

The Annual Report of the Certification Monitor* - 2005

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Full title: Monitor of certification of claims as unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002.

The 2nd Annual Report of the Certification Monitor

Section 1: Introduction

1. This is the second of the two annual reports which I will make as “Certification Monitor”. I was appointed in February 2004 to the post of Certification Monitor for 2 years by the Secretary of State for the Home Department. My appointment was made pursuant to s 111 of the Nationality Immigration and Asylum Act 2002 (the 2002 Act). I am the first holder of this post. My first report covered my work during 2004. This report covers my work during 2005 and is dated 27th April 2006. I have repeated in this report some of the information contained in my first report, since it continues to be relevant. A summary of my recommendations can be found in Annex A at the end of this report.
2. As Certification Monitor my duty is to make a report once in each calendar year to the Secretary of State regarding the use of the powers given to him by s.94(2) and 115(1) of the 2002 Act. Each report is then to be laid before Parliament. I can be requested to report on other occasions, but have not been asked to do so to date.
3. Annex B contains the full text of the relevant sections of the 2002 Act. In short, ss94(2) and 115(1) allow, and in some cases require, the Secretary of State to certify asylum and human rights claims he considers to be “clearly unfounded”, thus preventing the applicant from appealing the refusal until after he or she has been removed from the UK. This is known as a “non suspensive appeal” (NSA), so called because such appeals (unlike nearly all other immigration and asylum appeals) cannot be brought while the asylum claimant is in the UK and so do not “suspend” removal directions. The asylum applicant must wait until they have left the UK to lodge an appeal. The system of certification is commonly called the “non suspensive appeal system” (NSA system).
4. The statutory post of Certification Monitor was initially proposed as an amendment to the 2002 Act by the Government in response to Parliamentary concerns about the certification powers contained in ss94 and 115. These concerns were mostly about the potential for “flagrant unfairness”, particularly that individual asylum seekers might be removed before mistakes by Home Office officials were rectified, and the impact this might have on compliance with the UK’s international obligations under the Refugee Convention and the European Convention on Human Rights.
5. In announcing my appointment, Beverley Hughes stated to the House of Commons that in particular I would consider the procedures used to

determine whether claims are unfounded and the quality and effectiveness of decisions made under this procedure.¹

6. Since my appointment is coming to an end, I take the opportunity to state, once again, that I consider it vital that my successor be appointed in a timely fashion. I understand that some consideration has been given to the appointment process. *I repeat the recommendation made in my first report that there be no delay in the appointment of my successor.*
7. I can confirm that I am not employed within a Government Department, something the terms of my appointment prevent. I am not employed at the time of writing this report, nor was I employed during the period in which I undertook the work that informed it. However, I am employed as a solicitor at a firm in Birmingham, where I represent those claiming asylum and those with immigration matters. This provides invaluable background knowledge of asylum law, and of the asylum system, without which it would be extremely difficult to monitor decision-making quality and the NSA process. While holding the post of Certification Monitor I have undertaken not to knowingly act for those whose cases are being dealt with within the NSA process, nor those detained at Oakington, in order to maintain my independence.
8. The annual certification figures are stated below. Figures for 3rd country or non-compliance cases are not included since there was no substantive consideration of the claim. The figures for 2005 are not for the complete year, because the figures for the last quarter were not available at the time of writing the report, but for the first 3 quarters, i.e. 1 January to 30 September:

Wave 1

2002: Certified as clearly unfounded	1185
Refused but not certified	1335
2003: Certified as clearly unfounded	210
Refused but not certified	225
2004: Certified as clearly unfounded	40
Refused but not certified	80

Wave 2

2003: Certified as clearly unfounded	715
Refused but not certified	1185
2004: Certified as clearly unfounded	530
Refused but not certified	1405
2005: Certified as clearly unfounded	140
Refused but not certified	650

Wave 3

2003: Certified as clearly unfounded	175
Refused but not certified	315

¹ Hansard, 11 Feb 2004 : Column 69WS

2004: Certified as clearly unfounded	350
Refused but not certified	620
2005: Certified as clearly unfounded	220
Refused but not certified	230

India

2005: Certified as clearly unfounded	390
Refused but not certified	70

Case-by-case

2002-2005: Certified as clearly unfounded	701
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9. This means that between the date when the NSA system was introduced on 7 December 2002, up until the end of September 2005, there were 4656 decisions to certify claims for asylum and / or human rights applications as clearly unfounded. In the same period, there were 218 appeals that had both been lodged and determined. 4 of those appeals were allowed, despite the difficulties of winning such an appeal (see below). The remainder were dismissed. There had also been 181 applications for Judicial Review which resulted in the certificate being withdrawn by the Home Office, and 7 applications for judicial review where the certificate was quashed by the High Court out of 20 cases that have proceeded to full hearing.

Section 2: Monitoring Process

10. I have 40 days per year to monitor the use of the certification power and to produce my report. I consider that 40 days is the minimum period within which it is possible to monitor the system and produce such a report. In summary, I have taken time to update myself regarding the current operation of the NSA system; met with Home Office Officials, Non Governmental Organisations, and Legal Representatives; visited Oakington Detention Centre and viewed the NSA process for detained clients there; and reviewed files of individuals whose cases have been certified as “clearly unfounded”. I have also spent time writing this report.
11. The review of case files has taken up the majority of the time I have for monitoring the NSA system. During this time I have reviewed 95 files where certification had taken place under s94, or where certification had been considered. These were selected by the Home Office on a random basis.
12. Generally the complete set of case-files relating to a particular case was provided to me. However, in a significant minority of cases one or more of the case files was not provided, because it could not be located within the Home Office system. I identified 12 cases where at least one file was missing. There may have been others where a file was missing but this was not apparent. I do not have access to the Home Office computer system, and therefore it was particularly important for me to see all case files; where I was not provided with a complete set of files it meant that important information was missing and it made it difficult for me to assess the process that had been followed and /or the quality of the decision.
13. Due to time constraints, the number of files reviewed was not sufficient for statistical analysis. However, it provides sufficient information to map out areas of concern, and to feel relatively confident that most issues with the NSA system will have emerged in the sample.
14. The file sample can be broken down by nationality as follows:
 - Albania – 3 files
 - Azerbaijan – 1 file
 - Bangladesh – 9 files
 - Ghana – 6 files
 - India – 12 files
 - Israel – 1 files
 - Jamaica – 7 files
 - Kenya – 1 file
 - Malawi – 2 files
 - Moldova – 5 files
 - Nigeria – 12 files

Pakistan – 2 files
Romania – 5 files
Serbia and Montenegro – 7 files
South Africa – 3 files
Sri Lanka – 11 files
Ukraine – 4 files
Vietnam – 3 files
Zimbabwe – 1 file

15. The sample thus contained files from most of the nationalities where s94 places a duty on the Secretary of State to consider certification, and where there have been decisions made. However, I did not see files relating to those from Bolivia, Brazil, Bulgaria, Ecuador or Macedonia, all of which are on the s94 list, but this was because there were only very few applicants from these countries (usually less than 5 each month), and therefore very few decisions to certify. It also contained files where there had been appeal lodged from abroad, and of those who were unaccompanied children. Within the sample were decisions made in each of the three locations where decision-making occurs (Oakington, Liverpool and Croydon). Most of the applicants were represented for at least a portion of the legal process, although a small minority were either not represented at all or not represented for a portion of the process. The majority were represented by the on-site legal representatives, the Immigration Advisory Service and the Refugee Legal Centre, but some were represented by external solicitors or legal representatives. Some applicants changed their legal representative during the process.
16. I could only review files where active casework was concluded, so as not to interfere with the progress of the case. This had the inevitable but unfortunate effect of potentially biasing my sample towards cases where the decision to certify was not challenged, or if it was the challenge was concluded speedily. More complicated cases are likely to take longer to conclude, since legal challenges, successful appeals and the like take additional time. The other impact was that the more complex cases I reviewed tended to those where the initial decisions were taken at an earlier date, and were not likely to include, for example, those from nationalities recently added to the NSA country list. *I recommend that consideration be given to allowing the monitor access to files that are at various stages of the casework procedure, especially where there are challenges to the certificate.*
17. Most of the files were ones where the initial decision was reached in the early part of 2005 (76 files). I also saw files where the initial decision had been reached in 2004 (15 files) and 2003 (4 files). One of the 2003 files seemed to have been sent to me in error, since the case was straightforward and was completed in the same year. The other was a case where although the initial decision was made in 2003 the case was not concluded until 2005.
18. I specifically asked to see a selection of the decisions where there had been Judicial Review proceedings (both where the certificate had been maintained and where the certificate had been conceded). I requested

these on the basis that the applicant's legal representative had decided that the certificate was open to challenge, and hoped that this might help to direct my work towards areas of difficulty. I also asked to see all files where an appeal had been lodged from abroad and had been allowed, since such cases might also point to an error in the certification decision. I saw two relevant case files in this category. There have now been a total of four allowed out of country appeals in NSA cases.

19. I also specifically asked to see a selection of files where there had been "case by case" certifications, from a spread of the countries involved. The breakdown by nationality of decisions that were case by case certifications is as follows:

- Azerbaijan – 1 file
- Bangladesh – 5 files
- Ghana – 6 files
- Israel – 1 files
- Kenya – 1 file
- Malawi – 2 files
- Moldova – 5 files
- Nigeria – 12 files
- Pakistan – 2 files
- Vietnam – 3 files
- Zimbabwe – 1 file

I further asked that the "case by case" files sent to me for review included those where the certificate went unchallenged, and those where the certificate was challenged by way of Judicial Review proceedings. I further asked that in this latter category I was sent files where the certificate was maintained and others where the certificate had been withdrawn.

20. I also requested to see a sample of files where a decision had been made to certify applications where the applicant was now an adult but had applied for asylum as an unaccompanied child and had thus been granted a period of discretionary leave which expired on their 18th birthday. I was not sent any such files to review due to a misunderstanding. I am told that such decisions are few and far between. I have also been told that the next Monitor will be provided with examples of such cases to review should they decide this to be appropriate. I consider this to be important since these young people are potentially vulnerable, given their recent acquisition of majority, and because unaccompanied minors have been identified as a particularly vulnerable group who require special protection and who may not receive adequate legal advice at present. If such cases are certified, the process (presumably a response to an application for an extension of stay or a similar application) and the context (age and living circumstances of the applicant – who is likely to be in the care of social services or living with family members) will be different to that of other NSA cases in the system, and I think their cases merit review by the Monitor even if the numbers are small.

