

The Annual Report of the Certification Monitor – Government Response

I would like to thank Sarah Woodhouse for her annual report and I look forward to working with her further over the coming year.

The NSA process is a key element of the Government's asylum policy. It has played a crucial role in our ongoing initiatives to reform the asylum system, and has contributed significantly to the successes that we have achieved in recent years.

In particular the NSA process has played an important part in the following achievements:

1. Asylum applications down by 69% since their peak in 2002

The importance of the NSA process in contributing to this success is demonstrated by the large falls in asylum applications from countries which have been designated under section 94 of the Nationality, Immigration and Asylum Act 2002. These reductions have significantly exceeded the overall falls in asylum applications.

2. Asylum decisions now made much more quickly – around 80% of new substantive applications now decided within two months

At the end of 2004 2,828 asylum applications had been certified as clearly unfounded. In the majority of these cases the decision was made within 14 days of the application being lodged.

3. Increase in asylum removals – removals at around 50% of the level of new anticipated unfounded asylum claimants in 2004, compared with 20% in 1996

At the end of 2004 1,513 asylum applicants whose claims had been certified as clearly unfounded had been removed from the UK.

The success of the NSA process is also shown by the very low rate of allowed NSA appeals - to the end of 2004 less than 2% of NSA appeals determined were allowed - and by the fact that we have lost only three judicial review cases against our certification of cases as being clearly unfounded.

I am pleased to note that Ms. Woodhouse has made several positive comments about the NSA process in her report.

Firstly she notes the large amount of time that caseworkers allocate to the decision making process¹. This is indicative of our commitment to ensuring that the right decision is made on cases which are in the NSA process. Secondly, she acknowledges the readiness of senior caseworkers to amend decisions where the evidence does not support certification². When taking these measures through Parliament in 2002 we explained that every case would be subject, at a minimum, to scrutiny by two pairs of eyes, and the evidence of the

¹ The Monitor's Report paragraph 67

² Paragraph 15

report is that such a system is working as it should. In a number of cases, as noted in the report, legal advisers also check the proposed decision. Thirdly, she acknowledges the good standard of asylum interviews in cases that she reviewed³.

We have always stressed our commitment to ensuring a rigorous process is in place for decisions which involve the certification of claims. I believe that the assessment of case files by the Monitor shows that we take due care in processing these claims.

Ms. Woodhouse has made a number of recommendations, some of which are helpful and constructive and which we will be implementing. Our responses to each of the recommendations can be found at Annex A.

However, I cannot agree with the main conclusion in the report that the NSA process does not provide sufficient safeguards to prevent inaccurate decision making, as evidenced by the 147 certificates that have been withdrawn. In the Government's view this conclusion is not borne out by the facts or the evidence.

Firstly, as the report itself acknowledges, decisions on claims involving certification are taken with care.

Secondly, the number of judicial review applications of certificates issued indicates that where someone feels they have an arguable case against the certificate they can and do challenge it before removal.

Thirdly, the result of the above system is that in only three cases up to the end of 2004 (and four cases up to the present) has a person successfully appealed against the refusal of their asylum or human rights claim from abroad. In such cases, the individuals concerned have been returned safely to the United Kingdom without any harm coming to them. Of course, any case where a person is removed and subsequently found by the appellate bodies to have a well founded claim is a concern and we take each case seriously. But when seen against the backdrop of 2,828 certified claims up to the end of 2004 and 1,513 removals of those with certified claims during the same period, this hardly indicates a system with inadequate safeguards.

There will often be good reasons for withdrawing a certificate. For example new information which was not available at the time the decision was made may be provided by the applicant after the decision is served that means that it would not be appropriate to maintain the certificate. Or there might be a change in country conditions or case law which justifies our taking the cautious approach and withdrawing a certificate to permit an in country appeal.

We have already strengthened our procedures for the monitoring of cases where the certificate is withdrawn. Since June 2004 a regular casework forum has been held where issues at Judicial Review are discussed in depth and guidance issued accordingly. A formal pro-forma for full feedback to caseworkers, on each case where a certificate is withdrawn, has been in use since August 2004. These pro-formas are collated and analysed centrally. This analysis looks at whether there was in fact any fault with the decision to certify, or whether the facts of the claim altered significantly following the decision. Nevertheless, I

³ Paragraph 62

accept that the report has identified a serious point about the number of certificates withdrawn. We will consider further what more we should be doing in this area.

