a case which has some merit. Failing to represent a case that has merit or where the merits are "unclear" or "borderline" is contrary to LSC guidance, but BID fears that this is occurring. BID is also concerned that some solicitors may be refusing public funding when arguably the merits test is met and then requesting payment at the hearing on a private basis. Failing to represent a client or requesting payment when the merits test is met, are clearly unethical practices and BID was extremely disturbed to discover incidences of both amongst the sample. This is nothing less than complicit exploitation of an unfair system whereby lawyers and caseworkers carry out the initial stages of work on a case and then use the merits test as an

³⁰ Five of the 22 detainees had publicly funded legal representation. Four of the 22 detainees had privately funded legal representation.

excuse not to carry out their ethical duties of providing proper representation, dropping their client at the appeal stage. It is very clearly against Law Society guidance, best practice and is in breach of professional ethics. When asked, "If you did not have a lawyer at your appeal could you explain why not?", another detainee replied: "The lawyer said to me 'I don't have time'. He didn't tell me anything about a poor prospect of success." (Case N).

BID was able to interview nine of the 13 detainees who went before an Immigration Judge with no legal representation. Four of these 13 detainees said that they had been asked to fund their own legal representation. One detainee said: "[The lawyer] said you give me £1200 and I'll deal with your case. I didn't have the money so I represented myself" (Case R). The detainee of Case I was told by his legal representative that his case had merit but that the firm wanted £1,000 to represent him at appeal. He could not afford to pay so was unrepresented at his appeal. This is clearly in breach of the LSC guidance and also unethical and contrary to Law Society guidance. Legal representatives must refuse CLR in those cases where the prospect of success in court is assessed to be clearly below 50% (see ILPA 2005, p.250). However, the responsibility of legal representatives does not end once CLR is refused. Representatives must inform their client of their decision to refuse public funding and also give them a review notification form (also known as a CW4 form) which, in theory, enables them to challenge that decision³¹.

BID was interested in finding out how many of the detainees in this sample were actually given a CW4 Form. Of the 9 detainees interviewed who went before the Immigration Judge without any legal representation, four said they had received a CW4 form and five said they had not. One detainee who received a CW4 form said that he did not know what it was, suggesting that some legal representatives may fulfil their obligation to give their client a form but fail to fully explain the situation to them (Case F). A second detainee said: "The CW4 was sent but only arrived the day before the court hearing, too late to do anything about it" (Case O). The condensed timeframe of the fast track means that some detainees are

"dropped" by their representatives on the day of their appeal hearing, making it impossible to seek alternative representation. In BID's view, this is often due to the insistence by the LSC that if funding is granted on the basis that the prospects of success are unclear, the decision must be revisited prior to the hearing. One legal representative expressed great dissatisfaction about the LSC's understanding of the fast track procedure:

LSC funding is also a massive issue because of the fact that the LSC does not understand the fast track procedure. In this case the LSC initially refused to cover the costs of translation because they were too high. We needed massive amounts of documentation translated and authenticated at short notice. To get a qualified person to do this at short notice is expensive. The LSC does not understand the specific time constraints that we are working under and they do not differentiate between fast track cases and those cases in the general asylum stream when they are making funding decisions. (Case E)

The experience of another legal representative also suggests that legal representatives may not be receiving LSC funding support within an appropriate timeframe: "We needed expert evidence in relation to newspaper reports of army membership... That was quite rushed, even given the adjournment. We really had to push the experts. I'm not sure if I got LSC funds in time" (Case J).

Lack of Time to Adequately Prepare the Case

In most fast track cases, applicants are given only two days to appeal the initial decision to refuse the claim for asylum. During this time, the appellant and his legal representative, if any, must consider and draft full grounds of appeal. This would usually include formulating what will usually be complex legal arguments, supported by precedent, and gathering extensive supporting evidence. This may include a detailed witness statement, employment records, medical/psychological evidence or assessment and country specific information or expert evidence. Original documents frequently need to be obtained, translated and authenticated. Legal representatives have complained that the speed of the fast track procedure does not allow them to follow best practice in taking instructions from their client at the initial meeting that takes place on the day of the asylum interview. One said:

...you are always flying by the seat of your pants. You are working against the clock... Outside the fast track you have time to go away and come back, which

³¹ "...if you refuse CLR you must inform your client of their right of review and provide them with CW4 having completed your part. You can assist your client in completing the application for Review under Legal Help. If they wish to apply for a Review, and an appeal is lodged or to be lodged, it is best practice to notify the AIT of this and ask that the appeal not be listed until the Funding Review Committee has heard the appeal", 'Immigration specification of the General Civil Contract'

is better... You don't have to overload the client with information and then start taking instructions on a potentially traumatic history. In fast track you have to do this all at once. Any longer than the three hours [allocated for the meeting], you or the client are not thinking straight...I wouldn't advocate this system, it has huge problems. It would be better to have time to go away and clarify and have time to come back and take further instructions. (Case K)

In six of the 22 cases a request was made for more time at the appeal stage, in order to gather supporting evidence. This request was granted in four cases. Of the 16 fast track detainees that were interviewed, eleven said that they were unable to gather evidence in time for the appeal. It is clear that this lack of time leaves detainees feeling harshly-treated and disadvantaged by the system. The following statement was made by a detainee whose request for more time was refused in court:

To appeal you need grounds and evidence to show in court. Two days is not enough for someone to find evidence to work on his case so he can stand strong in court. You do appeal because you can but you are not appealing in confidence. You have no time and the lawyer has no time to look at your case and where you are weak and where you are strong. So you are pushed to appeal with no evidence...If you have evidence in court, then you have confidence. If you have nothing, no one will listen to what you are saying. They [the Home Office] had evidence and the time to work on the case and our weaknesses. (Case K)

None of the legal representatives who were interviewed felt they were given sufficient time to properly prepare the client's appeal. One of the legal representatives, who was able to get her client removed from the fast track, explained the difficulties in preparing an appeal in the given timeframe: "...basically time limits are absolutely horrendous...The way we get documentation in piece-meal fashion from the Home Office in respect to the refusal makes preparation over a short period even harder" (Case E). The time pressures also affect cases that are adjourned to allow the applicant and his legal representation to gather supporting evidence. One legal representative made this observation in respect to a case where a short adjournment was allowed:

Interviewer: *If you had had more time what else would you have been able to do to prepare your client's case?*

Legal representative (Case J): *We were disappointed with the expert evidence; we would have had time to get a better expert instead of one just ready to do a report at very short notice. We would have got a more detailed witness statement.*

This suggests that even when flexibility is applied, the ability of legal representatives to adequately prepare their client's case is still compromised if the case remains in the fast track procedure. A legal representative who was able to get her client's case taken out of the fast track described the action she had taken:

...since his case has been removed from the fast track we were able to procure a country expert report. Certain information is not available in the public domain and since he is from a minority group in [country of origin] it is essential that we get a country expert to comment on the organisations he was a member of in [country of origin]. We definitely would not have been able to do this if the case remained in the fast track. (Case E)

Restricted Communication Between Lawyer and Client

One of the reasons that Harmondsworth was selected as a fast track facility is because of on-site court facilities. The Home Office states of Harmondsworth: "Legal visits take place seven days a week between 09:00 to 20:00. All legal appointments are facilitated within 24 hours of the request being made"³². Yet our study found that detainees have difficulties in accessing their legal representatives, whilst access to their clients for legal representatives was problematic and restricted. The legal representative dealing with Case K stated:

We got a phone call late in the day, the day before the interview. I tried to book a Legal Visit for the morning and no one was available on the switchboard to let me. I faxed to book a legal visit at 10 a.m. and I got there at 9:30 or 9:45 but it's up to them how quick they are with security.

The representative dealing with Case M stated:

One of my colleagues has had to go three times to Harmondsworth for appointments with fast track clients on the rota, and each time it was cancelled. She had to wait outside because they had problems getting an interpreter, and the guards would not let her

³² Home Office documentation circulated to practitioners by ILPA

in. They even asked her, at the guard house, to wait in the MacDonald's!