21. Most of the applicants were detained while a decision was made on their cases. Of these, most were detained at Oakington, but a few were detained in prisons. In other cases the applicant was not detained during the process. Some of the detained applicants had dependent children who were detained with them.
22. Where I had significant concerns about the way the file had been handled, I drew these to the attention of Home Office officials. In some cases I understand this resulted in remedial action being taken and / or guidance to caseworkers being issued.
23. I was also, until May 2005, provided with monthly short briefings by the Home Office. These briefings contain information of relevance to my role as monitor, including statistics, legal developments, and practical and operational matters. However these were discontinued since they were based on management briefings which were discontinued at this time. I was provided with a specially prepared internal briefing in December 2005, giving an update on statistics and also information about recent case-law.

Section 3: The NSA Legal Framework

24. This section contains a summary of the legal framework within which NSA certification takes place. Inevitably the law in this area is complex, and I have aimed to make this section relevant for a non-legal audience.
25. In most asylum cases in the UK, the applicant has a right of appeal prior to removal. If they appeal, no removal can take place until after the appeal process is over. The asylum applicant has the choice of an oral hearing or a paper hearing where there is simply a review of the relevant paperwork. Most asylum applicants who are given the choice elect for an oral hearing in which an independent Immigration Judge² will hear oral evidence from the applicant and any other witnesses they choose to call in support of their claim, review relevant documents submitted by both the applicant and the Home Office, and hear oral submissions from the applicant (or their legal representative) and in all likelihood from the Home Office as well, if the Home Office chooses to attend the hearing. This appeal system is generally seen as a crucial safeguard of fair decision making: it means any decision by the Home Office to refuse asylum is reviewed by an independent decision-maker, who should have an opportunity to assess all the evidence and decide whether the Home Office decision is correct. It helps to ensure that the UK does not contravene the Refugee Convention by returning anyone to a situation where there is a real risk that their fundamental human rights will be breached, and that the UK does not breach the European Convention on Human Rights.
26. Ss115 and 94 of the 2002 Act give the Secretary of State the power to certify a claim as clearly unfounded, and the Act creates an alternative system for such cases. If an asylum and / or human rights claim is/are refused and also certified by the Secretary of State as being “clearly unfounded” there is no right of appeal exercisable from within the UK. Instead the applicant is removed and can only appeal from outside the UK, i.e. after return has taken place. An appeal of this kind is widely regarded as being an inadequate remedy to an individual wrongly refused asylum – firstly they face removal to the place where they claim a serious breach of their fundamental human rights is reasonably likely to take place, and secondly they may have no option but to stay there in danger until the appeal is heard which takes several months. Also, the appeal hearing itself is less likely to afford relief. Credibility is often the key issue (or at least a key issue) in asylum appeals; is the applicant to be believed? This is one reason why an oral hearing is normally chosen in asylum cases: without hearing from the applicant the independent Immigration Judge will not be able to reach an informed judgment whether or not they are telling the truth. Where the applicant has already been removed they have no opportunity to explain themselves in person and the Immigration Judge may find it impossible to make a decision whether their account was truthful or not. I therefore consider

the main concern regarding the NSA system is whether it provides adequate safeguards to ensure that no one is returned to face persecution or in breach of their human rights.

27. The meaning of “clearly unfounded” has been set out in various decisions of the higher courts. One definition is that the claim is “so clearly without substance that it is bound to fail”³. The approach that decision makers should take has also been set out, and is as follows;
- i. Firstly, consider the factual substance of the claim
 - ii. Consider how the claim stands with the known background information (i.e. information about the country of origin of the applicant)
 - iii. Consider the claim in the round, and decide whether it is capable of belief
 - iv. Consider whether some part of it is capable of belief
 - v. Consider whether, if eventually believed in whole or in part, the claim is capable of falling within the refugee convention or the ECHR

If the claim cannot on any legitimate view succeed, then the claim is “clearly unfounded”. If on at least one legitimate view of the facts or the law the claim could succeed, then the claim is not “clearly unfounded”. In practice this has led to an approach by those case-working staff responsible for decision making in NSA cases of considering the claim at its highest, i.e. to assume the applicant is telling the truth. If this approach leads the caseworker to take the view that the claim could succeed at appeal, it will not be certified. If, despite accepting the claim to be true, the caseworker believes that the claim would be bound to fail, then the claim will be certified as “clearly unfounded”. In the sample of files I reviewed the most common reasons given for certification were either that the background country information indicated that the applicant’s own Government would protect them from the harm feared (this concept is known as “sufficiency of protection”), or that there was a safe area of their own country where it was reasonable to expect them to live (known as “internal flight alternative”). Occasionally the basis of certification was that future ill-treatment would not be serious enough to meet the requirements of the Refugee Convention and the ECHR.

28. Certification as “clearly unfounded” is more likely to occur where an applicant is entitled to reside in one of the countries originally listed (“designated”) in s115 and s94 of the 2002 Act, or in one of the countries added to this list by subsequent order. This is because ss94 and 115 place a duty on the Secretary of State to certify claims which he considers to be “clearly unfounded” where the applicant has a right to

³ R v SSHD ex parte Thangarasa and Yogathas, [2002] UKHL 36

reside in one of the listed countries – in these circumstances there is no discretion not to certify a clearly unfounded claim.

29. The ten countries originally designated in s 94 and s115 were:

- i. the Republic of Cyprus,
- ii. the Czech Republic,
- iii. the Republic of Estonia,
- iv. the Republic of Hungary,
- v. the Republic of Latvia,
- vi. the Republic of Lithuania,
- vii. the Republic of Malta,
- viii. the Republic of Poland,
- ix. the Slovak Republic, and
- x. the Republic of Slovenia.

30. Claims from nationals of these ten countries were certified between 7/11/02 and 1/5/03. S115 came into force on 7 November 2002, and applied to claims made on or after 7 November 2002 where a decision was made before 1st April 2003. S94 was brought into force on 1st April 2003 and applied to decisions on an asylum or human rights claim made on or after that date.

31. The initial ten countries listed in s94 and s115 were removed on 1st October 2004, by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 so that the NSA system no longer applies to nationals of EU countries. They are now subject to separate arrangements. I understand that no decisions to certify under s94 took place relating to nationals of these countries after 1/5/04 when the countries concerned joined the EU. Most EU nationals now have no right of appeal against refusal of an asylum or human rights claim, since there will be no decision to remove them from the UK, and it is this that triggers the right of appeal. Those with a right of residence in these ten countries, but who are not nationals of an EU state, can still have their asylum claims certified, but on a case by case basis (see below).

32. States, parts of States, and since the 2004 Act also States or parts of States in relation to particular groups of people⁴ can be added to the list by Order⁵. So, for example, “Nigeria” could be added, or “Lagos”, or “Nigeria (men only)” or “Lagos (men only)”. The power to designate more specifically than simply by country has only been used in relation

⁴ S94(5)(A)-(C) 2002 Act, as amended by the 2004 Act

⁵ S94(5) 2002 Act, as amended by the 2004 Act

to Ghana and Nigeria, which are both now designated, but for men only (see para 39 below). To add to the list of designated states the Secretary of State has to be “satisfied” that the test laid down in s94 is met. This requires that in the State or part of the State, either for the whole population or for the group, there is in general “no serious risk of persecution” and that removal will not in general contravene the United Kingdom's obligations under the Human Rights Convention.

33. Subsequent to the commencement of the 2002 Act, there have been 4 additions to those contained in s94. The first of these took effect on 1 April 2003 when a further seven countries were added⁶. These “wave 2” countries remain on the s94 list and are:

- i. Albania,
- ii. Bulgaria,
- iii. Jamaica,
- iv. Macedonia,
- v. Moldova,
- vi. Romania, and
- vii. Serbia and Montenegro.

34. A further Order took effect on 23 July 2003, when a further seven countries were designated⁷. The “wave 3” countries which remain on the list are:

- i. Bolivia,
- ii. Brazil,
- iii. Ecuador,
- iv. South Africa,
- v. Sri Lanka, and
- vi. Ukraine.

35. Bangladesh was originally included in the list of wave 3 countries, but was removed from the list by an order which took effect on 22 April 2005. This was a result of a successful Judicial Review challenge to the decision to include Bangladesh in the s94 list; the High Court declared that the Secretary of State's designation of Bangladesh had been unlawful because the protection of human rights in Bangladesh was not sufficient to allow this. The High Court also found that the decision to

⁶ As a result of The Asylum (Designated States) Order 2003

⁷ As a result of The Asylum (Designated States) (No. 2) Order 2003

certify the asylum and human rights claims made by the individual bringing the challenge was correct.⁸ This indicates the extent to which the designation of countries, especially those which were added later, can be controversial.

36. I recommended in my first report that prior to designating additional countries the Advisory Panel on Country Information (APCI) should be consulted, in line with a commitment given to Parliament that this would happen, and this recommendation was accepted by the Secretary of State. The APCI is an independent body of experts, whose task it is to evaluate the accuracy of the Country of Origin Information Reports produced by the Home Office's Country of Origin Information Service. These reports are available regarding the situation in each country from which there are substantial numbers of asylum seekers and on every country which is designated under s94. This is particularly important not only because the Secretary of State will use the Country of Origin Information Report to decide which countries should be designated under s94, but also because the Country of Origin Information Report will be used by caseworkers to inform their decision making on individual cases. The APCI stated in its minutes of an extraordinary meeting held in December 2004 "that the Panel's role was to review the quality and soundness of the country information for the countries concerned; it was not in the Panel's remit to comment on whether the country should be designated. However, if the Panel were to find that the material was seriously deficient, this would have implications for the proposal to designate ... The Panel had agreed to undertake this task, provided their response contained a disclaimer making clear that their comments referred solely to the country information and should not be seen as endorsing any decision to designate a country for NSA."
37. India was added in a further order, taking effect on 14th February 2005. I am pleased to note that prior to designation, the APCI were asked to evaluate the October 2004 India Country Report.
38. Three further additions were made on 2nd December 2005: Mongolia, Ghana (men only) and Nigeria (men only). Ghana and Nigeria are designated for men only, meaning that the Secretary of State is required to consider certification for all men making asylum or human rights claims with a right of residence in those countries, but is not required to consider certification of claims from women from those countries. I also note that the APCI received an evaluation of the October 2004 Nigeria Country Report in its meeting in March 2005, and follow-up commentary on the amended Nigeria Country Report in its meeting in September 2005. I also note that the APCI received an evaluation of both the draft Ghana and the draft Mongolia Country Reports at its meeting in September 2005, in response to a request from the Secretary of State, since designation of Ghana and Mongolia was being considered. In addition, the APCI was asked to evaluate the Country Report relating to another country which was being considered for

⁸ *Husan v Secretary of State for the Home Department* [2005] EWHC 189 (Admin)

designation. The APCI did so, although designation did not in fact take place of the country in question. This provides an indication that designation is not automatic, and that those countries put forward for designation may not in fact be designated after all relevant information, including their human rights record, has been fully considered by the Secretary of State.