The NSA process will continue to be a central part of this Government's initiatives to reform the asylum system. We are determined to ensure that refugees receive the protection that they need, while at the same time stamping out abuse of the asylum system by those who are not in need of our protection.

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Government Responses to the Recommendations in the Certification Monitor's Report

1. Paragraph 31

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

Accept?

Yes.

Since the Advisory Panel on Country Information was established one country – India – has been added to the list of designated countries and we will fulfil our undertaking to consult the Panel on the country information we have for any countries we might add to the list in the future.

2. Paragraph 33

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

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

Accept?

i) Partially

ii) No

i) We agree that any increase in case by case certification should be undertaken with care – and indeed this is the case. However it is entirely appropriate that claims from residents of countries that have not been designated but which are clearly unfounded should be identified by caseworkers and certified as such.

ii) The APCI's role is to provide advice regarding the accuracy and objectivity of the country information material produced by the Home Office. Its remit is not to – nor does it – comment on the use of that material including any proposal to designate a country or certify any individual claim. Recommendations made by the APCI are applied across all country information materials. By their nature case-by-case certification decisions are made on the basis of the individual facts of a case; may be made on cases where the Home Office has not prepared country information material; or where the decision is made on the basis of country information researched specifically in connection with the particular case.

Where particular categories of claims have been identified as likely to be clearly unfounded, these are reflected in Operational Guidance Notes (OGNs). We

have recently agreed with UNHCR a formal process by which we will consult them on the contents of published OGNs, taking account of any comments they might make on these, making amendments and re-publishing amended versions where it is deemed appropriate after discussion with them

3. Paragraph 39

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

Accept?

- i) Partially.
- ii) Yet to be decided - see comments below.

i) Families are detained under the same criteria as individuals, i.e. whilst identity and basis of claim are established, because of the risk of absconding, as part of a fast-track process or to effect removal. Each case is considered on its merits and the presumption is in favour of granting temporary admission or release wherever possible. Detention is used only where necessary and this is especially true for families with children. The vast majority of families are not detained. Where they are this is kept to the minimum period, subject to frequent and rigorous review, and very few families are detained for more than just a few days.

If a family is considered suitable for the fast track process the present position is that they will be detained for a short period at Oakington. It is, however, never the case, including in respect of Oakington, that a family is detained simply because suitable family accommodation is available.

ii) We will consider this recommendation further with the Monitor to consider what data it might be possible to provide.

4. Paragraph 44

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

Accept?

No.

We do try to ensure that this does not happen unnecessarily. However, in order to maintain a balanced throughput of both NSA and non-NSA applicants, from

time to time the intake of applicants may be rolled forward, usually by no more than four days. Consideration of any applicants claims transferred in this way would still normally be completed within the 10-14 day timescale, and the vast majority of claimants receive the decision on their claim within 14 days of arrival at Oakington.

5. Paragraph 52

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

Accept?

Partially

We have measures in place, including specific instructions to address trafficking for prostitution, an area where the potential harm caused is especially serious. We agree that this is a very important area, and we are reviewing what more can be done in the light of the Monitor's comments.

6. Paragraph 57

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

Accept?

Yes.

Our existing guidance states that where a claimant is accepted by the Poppy Project, the interview is conducted by that team.

7. Paragraph 62

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

Accept?

We agree that wherever possible, all such requests should be acceded to. We have re-affirmed this with staff at Oakington.

It is the practice at Oakington to follow the protocol governing the conduct of substantive interviews and the roles of interviewing officers, representatives and their interpreters, which includes the use of interpreters.

8. Paragraph 63

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

Accept?
Partially.

This issue is covered in the NSA accreditation training. For example where internal flight may be a reason for refusal, caseworkers are trained to put this to the applicant at interview and ask why they could not relocate to another part of the country and explore any reasons provided. We do not consider it necessary or appropriate in an interview to state that we intend to refuse the claim but the interview is designed to obtain all relevant information relating to the claim which is needed to make a fair decision.

9. Paragraph 66

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

Accept?
Partially.

No decision is notified to the applicant before the time for submitting further representations has elapsed. But we consider it reasonable to compile a draft decision following the interview based on the information provided, and to review it carefully if material new evidence is brought to light.

10. Paragraph 69

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

Accept?
No.

The staff concerned would not be given the opportunity if they were not considered to be fully competent. They are working, being paid and assessed in the senior grade.

11. Paragraph 71

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

Accept?

We accept that referral to Country Information Policy Unit (CIPU) (now COI Service) is appropriate in some cases but not that this is not done as present.