Widespread Confusion About the System Amongst Detainees

The Office of the Immigration Services Commissioner (OISC) includes in its training to immigration caseworkers a list of information that the client needs to be given at initial interview, which includes explaining fairly complex legal points. This list includes: confidentiality procedures; organisational procedures including complaints; the role of the representative; the role of any interpreter present; the asylum application process including refugee and European Convention of Human Rights definitions; that removal cannot take place pending the outcome of the claim unless it is certified as manifestly unfounded; that the application lapses if the applicant leaves the UK; the implications of the different grants of leave; the implications of a failed application.³³

BID's research suggests that there is pressure on fast track legal representatives to take short cuts when giving initial information, adding to detainees' confusion, bewilderment, frustration and stress. In three cases, the detainee said that they didn't know that their case was being dealt with in the fast track and didn't understand what it was (Cases F, K and S). In response to the question "Who explained the process to you?", the detainee from Case K responded, "No-one. They just said your case is being fast tracked. When they said this, I didn't know what fast track was. I didn't know anything."

Lack of Legal Representation in Court at Appeal

Thirteen of the 22 detainees in our sample (approximately 60%) went before an Immigration Judge with no legal representation. Statistics released to BID under the Freedom of Information Act show that in January and February 2006, of 132 appeals, 72 appellants (55%) were not represented,³⁴ demonstrating that BID's sample was broadly representative. Our court observation data documents four cases where Immigration Judges assured applicants that their lack of legal representation would not prejudice their case. Through the court interpreter, one appellant was told by the presiding Judge, "The Home Office Presenting Officer and I are here to help you. You are not disadvantaged by your lack of representation". The Judge presiding over Case C

³³ OISC training materials, 2005

³⁴ 2006, 69 appellants were represented at their appeal and 31 were not. In February, 63 were represented and 41 were not.

said that since the applicant was un-represented, she herself would "try to assist his presentation". In another case the Judge explained to the un-represented applicant that she would ask him the questions that his representative would have asked (Case O). In BID's view it is not acceptable for Judges to suggest that the role of an absent legal representative could be assumed by either the Immigration Judge or the Home Office Presenting Officer (HOPO). The role of the Immigration Judge is to adjudicate the case, while the role of the HOPO is to argue against the asylum claim. It is not the responsibility of either to argue for the asylum claim and to suggest otherwise may give the detainee the misapprehension of the court process and the false impression that he would be wrong to assert his need for a legal representative.

In BID's view, it is not accurate for a Judge to suggest to an applicant that his lack of legal representation will not prejudice his case, especially when the case is being processed within the fast track procedure. It is unrealistic to assume that an individual who finds himself detained in a foreign country, who may be dealing with trauma and who may not understand English would be able to present his subjective case. It is out of the question that a detainee without legal representation could familiarise himself with UK immigration law within the given timeframe in order to adequately represent himself. Yet over half of the detainees in our study were forced into a position where they had to try to present their case without legal assistance.

Failure to Make Applications to have Cases Taken out of Fast Track

The advantages of taking the case out of the fast track for the preparation of evidence and the ultimate success of the case have been highlighted above. Yet the picture which emerged from the research was of a great proportion of un-represented detainees who had no capacity to make the legal applications to adjourn their case or to remove it from the fast track³⁵. Out of a total of 22 hearings observed, only four applications to remove the case from the fast track were made, only three applications for adjournment were made and only one application for bail was made³⁶. A legal representative who

³⁵ Paragraph 28(1) and Paragraph 30(1) of The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 outline the provisions for adjourning and removing a case from the Fast Track respectively.

³⁶ In a few cases, legal representatives interviewed said that these applications had been made prior to the hearing but were not made by the barrister in court and so were not encountered by our court monitors.

had made an application commented, when explaining why her client's application was refused: "...[the] Judge was confused about whether he had the power to de-fast track the case and that was why it had to be argued on the day of the appeal" (Case E).

One of the major reasons given for the lack of applications is the intense time pressures experienced by legal representatives. When asked if he had made any application at any stage for his client to be removed from the fast track, the legal representative involved in Case K replied,

No, there was insufficient time. We were battling even to present his case. There wasn't time to interview him properly and we had to conduct the interview by phone only. The only day I saw him was for five minutes on the day of his hearing.