39. Above I have explained how claims for asylum or human rights protection made by those entitled to reside in a listed country must be considered for certification. However, any asylum claim or human rights claim, made by a person of any nationality, can be certified under s115 or s94 of the 2002 Act, on what has become known as a “case by case” basis, provided it is “clearly unfounded”.

40. As stated in my last report, the numbers of cases certified on a case by case basis was initially very small, but at that time it was anticipated that, during 2005, the numbers of cases certified on a case by case basis would increase. This has indeed happened; 682 such decisions have been made between 1st September 2004 and 31st September 2005, an average of 52 per month. I recommended in my last report that any increase in case by case certification be approached with extreme caution. In my previous report I had stated that “the Home Office had said that the “second pair of eyes” for all case by case certification will be a Senior Caseworker with specialist knowledge of the country concerned.” Due to questions I raised when preparing this report this has been corrected by the Home Office. The position is actually that cases where case by case certification is contemplated are initially vetted by a country specialist Senior Caseworker, who will not necessarily be a member of the NSA team or accredited to make decisions to certify claims within the NSA process. Their involvement will not necessarily be reflected in the minutes on the file. The final decision rests with the NSA team and the “second pair of eyes” will not necessarily be a country specialist. *I recommend that in future the senior caseworker who “vets” any case where case-by-case certification is being considered minutes this on the file, and that it is clear from the file when this vetting process took place.* I remain concerned that Home Office caseworkers who interview applicants and draft the initial decision, and Senior Caseworkers who make the decision to certify, require a working knowledge of an increased number of countries as a result of case-by-case certification, and that this may have an impact on the quality of decision-making.

41. I also recommended in my last report that the advice of the Advisory Panel on Country Information (APCI) should be sought where there was a policy decision to begin certification of claims from particular countries without formally adding the country to the list. *I continue to recommend the consultation of the APCI regarding the accuracy of the relevant Country of Origin Information Report where there has been a policy decision to begin considering claims from new nationalities for case-by-case certification, or where statistical information indicates that a significant number of case-by-case certifications are from a particular nationality.* I see this as important to maintain the

quality of case-by-case NSA decision making. The response I received to my previous report's recommendation was that the APCI was not there to comment on the use to which country information was put, nor the decision-making in a particular case. As I hope I have made clear I do not have in mind consultation on the use to which country information is put by the Home Office, nor the decision-making in an individual case, but rather consultation on the accuracy of Country of Origin Information Report on which individual decision making is so often based.

Section 4 - NSA Procedure.

42. I have set out below a description of the procedure that is followed in respect of NSA cases because the quality of decision-making is inevitably dependent, in part, on the adequacy of the procedures followed, and I have recommendations to make about this issue.
43. Applications for asylum must be made in person by the applicant and may be made at “Port”, i.e. at the air or sea port of arrival, at an Asylum Screening Unit located in the Home Office in various cities for those applying after they have entered the UK, or on “detection” e.g. following arrest.

Screening

44. Asylum applicants are then “screened”, a process involving taking their finger prints and photograph, and completing an initial questionnaire which runs to some 20 pages regarding their family, education, employment history, nationality, ethnic origin, and details of each stage of their journey to the UK. They are then issued with an Applicant Registration Card, the size of a credit card, with their photograph, name and nationality, whether or not they have permission to work and also containing bio-data (their fingerprints). Up to this point, there is no difference in NSA cases to the procedure followed in all asylum cases.

Detained route - Oakington

45. For those who are nationals of, or who have been resident in, one of the countries on the s94 list⁹, at the time of screening it is decided whether they should be detained and transferred to Oakington Reception Centre, near Cambridge. Oakington is a centre used for immigration detention on a short term basis. It has relatively low security. It was used as a place of detention for fast track decision making before the NSA process was introduced. Since November 2002, when certification began, Oakington has been the location for detention and decision making in about 50% of potential NSA cases. In the six months from August 05 – January 06 the percentage was 43%. The proportion of certifications in the detained route is much higher than the non-detained route, since the reasons that lead to a claimant not being detained may be the very same that make certification inappropriate. Hence, the proportion of decisions to certify will be higher amongst detained cases than non detained cases. The Monitor is sent only closed files, and detained cases tend to resolve more quickly, this may

⁹ See above; currently Albania, Bulgaria, Jamaica, Macedonia, Moldova, Romania, Serbia and Montenegro, Bolivia, Brazil, Ecuador, South Africa, Sri Lanka, Ukraine, India, Mongolia, Ghana (men only) and Nigeria (men only).

be an additional factor why, in a high proportion of cases I reviewed, the applicant was detained.

46. Provided the asylum applicant and any dependents are considered suitable for detention at Oakington, and there is space for them, then they will be detained and arrangements made to transport them there. On arrival at Oakington applicants are given a leaflet in their own language or one which they may reliably be assumed to understand, which explains the NSA procedure. If such a language is not available, the services of “Language Line” will be used.
47. Applicants generally arrive within 24-48 hours of making their claim for asylum, although in some cases this can take longer. Families where the principal asylum applicant has a right of residence in a listed country may be detained at Oakington. Usually the whole family will be detained together, however, the Immigration Service sometimes detains the head of a family whilst allowing the remainder of the family to live in the community. The families of NSA applicants may thus become separated. However this has only rarely been applied at Oakington, which has sufficient family accommodation to accommodate 180 detainees. Indeed the general practice at Oakington is to avoid splitting families wherever possible. Unfortunately the policy of detaining applicants with their families means that significant numbers of children have been detained at Oakington pursuant to the NSA process. It should be noted that families are usually considered to be at low risk of absconding, and are therefore not generally detained during the processing of an asylum claim, and that it is Home Office policy is to detain children for “as short a time as possible and for no longer than is necessary.”¹⁰ Home Office statistics do not distinguish between dependents who are adults and dependents who are children, so I cannot specify how many children have been detained as a result of NSA decision making at Oakington, but it is likely to be significant. In my last report I recommended that alternatives to detention should always be carefully considered where children are involved – e.g. 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. This recommendation was not accepted by the Secretary of State. However, *I continue to recommend that the policy of detaining families with children in order to consider their claims under the NSA system should be reviewed.*
48. I also recommended in my last report that statistical data records adult and child dependants separately, so that it might be possible to see how many children were being detained as a result of a parent’s claim being considered within the NSA process. Some statistics are now published by the Immigration Research and Statistics Section (IRSS). In the “Control of Immigration: statistics United Kingdom 2004” command paper, CM6690, published on 22 November 2005, table 6.3 gives a “snapshot” of the numbers of persons recorded as being in detention in

¹⁰ Beverley Hughes, Minister for State, 8 May 2003, to the House of Commons, Hansard Column 927

the UK solely under Immigration Act Powers on 25 December 2004. It contains some information about minors; how many minors were detained on this day, how many of these children were male and how many female, their place of detention and the length of time they had spent in detention on that date. However, this is only a snapshot and information about the age of dependants in detention are not available nor is information broken down by decision type so it is not possible to say how many of the children recorded were detained as a result of them having a parent who was being considered within the NSA process. Table 6.1 of the asylum bulletin records some information about minors, but again it does not identify the numbers of children detained as a result of the NSA process nor how long they are detained for. *I believe that the Secretary of State could and should do more in terms of monitoring children detained within the NSA procedure, and I recommend once again that statistics are kept about the numbers of children involved and the length of time for which they are detained.*

49. HM Inspectorate of Prisons (HMIP) is also concerned about the detention of children at Oakington. There has not been a further inspection of Oakington since my last report, but it is worth repeating HMIP's concerns. During an inspection visit to Oakington during June 2004 (reported published November 2004) HMIP found that while most children held at Oakington were held for short periods, 15 of the 41 children detained at the time of the inspection had been held for between one and four weeks, and the longest stay in the previous year had been 21 weeks. This was in contrast to a previous inspection visit, before the introduction of NSA processing, when no children were held for more than seven to ten days. The HMIP report makes comment on the disruption caused to education of some children, including missing GCSE examinations in one case, and the fact that the majority of child protection "cause for concern" forms were opened because of staff worries about children's failure to thrive, often because of traumas associated with detention. Mechanisms for deciding to detain children, and reviewing their detention and developmental needs, were not sufficiently robust in the view of HMIP. The report observed that the detention of children should be authorized at a senior level, by an Assistant Director, and this was not being done at Oakington. I agree with this observation – in this year's sample I once again found no evidence of an Assistant Director's involvement in the detention decisions in family NSA cases in the files I reviewed. *I therefore recommend that in all family cases a clear note is placed on the file confirming the Assistant Director's involvement in the decision to detain, in line with Home Office guidelines.* HMIP's report also states that it found no evidence of a balancing exercise being carried out, weighing the necessity of detention and the welfare of the child, as article 8 ECHR requires. I agree with this observation as well – there was no mention in the detention reviews on the files I saw this year of the welfare of dependent children. The HMIP report states "it remains our view that the detention of children should be exceptional, and only for very short periods" and where a child is detained recommends an independent review of a child's welfare and development after 7 days. I endorse this recommendation. *I*

recommend that the Secretary of State introduces a procedure requiring that the welfare of any dependent children be separately considered after 7 days and at frequent intervals thereafter, and that a note should be made of this on the file, which should include the steps that have been taken to ascertain information relevant to assessing the child's welfare. This is relevant to my role as Certification Monitor because acute anxiety about family members' welfare will affect the ability of the principal applicant to properly prepare and present their case in the short timescales involved. If the claim is certified there is, of course, no appeal process before removal where any difficulties in presenting the initial case could be drawn to the attention of an independent Immigration Judge.