CIPU referral is encouraged in the guidance to NSA caseworkers that have been provided to the Monitor. The recommendation therefore supports existing advice. However, we do not accept that there is evidence to support that far more cases should be referred to CIPU than are at present.

12. Paragraph 79

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

Accept?

Recommendation reflects the existing practice.

Applicants interviewed remotely in this way do have the option of having their legal representative present at the interview. Asylum Casework Directorate (ACD) staff at Oakington invite all reps to attend these interviews. If the applicant does not already have a legal representative, ACD liaise with local Refugee Legal Centre (RLC) and Immigration Advisory Service (IAS) offices who will either represent them or make arrangements for a rep from their organisation close to the location of the interview to attend.

13. Paragraph 81

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

Accept?

Recommendation reflects new procedures that we are in the process of implementing as part of the New Asylum Model.

Comments:

The use of emergency accommodation (EA) for all categories of asylum seeker is being discontinued and replaced by induction centre accommodation which is of a much higher specification. Non-detained NSA cases are now dispersed, but only to Leeds, Liverpool, and Manchester. As a result of this limitation, cases can stay in initial accommodation longer than the norm where necessary, and therefore not be transferred to emergency accommodation.

14. Paragraph 82

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

Accept?

No.

Funding for legal representation for NSA claimants in the non-detained route is available for an initial limit of five hours which can be extended on application to the Legal Services Commission. It is considered that in the non-detained environment the provision of advice prior to and subsequent to an interview gives more valuable input to the process, and fuller opportunity for providing considered advice, than does merely observing the asylum interview. Claimants can request for their interview to be taped. A written record of the interview is immediately made available to the claimant's legal representative. Attendance at asylum interviews by legal representatives is costly and does not provide time in which to supply good quality advice. The current provisions for NSA claimants in the non-detained route give claimants fair access to funding for legal representation. Where further advice is required, further funding can be applied for.

15. Paragraph 83

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

Accept?

Yes.

As far as we are aware, this has never happened. An operational instruction will be circulated to operational staff re-affirming that it should never occur.

16. Paragraph 87

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

Accept?

No.

Asylum applications from unaccompanied children who are residents of an NSA country are considered in accordance with the general policy for children. In particular, if the asylum and human rights claims of a child fall to be refused we will nevertheless grant a period of Discretionary Leave unless we are satisfied that adequate reception and accommodation arrangements exist for that child in their country.

It is the case that for some – but not all – countries designated on the NSA list, the period of Discretionary Leave granted in such situations is the shorter of 12 months or until the child's 18th birthday compared with the shorter of three years or until the child's 18th birthday for most other countries. We grant this shorter period in respect of some of the designated NSA countries because we are more actively considering the creation of conditions there which would enable an unaccompanied child to be returned consistent with our policy of requiring adequate reception and accommodation arrangements. The shorter period reflects the position that it might be possible to return these children to their countries earlier than we are able to return other children to their countries.

We will, however, keep under review the set of countries for which we have this different approach to the period of leave granted.

17. Paragraph 92

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

Accept?

No.

It is our existing policy to give the benefit of the doubt in borderline cases and treat as a child someone who claims to be under 18. But that policy has to be applied in a flexible way taking account of the information available in a given case so we would not support this recommendation, which in our view is too rigid. For example, where the only evidence we have is IND's own assessment of an applicant's age based on their appearance and demeanour and we consider the applicant to be around 18 or 19 we may well treat the applicant as a child if they claim to be under 18. But in a case where there is also a full age assessment carried out by the social services estimating the child's age to be around 19 we do not consider that we should necessarily treat the applicant as being a child.

18. Paragraph 94-95

I recommend that a great deal of caution is employed when making decisions in disputed nationality cases. The same approach should be applied in these NSA cases to the issue of nationality as is applied to other issues involving the credibility of the applicant – i.e. is the claim capable of belief? If it is, then the claim should not be certified, and there should be access to an in country right of appeal, i.e. a suspensive appeal, where this issue can be examined in more detail. I believe that this is vital, since an applicant returned to a country which is not their own is probably at risk of removal by that Government, as a non national. This will invariably be to their country of nationality,, which in disputed nationality cases is usually a country where there are serious breaches of human rights, like Zimbabwe, since it is rare for the Home Office to suspect someone of claiming a different nationality unless this would advantage them in some way.

Accept?
Partially.