The solicitor involved in Case T also suggested that the time constraint was the major reason why he did not attempt to get his client's case taken out of the fast track, even though that detainee claimed to have survived torture. To the same question he responded, "No. It was too quick. Although he was a torture victim he did not have any scars or torture marks". The solicitor's explanation here is unconvincing and BID finds the solicitor's strategy here very concerning. Where lack of sufficient time to put the case properly was so evident to the solicitor, it seems clear that he should have asked for an adjournment to seek more time and it was an error not to do so.

Lack of Access to Bail and Failure to Safeguard the Right to Liberty

ILPA advises fast track legal representatives that "it may be worth spending valuable time making a bail application on the first day on which instructions are received"³⁷ and emphasises that post-decision, separate applications should be made for bail and to remove the case from fast track at the appeal hearing³⁸. The General Civil

³⁷ "...although if the client is a port applicant, paragraph 22(1B) of Schedule 2 to the Immigration Act 1971 means that bail cannot be granted until 7 days have elapsed from the date of arrival in the UK (and note the requirement in AIT practice direction 19.1 for the AIT to list the bail application within 3 working days of receipt "if practicable")" (ILPA 2005, p.18).

³⁸ "...detention has to be justified in accordance with normal detention criteria... Consideration should therefore be given to applications for (a) bail & (b) for the case to be removed from the fast track at the appeal hearing. These are separate applications. Justification has to be provided on a file if (a) is not pursued at the hearing (paragraph 24 of the Fast Track Specification)" (*Ibid.*, p.26)

Contract also emphasises the importance of bail applications³⁹. However, even in cases where detainees specifically requested that their legal representatives make an application on their behalf one was sometimes not made. One detainee stated "my solicitor wouldn't help with a bail application", and further explained:

My solicitor didn't care that much. I asked him why I should be in the fast track because it meant that I couldn't access my documents or have my cell phone to contact anybody. He was with me during the interview. I asked my solicitor about bail so I could print off documents from the internet and my solicitor didn't want to do it because he just said 'They will not allow you'. (Case M)⁴⁰

Another fast track detainee related a similar experience; he was told by his second solicitor that it was not worth applying for bail because he would be deported shortly (Case O). Of the 22 cases monitored in this study, only one application for bail was made at the appeal hearing.

Non-Removal and Continued Detention of Unsuccessful Fast Track Asylum Applicants

In 2005 there was an unannounced inspection of Harmondsworth IRC by HM Inspectorate of Prisons (Owers 2005). HMIP's report explains the isolation of some detainees who have been served with removal orders but who, for various reasons, cannot be removed: "...some detainees, fast tracked and refused, were still at Harmondsworth weeks or months later, awaiting removal. At this stage both the assigned caseworker and the assigned duty representative seemed to have disengaged from the case." (p.19)

The fast track aims to take applicants from their initial application through to integration or removal in approximately five weeks. The decision

³⁹ "The Asylum Adviser is required to consider whether a bail application should be submitted on the client's behalf. The Asylum Adviser should always consider making a bail application at the asylum appeal hearing. If an Asylum Adviser decides not to make a bail application at this stage they should record their reasons on the file. This will be monitored on audit. They must also inform the client of their right of review of the Asylum Adviser's decision and provide them with the review notification form CW4. Asylum Advisers are reminded that they may make a bail application at any stage in the proceedings where there is merit to do so".

⁴⁰ However, it should be noted that in this case the legal representative made an application for adjournment as well as a successful application to de-fast track the case. Thus this legal representative made two of the four applications made within the 22 cases observed.

to remove may not, however, immediately be followed by physical removal of the applicant. Administrative delay, difficulties in obtaining travel documents and non-cooperation or bureaucratic delay by the country of origin may mean that an unsuccessful applicant continues to be detained well after the decision to remove has been made. BID was able to learn about the decision from the appeal hearing we observed in all of the 22 cases. The decisions reached by the Immigration Judges are as follows: In 14 of the cases the appeal was refused; in two of the cases the appeal was adjourned; three cases were removed from the fast track procedure and therefore released from detention; in two of the cases the applicant chose to withdraw his claim for asylum, and; in one case the refusal of asylum by the Home Office was successfully appealed. At the end of the court observation period, 18 of the 22 detainees were still being held in immigration detention. This includes those cases where the asylum claim was refused (14), those cases where the case was adjourned within the fast track (2), and those cases where the claim for asylum was withdrawn and the applicant was awaiting voluntary return (2).