50. HMIP stated in its 2004 report about Oakington that “since our last inspection [in 2002], the population and function of Oakington had changed. In particular it was holding detainees facing the prospect of imminent removal without a right of appeal: some of whom would be removed immediately after completion of the fast track process. This had implications for security, vulnerability and the length of time detainees, including children, spent in the centre. The Centre had paid attention to the security risks; but in our view had paid insufficient attention to the need for effective systems to manage the increased risk of suicide and self-harm; or to provide sufficient purposeful activity for longer-staying detainees”. The report notes the use of the secure Detainee Departure Unit – a locked down separation unit – for various incompatible functions, including the detention of those thought to be at high risk of absconding, disruptive detainees, those at serious risk of suicide and self-harm and as a temporary staging post for those due to depart the Centre. These functions were held to be incompatible and unsustainable. The systems for supporting those at risk of self harm were insufficient to cope with the current population held at Oakington. During my visit this year to Oakington I was informed that the DDU continues to be used for these same purposes, and although I was informed that staff makes efforts to ensure that any stay in the DDU is pleasant for vulnerable individuals I believe the recommendations of the HMIP continue to be relevant. There are thus concerns that, for at least some detainees, Oakington does not provide a conducive environment to advance their claim for asylum. As stated above this is particularly relevant as there is no right of appeal against certification, which might have allowed any difficulties an individual had in presenting their claim to be resolved before removal.
51. At some stage, probably on the date the claim was made, a “One Stop Notice” will have been served on the applicant. For those subject to the Oakington NSA process, 3 working days is allowed to complete and return this. This form requests the provision of “additional grounds”, i.e. any reasons in addition to the asylum claim that the individual has for wishing to remain in the UK.
52. Once an individual arrives at Oakington, they are given a series of dates – for an interview with their legal representative, for their asylum interview, and for their decision interview.

53. Some individuals, for reasons of Home Office staffing capacity, are not admitted into the NSA system immediately on arrival. Some spend a period of days, up to four, detained at Oakington before they are formally admitted to the NSA process. **The number of applicants Oakington can process on a daily basis is based on the number of caseworkers and detaining before admitting into the process is designed to maximise the occupancy and throughput of applicants.** However, this inevitably extends the time they spend in detention at Oakington. I recommended in my last report that applicants should not be 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. The Home Secretary did not accept this recommendation, seeing the staged entry of applicants into the NSA system as necessary to maintain a “balanced throughput of both NSA and non-NSA applicants”. However, I have seen no evidence of delays of more than a day this year in my file reviews. This may be a result of the fact that Oakington has, I understand, only been about half full for most of this year, placing less strain on resources.
54. Within 2 days of arrival at Oakington, the applicant should have a meeting with their allocated legal representative, at which the legal representative is able to provide legal advice to the applicant, and to take information from them about their claim. I understand if the applicant requires more than a single legal advice session it is possible to arrange this prior to the asylum interview.
55. Two organisations provide “on site” legal representation at Oakington - the Refugee Legal Centre (RLC) and the Immigration Advisory Service (IAS). Both have staff permanently based at Oakington, and offices on the premises. Both are non profit making organizations, and both have been providing legal advice and representation to asylum seekers for many years. Both also have contracts with the Legal Services Commission (LSC) which is responsible for allocating public funding for legal representation for those who cannot afford to pay for this. IAS and RLC therefore offer free legal advice and representation to those who have limited financial means. A system of “exclusive contracting” has now been introduced, meaning that the legal representation of those detained at Oakington will only be funded by the LSC if this legal advice and representation is provided by either the IAS or the RLC, except in limited exceptional circumstances (i.e. the legal representative has done at least 5 hours work on the case already, prior to detention of the applicant at Oakington, or represents another close family member whose case is interconnected with that of the applicant). Off-site legal representatives have to work within the timetable laid down by Oakington, which may mean “out of hours” work at short notice. It is in my view a crucial part of the limited safeguards the NSA system affords that high quality legal advice is available to applicants during their interview and subsequently. Legal representation is also vital to ensure that the applicant understands what is happening to them and what the process is likely to be in their case, and has access to

independent advice and assistance when things go wrong. I will return to the issue of legal representation and the quality of legal advice afforded to applicants later in the report.

Trafficked persons

56. I considered this issue in some depth in my last report. Little has changed since then. I consider this to be an important issue, and that insufficient attention has been given to it by those operating the NSA system, especially given the nationalities of those commonly detained at Oakington, some of which are acknowledged to be particularly targeted by traffickers and to be particularly vulnerable to being trafficking.
57. The fact of being trafficked may be the source of the applicant's claim for asylum, and for a fair decision to be made on their claim it is vital that they are sufficiently recovered from their ordeal, and that they feel safe enough, to explain the basis of their claim in full by the time they are interviewed. Time to reflect is generally seen as crucial for those who have been trafficked and especially those who have been under the control of their traffickers in the very recent past. This presents significant challenges at Oakington because of the fast timetable in operation there. Therefore, all those involved in Oakington decision-making processes need to be vigilant to ensure that applicants are able to give information about their claims without fear of subsequent reprisals, and that they understand their options. Without this, the decision may be based on partial information about what has happened to the applicant and without full information an assessment of future risk should they be returned may be inaccurate. Once again, this is especially relevant since if the claim is certified there is no right of appeal and removal may take place almost immediately, allowing no opportunity to explain further what has happened.
58. Secondly there are issues about protecting applicants during their time at Oakington and beyond; clearly this is linked to the issue above, since if victims are under ongoing pressure not to speak out then this may mean they do not feel able to explain their claim. There is much more chance that they will be able to do so if there is freely available information about their options in a language they can understand, that they can access in an unobtrusive way, and preferably take away for future use. Even if they do not decide to seek help while in Oakington, if they have information about sources of potential assistance they might be enabled to do so in the future. *I therefore recommend that a supply of leaflets advising detainees about trafficking and how to seek help should be made freely available in Oakington in a variety of languages.*
59. There is widespread acknowledgement of the ingenuity employed by traffickers to maintain control of their victims. When I first visited Oakington, I noted that Immigration Service staff seemed resigned to releasing applicants to addresses they suspect are used by traffickers, and as far as I could ascertain the relevant addresses had not been passed onto the police for investigation. It was also clear that suspicions of

links between particular law firms and traffickers had not been reported to the Legal Services Commission or to the Law Society. It is clearly also possible that some of those detained at Oakington might themselves be traffickers, and that these individuals might therefore be detained amongst their victims (for example if a van is stopped carrying a group of individuals working here illegally, the person controlling them may well be detained as part of the group). In my last report, I therefore recommended that clear procedures were put in place instructing staff what action they should take when they suspect the involvement of traffickers in any way. The Secretary of State responded that “we are reviewing what more can be done in the light of the Monitor’s comments”. In commenting on this report Home Office officials have stated, “we take this issue extremely seriously. As part of the proposed for a UK action plan for tackling Human Trafficking, we are working closely with the Enforcement Policy Unit and the Organised Immigration Crime Section on the development of enhanced guidance for asylum caseworkers in relation to Victims of Trafficking. I welcome the prospect of future guidelines for all asylum caseworkers on this issue. However, *I continue to recommend that urgent steps are taken to ensure that staff involved in the NSA process, particularly but not exclusively those at Oakington, take appropriate steps where trafficking comes to light or is suspected, and that steps are taken to try to ensure trafficking victims detained at Oakington are protected.*”

60. The amended version of the Oakington “Victims of Trafficking” policy I reported on in my first report is still being used. It adopts the definition of “trafficking in persons” contained in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000). The Protocol includes in its definition of “trafficked” those trafficked for forced labour as well as for prostitution. However, as I stated in my first report, the policy focuses almost exclusively on women trafficked for prostitution and on the Poppy Project. This is a project funded by the Home Office to help victims of trafficking and to assist in gathering intelligence about traffickers. The aim of the scheme is both to provide support to victims, and to help the police and other agencies tackle trafficking, by gathering intelligence from the women accommodated there; one of the criteria for acceptance onto the scheme is willingness to co-operate with the authorities. It is expected that victims will return to their country of origin at the end of any investigation or criminal trial. It is run by Eaves Housing, an organization experienced in supporting and assisting victims of trafficking. However, while the service it provides is valuable, this is only available to women aged 18 and over, who are identified in London, and there are further restrictive criteria for eligibility. The policy makes almost no reference to other sorts of cases or the issues about care and protection of victims of trafficking within Oakington.
61. The criteria for the Poppy Project, in detail, are:
 - The victim has been brought to the UK,
 - She is being forcibly exploited,
 - She is working as a prostitute,

- She has come forward to the authorities,
- She is willing to co-operate with the authorities.

However, women who are not currently working as prostitutes can be considered eligible if:

- they demonstrate they have escaped from the trafficker,
- that in the period immediately prior to their escape they had been working as a prostitute,
- that the period they have not been working as a prostitute does not exceed 30 days,
- that the remaining criteria are met.

Accommodation space at the Poppy Project is limited to 25 beds

62. Both the restrictive criteria and the space limitations mean that the fact that the Poppy Project cannot accommodate an individual is far from conclusive as to whether there are issues that need to be addressed within the Oakington system. As well as all male victims of trafficking, there will be trafficked women who fall outside of the current entry criteria cannot be accepted onto the scheme. These include (according to the Home office's own policy on trafficked cases):
- Port of entry referrals by Immigration/NGOs (because the woman has not yet been working as a prostitute within the UK),
 - Women trafficked into another country (perhaps other EU countries) before being re-trafficked into the UK,
 - Women who escaped/left prostitution more than 30 days before referral (there is scope for limited discretion if the period since leaving prostitution is not significantly more than 30 days),
 - Women who have claimed asylum in the UK already and have exhausted all avenues of appeal through the asylum process (this is to prevent the Scheme being used as a last resort attempt to remain in the UK when the asylum process has been fully explored),
 - Women trafficked for purposes other than prostitution (domestic slavery, forced marriage, etc).
63. The policy is clear that women who have already been accepted by the Poppy Project should not be detained. However the policy is not, in my view, clear about what should happen to women who are accepted by the Poppy Project after their arrival at Oakington, i.e. whether they should be released immediately or only released after interview or decision. I have had information from legal representatives that women are not always released immediately they are accepted by the Poppy project. *I recommend therefore that women accepted by the Poppy Project are released immediately and not interviewed at Oakington, and that the policy is amended so that it states this explicitly; I make this recommendation because I believe that many of those accepted by the Poppy Project will benefit from their support before being interviewed about their asylum claim.*

64. The Oakington “Victims of Trafficking” policy then goes on to state that “Those who do not wish to be referred to the Poppy Scheme should be processed in the normal manner. Whilst we do not accept that lengthy recovery and reflection periods are necessary in every case, or that they should be granted regardless of whether a victim chooses to assist in any prosecution of the traffickers, staff should be mindful that victims of trafficking may need time and assistance to recover from the effects of abuse at the hands of their traffickers and to make informed decisions about their future. As with any other applicant being processed through Oakington, ready access to their appointed representative, Refugee Council and medical services will be available. Where there is concern about a claimant’s mental or physical health this should be referred to a SCW, and Primecare FMS advised at the earliest opportunity.” It is unclear to me whether the policy is to allow traumatized victims of trafficking additional time to prepare their claims, which I would strongly recommend, or whether the policy is to resist any such application on the basis that access to a legal representative and medical services at Oakington make this unnecessary. *I recommend that the “Victims of Trafficking” policy is formulated more clearly to make it clear that traumatized victims of trafficking who request additional time to prepare their claims will be given this.*