We agree that a great deal of caution should be employed in making decisions on disputed nationality cases, and indeed current policy guidance reflects this approach. If we considered that a person was a resident of a designated country and that their claim was clearly unfounded in respect of that country we would certify it provided it was unarguable that the applicant was a resident of that country. Where we thought it was arguable that the applicant was not a resident of such a country (albeit we still thought they were from that country) we would not certify the claim unless we also considered their claim was clearly unfounded in respect of the country from which they claimed to come.

We think this is a fair approach which has proper safeguards built into it

19. Paragraph 97

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

Accept?

The Unified Appeals System addresses the principal concerns of the Monitor in this regard by significantly speeding up the process. However it is not possible to agree a fixed maximum number of days that it must take to prepare documentation.

Under the Unified Appeals System, introduced on 4 April 2005 by the Asylum and Immigration (Treatment of Claimants) etc Act 2004, the appellant serves the appeal directly on the new Asylum and Immigration Tribunal (AIT). The AIT lists the appeal upon receipt. Once notified by the AIT that an appeal has been lodged, IND produce the bundle. The timescale should be much shorter than under the old appeals system. The AIT aim to list the case management review hearing 10 working days after receipt of the appeal and the substantive hearing after 20 working days. The new appeal system does not rely on the Home Office preparing documentation to trigger the process.

20. Paragraph 101

- i) *I recommend that video link be considered as an option in cases where it would assist the adjudicator to make a fair decision on the claim. Such cases are likely to be rare, but this is not a possibility that should be dismissed out of hand.*
- ii) *I recommend that the Home Office re-considers its policy of always resisting such an application.*

Accept?

- i) Partially.
- ii) Partially.

It is up to the immigration judge whether to accept video-link evidence, not the Home Office. However, where the judge does decide to accept it we would not necessarily oppose his or her decision to do so.

21. Paragraph 102

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

Accept?
Partially.

It is not standard practice for Presenting Officers at NSA appeals to raise issues of credibility where this was not raised in the reasons for refusal letter (RFRL). In fact the guidance for Presenting Officers strongly discourages reliance on credibility in general. In some cases however, where new evidence is adduced by the claimant at the appeal, it may be appropriate for POs to challenge the credibility of this evidence, but such situations will be rare.

22. Paragraph 113

I recommend that those who conduct NSA cases are required by the Legal Services Commission to accredit at level 2; I do not think the standard required at level 1 is high enough given the complexity and importance of this work.

Accept?
No.

LSC have commented that they are satisfied that the competence standards and work restrictions as currently drafted will ensure that level one staff are capable of doing this work.

The competence standards were produced by the Law Society. This gives a strong indication that they are content that Level One staff can deal with this work.

23. Paragraph 114

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

Accept?
Partially.

We agree with the principle and that files should be rationalised wherever possible. However, with action sometimes, of necessity, being taken by more than one area at similar times, there may be occasions when extra files will need to be raised.

24. Paragraph 120

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

Accept?
Partially.

We agree that standard paragraphs should be closely tailored to individual cases, but do not agree that this is not happening on a widespread basis. Indeed, the appropriate use of standard paragraphs and the importance of tailoring them to the particular facts of an individual claim are emphasised in NSA training and guidance, as the Monitor is aware. We will continue working to ensure that this training and guidance is acted upon by caseworkers.

25. Paragraph 121

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

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Accept?
Partially

We continually review our certification training for caseworkers to ensure that it fully equips them to undertake the certification of asylum claims.

Asylum caseworkers are not expected to maintain a comprehensive knowledge of all immigration areas. They would normally defer to the expertise in the appropriate directorates. However they are kept up to date with appropriate asylum legislation and case law.

However, we will be happy to work closely with the Monitor in order to ensure that the training is of the highest standard and will give close consideration to any suggestions that she has on how the training might be improved.

26. Paragraph 127

- i) I recommend that the reason why the certificate to certify a claim as “clearly unfounded” was withdrawn should be monitored as it may provide useful feedback about the sorts of errors being made.*
- ii) I also recommend that all caseworkers and senior caseworkers are told about any decision to withdraw the decision to certify that they have made, and the reasons for it.*

Accept?
i) and ii) Yes

Since June 2004 a regular casework forum has been held where issues at Judicial Review are discussed in depth and guidance issued accordingly. A formal pro-forma for full feedback to caseworkers, on each case where a certificate is withdrawn, has been in use since August 2004. Through guidance that has been shared with the Monitor, they will already be aware that these pro-formas are also collated and analysed centrally. This analysis looks at whether there was in fact any fault with the decision to certify, or whether the facts of the claim altered significantly following the decision.