Several of the detainees raised problems about their removal without prompting. They expressed frustration and desperation that they remained in detention following the exhaustion of their appeal rights, either because it is impossible in practice to remove them to their home country, or because there are considerable administrative delays by the Immigration Service in processing their removal. The following exchange from an interview with one of the fast track detainees (Case V) is representative of that frustration:

Interviewer: *Have the Immigration Service given you a date for when you are going to be removed from the UK?*

Applicant: *No, they don't tell me anything.*

Interviewer: *If the Immigration Service are not sending you home quickly, do you know why?*

Applicant: *I don't know, probably they don't find it profitable to do it now. There's somebody here who signed - meaning consented - to be removed but it's been three months and they still keep him here. It's a real mess. I don't understand what they're doing.*

Interviewer: *How long do you think it will take for IS to remove you?*

Applicant: *Taking the example of other friends here, I can guess they could keep me for another three months, I would say.*

One lawyer commented:

I think the system is unjust and unfair. We are not given ample time to prepare for bail hearings and the client is detained for a longer period than is necessary. The time the client spends in detention is not used to properly prepare the case. Even when the case is finished and determined the client is still stuck in detention. (Case V)

When BID made attempts to contact the 18 detainees who were detained at the end of their appeal, it was revealed that 12 of the asylum applicants were no longer being held in immigration detention and six were still detained. This means that almost one third of the fast track detainees included in this study (27%) have been in detention for a period of more than 60 days.

The findings of the research inform the wide-ranging concluding recommendations to the Immigration Service, Legal Services Commission, Immigration Judges, Legal Representatives, the public and detainees (see Oakley & Crew 2005, pp.36-37). Among other things, the report urges the Immigration and Nationality Directorate (IND) to establish a maximum period for detention for those detained for fast track processes, and asks the IND to provide an automatic independent review of detention of those in the fast track. One recommendation to the Legal Services Commission is to require publicly funded representatives to automatically present a bail application on behalf of their fast track clients. The report asks Immigration Judges to refuse to preside over fast track cases where a legal representative is not present. Finally, the report recommends that legal representatives make bail applications for all fast track clients, and it asks the public and detainees to put their concerns about the fast track procedure in writing.

Conclusions

The European Council on Refugees and Exiles (ECRE) reason that determining states "...have a vested interest in ensuring that fairness is not sacrificed for speed and efficiency in asylum procedures" (ECRE 2005, p.10). States are obligated to ensure that individuals in need of international protection have access to fair refugee status determination procedures. This paper has examined whether this obligation is compromised by attempts to process asylum claims in a rapid manner. The findings suggest that safeguards that are in place are either not sufficient or are not being followed. Taken together, the data presented strongly suggests that the majority of accelerated procedures used by Member States to rapidly assess certain asylum applications do sacrifice fairness for efficiency.

Current Implications

This paper suggests that that the accelerated procedures that are in operation in European Union Member States are an example of an exclusionary asylum policy. It has argued that these procedures are underpinned by an emphasis on speedily *rejecting* an individual's asylum application rather than on speedily *accepting* it. This is supported by the expansive criteria used in many Member States to deem a claim manifestly unfounded. It is also supported by the overwhelming reliance on procedural and formal grounds, rather than on grounds related to merit, in assessing the speed at which an asylum application should be processed. The concept of exclusionary asylum policies can be examined further by introducing the concepts of 'physical exclusion' and 'procedural exclusion'. Physical exclusionary asylum policies are those policies that physically block an asylum seeker's access into a country (for example, visa restrictions and carrier sanctions). Procedural exclusionary asylum policies are those policies that inhibit an asylum seeker's access to a fair hearing of their asylum claim when they are *in* a country of asylum (for example, restricted access to legal aid and diminished rights of appeal). The speed at which an application for asylum is processed in an accelerated procedure means that asylum seekers and their legal representatives often struggle to adequately present their case. In this sense an accelerated procedure may be said to be an example of an exclusionary asylum policy that involves procedural exclusion. It can also be argued in some cases that accelerated procedures also involve physical exclusion. In some Member States, individuals whose asylum applications are processed in an accelerated procedure are detained throughout the application process. The exclusionary nature of immigration detention is summarized by Bloch and Schuster (2005): "While deportation is an explicit form of exclusion from the territory of the state, detention is both 'enclosure' within a camp or prison, and exclusion from the receiving society" (p.493). In such instances then, an accelerated procedure is the ultimate example of an exclusionary asylum policy since it involves both procedural exclusion *and* (internal) physical exclusion.