Asylum interview

65. The Home Office has a team of caseworkers and senior caseworkers trained in NSA decision-making based at Oakington, and theoretically on day 3 but more often on day 5 or thereabouts the asylum interview takes place. This is conducted by an Executive Officer, with the assistance of an interpreter if this is required. The official conducting the interview is not always an accredited NSA caseworker, since the Home Office takes the view that it is not necessary, and that general asylum interviewing skills are sufficient. The interviewing officer will often only know the nationality and ethnic origin of the applicant prior to their interview, since in NSA cases the practice of requiring a written questionnaire to be completed prior to the interview about the claim, known as a Statement of Evidence Form, is not used.
66. Those interviewed within the NSA process usually have a legal representative present at the asylum interview, as well as an interpreter provided by that legal representative to check on the accuracy of the Home Office interpreter if this is needed. The Legal Services Commission covers the cost of this for those unable to pay for their own legal advice and representation.
67. It remains the case that most such interviews are not tape recorded. Instead, the Home Office interviewing officer takes a written note of what is said by themselves and by the applicant. The legal representative does the same. However, in a significant minority of cases tape recording of interviews has been introduced at Oakington. No written record is taken, and instead the interview is transcribed afterwards by a typist, and a transcript provided to the detainee through their legal

representative. This has been introduced to deal with repetitive strain injury amongst interviewing officers who spent large periods of time taking notes during interviews, and it seems to be a development that is welcomed by all involved, since transcripts are likely to be more accurate as a record of the interview than notes taken at the time. The transcript's accuracy can be checked by the legal representative by listening to the tape recording of the interview. The other main advantage is that the transcript is usually much easier to read, by the decision maker and anyone who subsequently has involvement with the case. This is not an unimportant issue; I saw one example of hand written interview notes that were so illegible they had to be sent for transcription before a decision could be made, and I was also told that decision making is faster when the interview notes are typed since the decision maker does not have to spend time deciphering handwriting.

68. In my opinion, legal representation at interview in NSA cases is a vital safeguard, since it provides an independent observer able to take notes about what takes place, and to comment on any difficulties that arise. Legal representatives often played a valuable role during and after the interview, in terms of correcting errors made by Home Office interpreters, and by clarifying misunderstandings. I also saw examples of legal representatives intervening during the interview in relevant ways, and also of requests for additional time prior to interview or between interview and decision for a variety of meritorious reasons. Such requests seemed to be acceded to by the Home Office where the reasons for the request were cogent. For applicants who are not able to speak English, who are frightened, who may be traumatized, who are not accustomed to dealing with British officialdom, and whose cases are being dealt with at an accelerated rate with no in country right of appeal it is vital, in my view, that this representation continue. The interview is their only opportunity to put forward their claim, and thus is the most important part of the process for them. In NSA cases, asylum interviews tend to last longer than they do in non-NSA asylum cases, often for two to four hours or more, depending on the claim and the level of detail the applicant provides in their replies to questions. The Home Office acknowledges the importance of providing an adequate opportunity to the applicant to set out their claim in full, and being asked to describe everything of relevance, as well as being questioned on issues likely to be relevant to the Home Office in reaching a decision on the claim. Any discrepancies should be put to the applicant during the interview allowing them an opportunity to explain. Caseworkers are encouraged to take their time, and probe for further details that might be relevant. Caseworkers should also put to the applicant aspects of their claim on which certification was likely to rely, for example asking whether there was any reason they could not move elsewhere in their own country to avoid persecution, or whether they had tried asking the authorities for assistance before leaving, and any other relevant further questions. In some cases there is a further interview with the applicant, if the caseworker or the senior caseworker decides this is necessary because something has been missed in the initial interview or there has been some problem in the way the interview was conducted.

69. Most of the interviews in the case files I reviewed appeared to have been properly conducted, in that they were free of complaints during the interview or subsequently. I saw examples of good interviewing practice by Interviewing Officers, including occasions where those who became distressed during the interview were asked if they wished to take a break, where time was taken to elicit a detailed account, and where further questions were asked where the meaning of an answer was unclear.
70. However, I also saw examples of interviews which were very short and in which only an outline of the claim was obtained by the interviewing officer. I also considered that in many cases the two key issues for decision making, sufficiency of protection and internal flight alternative, were not sufficiently explored. I do not consider that internal flight is sufficiently addressed by simply asking the applicant whether he tried moving to avoid his difficulties before leaving his country. Clearly what is also required is a question about whether there would be anything that would prevent him from moving to a different part of his country to avoid further difficulties if returned now – the situation may have changed since he left - and follow up questions to explore any objections raised in some detail. I also consider asking the applicant only one question, for example whether he tried reporting his problems to the authorities in his country, insufficient to explore the issue of sufficiency of protection. If he answers no, he should be asked why not. If he answers yes, he should be asked the outcome of the report in some detail. Any assertion that local officials are corrupt should be further explored, by asking questions about the basis for this assertion.
71. To give an example, in one case the claim was based on an assertion that a former business associate was seeking revenge because the applicant owed him money. This man had, it was claimed, *inter alia* caused corrupt police officers to arrest the applicant's brother. The applicant's father had used his influence to secure the brother's release. The applicant was not asked in his asylum interview some obvious questions, for example whether there was any reason to believe his father's intervention could not bring about a similar outcome if the applicant were to be falsely arrested like his brother, nor whether the family had complained about the actions of the police officers after his brother's arrest and if so what the outcome had been.
72. I noted in the questionnaire that unaccompanied asylum seeking children complete about their asylum claims that there are a series of detailed questions about sufficiency of protection. Home Office interviewing officers should be asking equally detailed questions about sufficiency of protection to adults during the interview process.
73. It is vital that both these issues, internal flight and sufficiency of protection, are carefully explored in interview since they are often the basis of a subsequent decision to certify. In some cases one or the other of these issues was not raised in interview by the interviewing officer at all, but I observed that in a significant number of such cases that written

material submitted after the interview by the legal representative corrected this, allowing a decision to be made without re-interviewing.

74. I saw two examples of a refusal to organize an interpreter when this was requested by the legal representative. In one of these cases there was a file note that the legal representatives had an interpreter present and that they had asserted the applicant did not speak sufficient English for an asylum interview. The interviewing officer sought advice and was told to continue with interview without interpreter. This was attempted but the interview was terminated when it became apparent that the applicant did not understand or speak sufficient English for the interview to proceed.
75. In the second example, the legal representative requested an interpreter be arranged before the interview was conducted in writing twice, and followed this up with telephone calls. This was refused because the client had answered questions during his screening interview without an interpreter, and the policy set out in the general Asylum Policy Instructions applying to all asylum cases is that in such cases the interview can be conducted in English. The applicant was threatened with a decision to refuse his claim for non compliance if he did not agree to be interviewed in English, and then agreed to proceed in English. The interview record makes clear that many questions had to be repeated and / or rephrased, up to five times, before it was understood, for example one question was asked, rephrased, repeated, rephrased again, and then the answer was not understood and clarification had to be sought. On one page of the interview notes there were 8 questions asked, and after four of these the interviewing officer has noted that they had to clarify the question. The legal representative then sent a letter (a page of closely written type) correcting misunderstandings of the applicant's answers in the written record of the interview, for example the word "oga" (a foreign word used repeatedly by the applicant) recorded as "own car", "Saturday" recorded as "that on", and "bury my family" recorded as "many of my family". The interviewing officer recorded in their comments about the interview that "interview was very difficult, but applicant managed to complete in English". This is not good practice, let alone best practice, and is unacceptable from all points of view. It makes the task of interviewing, in terms of ascertaining what has happened to the applicant in detail so that a proper decision can be made about their claim, almost impossible; it makes it more likely that mistakes in decision making will be made, and therefore more likely that legal challenges will need to be brought; it is also more likely to leave the applicant with a sense of unfairness and injustice. Finally there is a substantial chance this approach will cause delay in some cases, in that if the applicant cannot be understood at all the interview will have to be rescheduled.
76. As stated in my previous report, in my view it is not appropriate to attempt to proceed with an asylum interview without an interpreter if the applicant is requesting one, particularly in the NSA context. Even if a screening interview has been successfully completed without an

interpreter, this does not mean the applicant feels competent to answer questions about their substantive claim in English. The Screening Interview asks questions about practical issues for the most part, and requires less linguistic ability than an asylum interview. It is probably also the case that confidence plays a part and applicants will have been advised about the importance of giving full and accurate answers in their asylum interview by their legal representative. I hope the example given above will result in a change of policy in respect of NSA cases. *I recommend once again that all requests for an interpreter for an asylum interview are acceded to in NSA cases where the highest standards of fairness must be complied with – 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.*

77. Following the asylum interview, there is a two day period in which the applicant and their legal representative can submit representations in writing and further evidence in support of the claim. In the case of the RLC and IAS, the legal advisors based at Oakington, this comprises a detailed letter of representation, setting out the factual background to the claim and relevant legal argument, and enclosing objective evidence in support. The RLC also provides a detailed statement from the applicant, setting out their claim. Generally these representations are of a reasonable or a high standard. However, in the files I reviewed, for applicants represented by other organisations and law firms, the quality of written representations was generally (although not always) poor. I will return below to the issue of legal representation for those within the NSA process.
78. In one of the cases I reviewed the applicant had mental health problems. Interviewing him was a challenging task, since he gave lengthy and unfocussed responses to the question he was asked. The interviewer appeared to me to give up on trying to obtain relevant information from him, and I did not think this was justified or appropriate. It is important that those who interview applicants have training in how to question applicants with mental health problems.

Decision making

79. In the majority of cases where the applicant is from a designated country the Home Office's decision is to refuse and to certify the asylum claim and any human rights claim as "clearly unfounded". A minority of cases are refused asylum without certification, and can then appeal in-country prior to any removal taking place. Such applicants may be released pending the hearing of their appeal, or transferred to a different detention centre. On occasion, applicants where a decision has been taken not to certify their claims are transferred to Harmondsworth, and processed through a different fast track process, where the case progresses to an appeal hearing within 10 days.
80. On rare occasions the decision is to grant some sort of status to the applicant. Between the commencement of the NSA process and

September 2005 I am told that more than 95¹¹ claimants from designated NSA countries were granted asylum. There have also been grants of subsidiary forms of protection in 15¹² cases. These statistics will include cases where the applicant was never detained, or detained elsewhere, as well as cases processed through Oakington. There have also been 1,540¹³ grants of Discretionary Leave to those from designated countries, for example to unaccompanied minors. Such children will not have been detained at Oakington or other detention centres unless their age was in dispute.