The Way Forward

At the time of writing, the fast track procedure was being piloted in 3 of the 10 Immigration Removal Centres in the United Kingdom. It has been indicated that the fast track pilot scheme will be "rolled-out" if successful (Great Britain 2005, p.36). This expansion will allow the government to meet its stated target of processing up to 30% of new asylum applications within a fast track

detained process (*ibid.*). This is a European Union-wide trend. Indeed, some Member States process the majority of asylum applications in an accelerated procedure. According to Human Rights Watch, the accelerated procedure in The Netherlands "...is regularly used to process and reject some 60 percent of asylum applications..." (HRW 2003, p.2). In Austria, all asylum applications are initially processed in an accelerated procedure and, within 72 hours, a decision is made to grant asylum, refer the case for further hearings, or refuse asylum⁴¹. The fact that most Member States process — or plan to process — a large percentage of asylum applications in an accelerated procedure would seem to suggest that exclusionary accelerated procedures are well entrenched in the European Union; however, the process of harmonisation is ongoing. The European Union has announced its intentions to establish a Common European Asylum System by 2010. In light of this it is important to conclude by briefly considering proposals that have been put forth for fair *and* efficient accelerated asylum determination systems.

The first policy proposal to consider is the establishment of best practice guidelines for accelerated procedures. This suggestion has been put forth by the Committee on Migration, Refugees and Population. In a report presented to the Parliamentary Assembly of the Council of Europe (PACE), the Committee noted the "...urgent need for the development of either overall guidelines, to bring together best practice on accelerated asylum procedures, or for the development of specific guidelines on particular aspects of accelerated procedures" (Agramunt 2005). Examples of best practice would be for accelerated procedures to be activated only *after* the first instance of decision-making, and for such procedures to be informed by UNHCR's EXCOM Conclusion No. 30 (ECRE 2005, pp.43-44). The second proposal to consider is prioritization over acceleration. The European Council on Refugees and Exiles (ECRE) has suggested that instead of States' accelerating the processing of 'manifestly unfounded' claims, they should instead prioritize the processing of 'manifestly well-founded' claims. The organization suggests that measures be taken to "facilitate quicker decisions on obviously well founded applications for asylum" (ECRE 2005, p.38). The final proposal to consider, again put forth by the ECRE, may eliminate the need for accelerated procedures altogether (or at least during the first-instance decision-making

⁴¹ Austria's 2004 Asylum Law (effective 1 May 2004) has been described as the most restrictive in Europe (Homola 2003; Oezcan 2003).

process). This proposal, known as 'frontloading', "...is the policy of financing asylum determination systems with the requisite resources and expertise to make accurate and properly considered decisions at the first instance stage of the procedure" (p.38). This is supported by Bryne (2002) who writes "...if a refugee determination system is well resourced, it should be able to render judgments speedily without abridging safeguards. This ultimately saves costs, time and the integrity of the system". Frontloading ensures that every asylum application is given a thorough examination in a well-resourced refugee determination procedure.

These three proposals have put forth some valid suggestions for reconciling the two seemingly incompatible qualities — fairness *and* efficiency — within refugee determination systems. All of these policy proposals have one thing in common. For any of them to be taken up seriously requires that protection, rather than deterrence, become the central focus of our asylum systems. By implication this means that the "culture of disbelief" — a mindset that has allowed exclusionary asylum policies to become the rule rather than the exception — must first be disbanded.

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