81. Senior case workers make the decision about certification. They work on recommendations drafted by case workers. Often the caseworker drafting the recommendation is not the official who interviewed the applicant; a good proportion of the recommendations where the applicant is detained at Oakington are drafted by staff based in Liverpool or Croydon, but even where the decision is made at Oakington the case worker will often not be in the interviewing officer. The process of deciding whether to recommend certification or not, drafting a minute concerning this with a reasoned explanation, and drafting a Reasons for Refusal Letter if the case is to be refused will probably begin soon after the interview. Therefore, these documents may be completed prior to receipt of the further written representations from the legal representative, although I am told the recommendation and draft Refusal Letter would be reviewed in the light of those further representations. There is legal authority that acknowledges that once a decision is made, there is a human tendency to be reluctant to change it. I believe it is vital that there is a clear decision-making stage, where the case worker drafting the recommendation considers all the evidence available and decides whether this is a case that falls to be refused, and if so whether it should be certified. However, this approach is not accepted by the Home Office which responded to my first report by stating that *"We consider it reasonable to compile a draft decision following the interview based on the information provided, and to review it carefully if new evidence is brought to light."*
82. Home Office caseworkers are allocated a very significant amount of time draft the recommendation and any "Reasons for Refusal Letter". Caseworkers told me they took approximately a half day to a day drafting the paperwork and formulating their recommendation about certification, depending on the case. They made it clear that they are not under time pressure, the emphasis being on properly drafted decision letters.
83. Once any Reasons for Refusal letter, a short summary of the factual basis of the claim and a recommendation about certification have been drafted the file is passed to a senior case worker. The senior case worker reviews all the documentation in the case, often amends the Reasons for Refusal letter, and makes the final decision whether the

¹¹ This statistic is provisional and rounded to the nearest 5.

¹² This statistic is provisional and rounded to the nearest 5.

¹³ This statistic is provisional and rounded to the nearest 5.

claim will be certified or not. Senior caseworkers take perhaps a further half day to a day over the task of reviewing the decision, any draft Reasons for Refusal letter, and the recommendation regarding certification, the length of time again depending on the case and the expertise of the caseworker whose decision they are reviewing. Having this “second pair of eyes” cast over all decisions was promised to Parliament as one of measures that would be introduced to ensure the integrity of the NSA system.

84. At the present time approximately two thirds of applications from designated countries are certified. The percentage of claims from nationals of designated countries that are certified will naturally vary over time depending on the composition of the list of designated countries and other factors including developments in caselaw.
85. I can confirm that in most of the files I examined there was evidence of involvement of a caseworker and a senior caseworker in decision making, in the form of written memoranda, firstly from the caseworker recommending whether or not the case should be certified and the basis for this recommendation, and indicating they had drafted a Reasons for Refusal Letter, and then from the Senior Case Worker indicating their decision about whether or not to certify. Occasionally the senior caseworker will suggest the applicant should be re-interviewed. Sometimes the senior caseworker did not follow a recommendation to certify the claim. I was informed by several senior case workers that this happens in about 10% of cases. I can confirm that I saw, amongst the files reviewed, a small number of cases where the caseworker recommended that an applicant’s claim should not be certified as “clearly unfounded”, and also a small number of cases where senior caseworkers declined to follow a recommendation to certify.
86. However, in eight of the files that I reviewed I could not locate a clear memorandum recording the involvement of a Senior Case Worker with their signature. Home Office officials have reviewed six of these cases, but the remaining two have not been checked by the Home Office since the files are “live”. In the six that have been checked, I am told that in fact a second pair of eyes was involved in all of them. In three of the cases the evidence is on the Home Office’s computer system, to which I do not have access, not on the file. In one of the cases the evidence of the second pair of eyes was on one of the sub files. In two further cases I am told that a file note or a computer print out was on the file as evidence (but not a clear memorandum in the usual format with a signature). It is difficult for the Monitor to make sense of documentation in a variety of formats contained in what are potentially very large files. Since senior caseworkers have a crucial role in the NSA system as a second pair of eyes, and since it is only they who are authorised to take the final decision to certify a claim, and since a very considerable amount of time is spent on this task, *I recommend that systems are put in place to ensure that in all certified cases the correct procedure is followed, including the involvement of a “second pair of eyes”, and that to confirm this clear, consistent memoranda, in the same format in all cases are placed on file.*

87. During the decision-making process, caseworkers and senior caseworkers can also ask the Home Office's Country of Origin Information Service, for its advice about a particular aspect of the case. I saw several examples of such requests on the files I reviewed, but usually not until the case had reached the Judicial Review stage. I consider that the fact that advice was asked at this stage but not before supports my position that insufficient use is being made of this Service to support decision making. *I therefore continue to recommend far more use is made of Country of Origin Information Service for advice on individual cases, and believe that if this were to happen, the quality of decision making would be improved.*
88. I understand that additional material received from the applicant between the time the decision was made and the service of that decision would normally be reviewed by the decision maker, even if this is supplied after the deadline for providing written representations and the Reasons for Refusal Letter amended to reflect any change of position.
89. Once completed, the relevant documentation, in most cases a detailed Reasons for Refusal letter and the accompanying formal notices of the decision, are served on the applicant in person, at the "decision interview". This occurs usually between day 10 and day 14.
90. If the applicant is granted asylum or some kind of status, then they are released, having been presented with their status papers at the decision interview. This is extremely rare in cases where the applicant comes from a designated country.
91. If the applicant is refused asylum and their claim is not certified, then they leave the NSA process. They may be granted temporary admission (i.e. released from detention, usually to accommodation provided by the National Asylum Support Service) or detained, in either case to await an appeal hearing on their claim.
92. If the applicant is refused asylum and their claim is also certified, then removal directions are set (i.e. a date for departure with a booked flight) immediately or for a later date. The applicant will be detained in all likelihood until this date. In some removal is a simple process, since it is possible to remove the individual on documentation called an "EU letter", i.e. documentation prepared by the Home Office. In other cases this is more complicated, for example Jamaica, Moldova, and India where there is no agreement with the destination country that their nationals can be removed on EU letters: if the applicant does not have a valid passport a one way travel document must be obtained from the relevant embassy. This can take, for example, about 3 months in Jamaican cases. During the documentation process the individual may be detained, but where very significant delays are likely they must be released. Release is rarely granted by the Home Office if obtaining documents is likely to be a quick process, since it is thought likely that such individuals will abscond. The applicant can apply for bail from an Immigration Judge if they are not released. Once travel documents are

arranged, and the flight booked, the individual will be escorted to the airport and to the flight itself.

93. Throughout the above process, it is possible for the applicant to make a voluntary departure, i.e. to confirm that they wish to leave the UK on a voluntary basis and withdraw their claim. However, the same problems outlined above in arranging their departure may be encountered.
94. Finally, Oakington is due to close in November 2006 because the Home Office has given a public undertaking that it will leave the site by then. Consideration clearly needs to be given as to whether detention during NSA decision-making is to continue, and if so where it is to happen.

Detained Route – non-Oakington

95. There may be those who are detained other than at Oakington whose cases are considered under the NSA system. An example would be a case that was not thought suitable for detention at the relatively low security of Oakington, perhaps at the end of a criminal sentence. The process will be as above, except that the timescale for decision making is likely to be slightly longer, and the applicant would have no access to publicly funded legal advice and representation during their asylum interview. I was very concerned at the delays that were evident in the one case I reviewed that fell into this category. The applicant had been given a 3 year prison sentence. The beginning of immigration service involvement was timely – he was due for release from his prison sentence in March 2005 and an immigration officer attended to interview him about his immigration status in the proceeding September, about five and a half months previously. The applicant claimed asylum during that interview. An asylum interview was not arranged until five months later, a week before the date when his prison sentence ended. The decision to refuse and certify his claim was made on the date of his expected release. He was not removed until almost 6 weeks later, during which time he was in prison in immigration detention. There was no apparent reason for this delay, especially since he was removed on a passport that the UK authorities had had in their possession since his arrest. Had he been interviewed and a decision made prior to the end of his sentence, removal could have taken place immediately thereafter. Such delay is expensive, since holding someone in prison is not a cheap option, but also involves infringing the individual's right to liberty. Had the claim not been certified this applicant would have had a right of appeal against refusal, perhaps extending his time in prison further. It is imperative that decisions are made in a timely way in such cases so that there is time for the process to be concluded prior to the date of release. It was also clear from this file that it should have been dealt with by the criminal casework team, and that had this happened a deportation order would have been made, but by the time caseworkers appreciated this time pressures made such involvement impossible. *I recommend that clear procedures be established for applicants detained other than at Oakington to ensure that applicants do not spend unnecessary time in prison.*

96. I recommended in my first report that the Legal Services Commission rules covering free 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 free advice and representation during their asylum interview regardless of their place of detention. The LSC's Immigration Contract Specification indicates that advice and representation is available at interview where "The client is subject to a Home Office fast track process", and defines this to mean "all cases at Oakington from 1 April 2004 and all cases subject to the Home Office fast track process at Harmondsworth from 1 July 2004". Since it defines fast track cases by place of detention, this creates a difficulty where an applicant is detained elsewhere. I understand that the Legal Services Commission has now entered into an arrangement that they will fund a legal representative from IAS or RLC to attend an interview elsewhere for detained applicants subject to the NSA process, and that the Home Office has agreed to notify IAS and RLC of all such cases so that they can provide legal advice and representation to those individuals. However, this still leaves in an anomalous position those who are already represented by other legal representatives, including representatives funded by the LSC. Those representatives will not necessarily be aware that a legal representative at interview will be funded by the LSC unless procedures are in place to inform such representatives that the case is being considered under the fast track process, and in addition unless the LSC's Immigration Contract Specification is amended to make clear that this is sufficient. Equally on the face of the LSC's contract specification there would be no requirement to transfer such a case to IAS / RLC as there is in relation to applicants detained at Oakington and Harmondsworth, subject to certain exceptions. *I therefore recommend that the issue of funding for legal representation at interview for those detained (but not at Oakington) and being considered under the NSA system receives further attention, since it would seem anomalies still remain. Proper procedures must be put in place for notifying any legal representative of the fact that such a case is being considered under fast track procedures by the Home Office. The LSC should also amend the Immigration Contract Specification to make clear that the funding regime for such cases is equivalent, so that legal representatives are aware that funding is available to attend the asylum interview. This is important to ensure fair and equal access to legal advice for all those detained whose cases are being considered within the NSA process.*

Non-Detained Route

97. Those not suitable for detention, e.g. because of ill health, or age, or those who cannot be detained at Oakington because of lack of capacity there, will have their applications for asylum considered by the designated NSA decision making teams, but will be allowed to live in the community while their claims are processed.
98. Such individuals will be eligible for financial support and accommodation from the National Asylum Support Service (provided they are destitute and are not excluded from support because of a delay in making their claim combined with access to financial support in the community). They will be dispersed to Leeds, Liverpool or Manchester,

and placed in induction centre accommodation while an initial decision is made on their claim. This is a change from the system reported in my last report, where NSA applicants were kept in emergency accommodation, potentially for extended periods. I am informed that induction centre accommodation is of a higher standard than emergency accommodation, and more suited to long term accommodation.

99. Those in the non-detained route will be interviewed by a caseworker from either the Liverpool or Croydon NSA teams. It is the aim for this to take place about 14 to 21 days after the application for asylum is made. The interview takes place in most cases without a legal representative since the changes to the legal aid system means in most cases there is no funding to attend. The recommendation in my first report that this be changed for reasons of parity and equity, and funded legal representation re-introduced, was rejected by the Secretary of State

100. Thereafter a decision will be made, ideally within about 7 days of the interview, and consideration given as to whether or not the claim should be certified. The same process of decision making described above is followed. The aim is for decisions to be made in such cases within 2 months. However, this time limit is often exceeded. Once a decision has been made, it is usually sent to the reporting centre where the applicant signs on, and should be served on them in person. Often the applicant will be detained at this point, if the decision is to certify their claim, on the basis that they have no appeal and can be removed. At the same time as the decision is served on the applicant, it should also be served on the legal representative, usually by fax. I recommended in my first report that no-one certified in the non detained route should be removed within 24 hours of the decision being served, and have been reassured that this has not occurred in the past and that an instruction has been issued re-affirming that it should not. This is important to allow adequate time for legal advice to be taken and options to be considered, including the option of a challenge by way of Judicial Review to the decision prior to removal of the applicant. It is particularly pertinent for cases certified on a case by case basis, where the applicant and their legal representative will not have been told and will have had no clues in advance of the decision being served that certification is being contemplated.

Unaccompanied minors

101. Unaccompanied asylum seeking children from the listed countries are not eligible for detention at Oakington. Unaccompanied minors almost invariably cannot be returned to their country of origin, whether this is a country that is designated under s.94 or not, since no suitable arrangements for their reception exist and it cannot be guaranteed that they will be adequately looked after on arrival. Therefore, if they do not qualify for asylum, they will be granted “discretionary leave”, i.e. permission to remain in the UK. For children from designated countries, this is generally for a year, or until their 18th birthday, whichever is the shortest period. This is in contrast to children from

other countries, who are granted discretionary leave either for a 3 year period or until their 18th birthday, whichever is the shortest, for the same reason, i.e. inadequate reception arrangements should they be returned. Although unaccompanied children are not formally excluded from being considered under the NSA process, because at the current time children from NSA countries are granted permission to stay, the asylum claims of unaccompanied minors from designated countries are not certified. This is because a child granted Discretionary Leave for a year does not have a right of appeal under the 2002 Act, so the issue of certification does not arise: by operation of statute it is not until the grant of leave exceeds a year that an appeal against refusal of asylum can be brought. These children must therefore wait until the end of their period of discretionary leave, and apply to extend it. If a child from a designated country should be granted an initial period of leave of more than a year, as a matter of policy the Home Office would not certify their asylum claim since where leave to enter or remain has been granted the individual will not be able to exercise their right of appeal, since to do so they must be abroad.

102. If a further period of leave is granted then, because the Unaccompanied Asylum Seeking Child now has cumulative leave to remain for more than a year, he or she can appeal the refusal of asylum under s83 2002 Act, and this right of appeal cannot be certified because there is no certification power where the appeal is being brought under s83.
103. Only if the child has completed 6 years in the UK before the age of 18 will they be granted permanent permission to remain here (Indefinite Leave to Remain). Most Unaccompanied Asylum Seeking Children are older than 12 on arrival, and will not have completed 6 years of discretionary leave by the time they are 18. Once they reach the age of 18, then they will not be granted an extension of stay, except in very exceptional circumstances. This is because they will now be treated as an adult and capable of caring for themselves, and therefore the lack of reception arrangements in their country is no longer a bar to removal. For young adults from NSA countries, this may mean certification of their asylum claim and removal once they reach the age of 18. I have stated above that I consider a sample of any such decisions should be reviewed by the next monitor.
104. It has been explained to me that the reason why children from designated countries are granted periods of leave to remain of a year or less, instead of 3 years or less granted to those from other countries, is because the Home Office is “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”. To date no such arrangements have been made, despite the fact that differential periods of grants of leave have been made since April 2004. As time passes without arrangements being reached, this explanation begins to look insubstantial. Therefore I continue to believe it is unfair to treat children from NSA countries

differently to those who are from other countries. I believe grants of short term leave of a year at a time to children who are under 17 (and would therefore otherwise be granted leave until their 18th birthday) creates unnecessary bureaucracy (dealing with applications to extend stay every 12 months) for both the Home Office and for the carer of the child (in all probability social services). It may create obstacles for social services putting in place stable long term arrangements for their care and it creates uncertainty for a child which is unnecessary. It also prevents a timely hearing of their asylum appeal, which cannot take place until leave of more than a year has been granted, i.e. the applicant must wait a year and whatever time it takes to grant a further period of leave before appealing. I believe that this is not to be in the interests of justice, particularly since it is common knowledge that the memory of a child will fade particularly quickly with time. *I therefore recommend once again that children from NSA countries are not treated differently to other children, and are granted the standard period of discretionary leave.*

105. I saw several cases where children were refused asylum, but granted a period of discretionary leave. Such children are not interviewed, and therefore the decision to refuse asylum is made on the basis of the answers provided in a written questionnaire. I was concerned about the way in which these decisions were made, in that there was no evidence that account had been taken of the age of the applicant. The decision making memorandum often stated blunt opinions by the caseworker about the lack of credibility of the claim. However, guidelines from UNHCR, the UNHCR Handbook, indicate that claims from unaccompanied minors should be treated differently from those of adults, with greater benefit of the doubt given to the applicant in view of their age and greater emphasis placed on objective information, with awareness that children are less likely to understand what has happened to them and less likely to be able to explain this coherently.

106. Despite requesting to see a sample of files regarding former children who had now reached 18 and whose claims were certified, no such files were provided to me. I remain concerned about decision making in relation to such young people, and recommend that my successor keep a watching brief on this issue and requests to see files from children in this situation.

Disputed Age

107. Assessing the age of adolescents is notoriously difficult, partly because of variation between individuals, partly because documentation may not be available or there may be a dispute about its genuineness, and partly because in the asylum context there are also issues of age assessment of those from a different culture. It is possible for example that those who have come from other cultures may typically look older than an average British teenager of the same age, due to harsh life experiences, for example. It is an area of decision making where the

Courts have acknowledged the usefulness of expert opinion. This issue remained one of concern to me this year, as it did last year.

108. Some of those whose applications are dealt with under NSA procedures claim to be under the age of 18, but this is disbelieved by Home Office officials. In such a case, the applicant may be detained at Oakington and treated as if they are 18.
109. The initial decision regarding the age of the applicant will be made by the Home Office, probably by a Chief Immigration Officer based on the applicant's appearance. In such cases the procedure the Home Office follows is now clearer than it was last year. The current policy at Oakington is to refer cases where age is disputed for assessment by a social worker from Cambridge Social Services Department. If the social worker decides that the applicant is under 18, then the Home Office will accept this decision and they will be released from detention. Social Services will then be responsible for supporting and accommodating them. South Cambridgeshire Children's Team have given an undertaking to assess age dispute applicants within seven working days of the referral being made, and to conduct in this time a full age assessment that is compliant with the requirements of the relevant case law (i.e. "Merton" compliant). Very occasionally, I am told, they fail to meet the seven day target for resource reasons.
110. I believe it is vital that extreme caution is exercised in deciding the age of applicants. Since this is a difficult task, I recommended in my last report that the benefit of the doubt should be given in all cases where the age assessment indicates the applicant to be under 20— I understand in most cases a Consultant Paediatrician would give a 4 year band for probable age, it being most likely that they fall within the mid portion of that band, and least likely to be at the edges of it, and I do not see how a social worker could give a more accurate assessment than a Consultant Paediatrician. Thus an applicant judged to be 19 may only be 17. The Home Office's response was to state that where they consider an 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 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". I believe that the serious consequences of the decision regarding age, which not only affects how a claim will be processed but also whether or not the individual will be detained, should cause this policy to be reviewed.

Disputed Nationality

111. In my last report I indicated that this issue had caused difficulty, with applicants who claimed to be Zimbabwean, but arriving on South African passports, being removed to South Africa, and then facing removal to Zimbabwe since their original claim to be Zimbabwean was true. This had occurred in two cases, and both applicants were brought

back to the UK following legal proceedings. Subsequently an agreement was reached between with the South African government, and it is now possible to arrange for a thorough nationality check to be undertaken by the South African authorities. The South African Government has agreed not to remove anyone to another country whom they confirmed to be a citizen of South Africa.

112. I recommended in my last report that a great deal of caution be employed when making decisions in NSA disputed nationality cases, specifically if their claim about their nationality was capable of belief their case should not be certified. The Home Office accepted this in that they stated if they considered it to be arguable that the applicant was not a resident of a designated country (e.g. it was arguable that they were Zimbabwean and not South African) their claim would not be certified. As far as I am aware there have not been further problems in this area.

Appeals

113. Once the applicant whose claim has been certified has departed from the UK, they or their legal representative can lodge an appeal against the refusal of asylum. Lodging an appeal is done by sending a completed appeal form to the Asylum and Immigration Tribunal, the specialist immigration court which has responsibility for determining most asylum and human rights appeals in the first instance. The AIT lists the appeal on receipt, and the Home Office, on receipt of notification that the appeal has been lodged, prepares a bundle of papers for the appeal, containing a summary of the case, the interview notes, documentation submitted by the applicant, notice of decision, reasons for refusal letter, and the notice of appeal. This is sent by the Home Office to the AIT and to the representatives of the appellant or to the appellant themselves if they are unrepresented. The AIT aim to have an administrative hearing (called a “Case Management Review Hearing”) 10 working days after receipt of the appeal and the substantive hearing of the appeal after 20 working days. This deals with the concern about delays in the previous system raised in my first report.
114. If neither the legal representative nor the applicant attends the first hearing, then the Immigration Judge can determine the appeal at the Case Management Review Hearing in their absence. Presumably because of practical difficulties obtaining instructions and perhaps difficulties securing public funding for the appeal, in the case files I reviewed many Appellants were unrepresented by this stage. Since by definition they are not in the UK and it would not be possible for them to attend the Case Management Review Hearing themselves, their appeal will then be determined on the papers.
115. If the Case Management Review Hearing is attended by a legal representative, then the appeal is usually heard on a later date as specified in the initial hearing notice. It is Home Office policy always to attend full oral hearings in NSA cases. Sometimes in the files I reviewed

the Appellant was represented. In most cases the Appellant was not represented. In none of the files I reviewed were witnesses called on behalf of the Appellant (e.g. a relative or a friend who might be able to give evidence about what had happened to the Appellant, or an expert). The Immigration Judge who is to hear the appeal is instructed that the “appeal shall be considered as if he had not been removed from the United Kingdom”¹⁴ in order to deal with the technical difficulty that to qualify for refugee status an individual must, according to the Refugee Convention, be outside his country of nationality.

116. As I reported last year, no Appellant attended their appeal hearing in the cases I reviewed. Nor in any of the files I reviewed was there evidence that an Appellant had applied to return to the UK for their appeal hearing, but as this application would probably have been made from abroad, at the relevant entry clearance post, it is possible this had happened without the knowledge of the Home Office in the UK. The official Home Office view is that, “We would not agree to any such request. This is for two principal reasons: Firstly we would resist such a request as a matter of policy. To agree would undermine the central purpose of section 94 - which is to prevent certain asylum applicants from bringing an in-country right of appeal. Secondly we interpret the wording in section 94(2) “may not bring an appeal” to encompass the whole process of pursuing an appeal, not merely the lodging of that appeal. The effect of this interpretation of the law is that if an appellant lodges a section 94 appeal abroad, and then is given leave to enter the UK for the hearing, the appeal would be automatically abandoned.” I think this interpretation is not necessarily correct, and that “bring an appeal” could alternatively be interpreted simply to mean “lodge an appeal”.
117. Also in none of the files I reviewed was there an application that the Appellant be allowed to give evidence by video link. Of course, many Appellants are not represented by the time of their hearing, and in any event may feel too unsafe to give evidence in this way from their home country, since in many countries which generate asylum seekers giving evidence by a video link would probably attract attention to the appellant and might be officially monitored. The Home Office’s previous position was that it would oppose any such application. However, I recommended that this be reconsidered, and the Home Office’s response was that where the judge decided to accept video evidence the Home Office would not necessarily oppose his or her decision to do so. I welcome this change of approach.
118. When the hearing takes place, the Immigration Judge will consider the case “as if [the Appellant] had not been removed from the United Kingdom”.¹⁵ In my first report, I reported that I was concerned that I had seen examples of cases where the Home Office had made submissions attacking the credibility of the appellant at the appeal

¹⁴ S94(5) 2002 Act

¹⁵ S94(9)

hearing, in addition to relying on the reasons contained in the Home Office refusal letter (which invariably do not contain challenges to an applicant's credibility). Although the Immigration Judge may decide to make a finding that an applicant lacks credibility, whether this is advanced by the Home Office or not, they are much more likely to do so if the Home Office puts this forward. I stated in my first report that I believed it would be fairer if this was not done, since the Appellant has no opportunity to answer this challenge since they are not in court. The Home Office has asserted in certifying the claim that it is not possible for the appeal to succeed, regardless of whether the applicant is telling the truth or not. If the Home Office is confident of its case, there is no reason to put credibility forward in the hearing. I therefore recommended that the Home Office does not challenge credibility at the hearing unless this was done in the Reasons for Refusal letter. The Home Office stated in response "it is not standard practice for Home Office Presenting officers at NSA appeals to raise issues of credibility where this was not raised in the reasons for refusal letter. 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."

119. It is interesting to compare this comment to what I observed in the files I reviewed this time. In at least 3 of the 6 appeals the Home Office Presenting Officer raised credibility issues not in the reasons for refusal letter, and this was clear from either the determination of the appeal or from the notes made by the presenting officer. It was in each case the immigration history of the applicant or their delay in claiming asylum which gave rise to the credibility challenge, not new evidence. It is therefore clear that what the Home Office states should happen is not reflected in practice. In one of the files I reviewed there were disparaging comments written by the Home Office Presenting Officer in the margins of the applicant's statement, and I considered this to be both unprofessional and as potentially indicating a biased approach that all Home Office decision makers should avoid. *I recommend once again that the Home Office does not challenge credibility at the appeal hearing unless this was done in the refusal letter.*
120. In two of the files I reviewed, the appeal was allowed (i.e. the Adjudicator who heard the appeal decided that the applicant did qualify for refugee status). Clearly an allowed appeal indicates that the Home Office decision to certify the claim was not the right decision. The circumstances in which this occurred are instructive.
121. In the first case the applicant, who was from an Eastern European country, based her claim her fear of physical violence from family members and her ex-fiancé, after she fled rather than go through a forced marriage. It is clear to me that on the facts of the case, and based on the legal authorities at the time the decision was made, it should not have been certified. No application for a review of the decision of the

Immigration Judge was brought by the Secretary of State; I understand this was partly because of administrative difficulties (the appeal decision was not received by the relevant individuals so any application would have been “out of time”) it was also decided there was no error of law justifying an application for review. The appellant was returned to the UK and granted refugee status.

122. In the second, the applicant, who was also from an Eastern European country, put forward a new basis of claim after the decision to certify her initial claim had been served. She had by then spoken to one of the Chaplains at Oakington about her experiences of forced prostitution, in some distress. This information was disclosed to new legal representatives, and then put forward to the Home Office.
123. The representations were, as a result of their timing, not considered by the specialist NSA decision makers, but referred to the Judicial Review Unit. They were considered and refused. The decision maker applied the criteria that are used to consider second, or “fresh” asylum claims, and refused to accept the representations as meeting those criteria, since the new information was stated not to be credible. The request by her legal representative that she be re-interviewed about her new claim was also refused. Whether or not the decision to certificate was still justified in light of the new information was never addressed. This was a serious error, and given the strength of the new material I consider it was not justified. This was born out by what later happened; the applicant lodged her appeal after she was removed, and her appeal was allowed. The adjudicator accepted her credibility.
124. In another case I reviewed the legal representatives attempted to make a fresh claim, although there was, in my view, nothing in the material put forward that could have met the relevant legal test. However the response from the Home Office was similar to that above, a letter stating that “certifying your client’s application means that he can only appeal against the decision **after** he has left the United Kingdom. Any further representation could therefore form part of the grounds of his appeal if he chooses to appeal after leaving the UK. Your representations are accordingly rejected.”
125. In my view the approach of the decision maker in these cases to the new material was wrong. The decision maker did not address whether the new information meant that the certificate was unsafe. In my view any new information put forward in NSA cases should not be treated as an attempt to make a fresh claim for asylum, but rather lead decision-makers to ask themselves the question whether the certificate can be maintained. I raised this issue with Home Office officials in September 2005, when I visited Oakington, and the October 2005 Asylum Policy Instruction on “*Certification Under Section 94 Of The NLA Act 2002*” addresses this issue. It states “where further submissions are received after a section 94 certificate has been issued, the **first step** to take is to consider whether the refusal of the asylum application/HR claim (“the refusal”) should be maintained in the light of the further submissions.

If, as a result of the further submissions, it is appropriate to reverse the refusal, the certificate should be withdrawn and leave granted as appropriate. If it is determined that it is appropriate to maintain the refusal, the **next step** is to consider whether the section 94 certificate should be maintained in the light of the new submissions. The clearly unfounded test should be applied to all the evidence that is now available.” I agree this is the correct approach. I hope the existence of this paragraph has been specifically drawn to the attention of NSA decision makers, and those in the Judicial Review Unit who may deal with representations made after decision. However given the appeal in question was heard in May 2004, and given the involvement of senior Home Office officials in the case soon after that happened, it has taken a very long time for this problem to be identified and for the correct approach to reach policy instructions. I would have expected a detailed review of the file to have taken place once the appeal was allowed, to try to ascertain any lessons that could be learnt, and for this problem to have been identified at that stage. I understand that the Home Office has established a procedure to try to learn lessons from the outcomes of appeals and Judicial Reviews, namely that since June 2004 a regular “caseworking forum” has taken place and other related measures. This is described in some detail below. Given my observations about this case, it is disappointing that the procedure did not pick up the systemic problem identified above.

126. If the appeal is allowed, and the Home Office does not challenge the decision by trying to appeal further, then the Appellant must be brought back from wherever they are, and given refugee status or Humanitarian Protection, depending on the reason why their appeal was successful. Bringing an applicant back to the UK may not be a straightforward process. In the case described above where the appeal was successful there were considerable difficulties obtaining a passport for the individual concerned, since her Government had placed restrictions on her obtaining a passport due to her assumed breaches of UK immigration law. There was a very significant delay in her return to the UK as a result, with the potential of further exposure to human rights abuses. This both emphasizes the potentially serious consequences of decisions to certify which are wrong, and the practical difficulties of the current system. Prior to this example, I understand the Home Office had been unaware of the possibility that such difficulties might arise in bringing back a successful NSA appellant. *I recommend that the Home Office establishes whether there are likely to be similar problems securing the return of applicants from other designated countries, if it has not already done so, and where such difficulties come to light finds out how they can be dealt with now, in advance.*

Judicial Review

127. Those whose claims have been certified have a single legal safeguard against return. This is an application for Judicial Review to the High Court. An application for Judicial Review can be brought on the grounds that, for example, the decision to certify the claim as “clearly unfounded” is unlawful, or unreasonable. A more detailed discussion of

the implications of the outcome of Judicial Review applications that have already been brought in NSA cases is to be found below. I will set out here a much simplified description of the Judicial Review procedure.

128. If a legal representative notifies the Home Office that they intend to bring an application for Judicial Review of the decision to certify, removal of the applicant is delayed for 3 working days in NSA cases. In this time the solicitor must obtain a reference number from the Court for their application. In order to do so, they must obtain a legal aid certificate (usually by applying to the Legal Services Commission on an emergency basis), instruct a barrister to draft the relevant legal argument, and then file a completed form, a fee and an indexed bundle of documents with the High Court. Once this has been done, removal directions will be cancelled, until the application for Judicial Review has been concluded.
129. An application for Judicial Review takes place in two stages. The first is the “permission” stage, where unmeritorious applications are filtered out. A High Court Judge makes a decision, initially on the papers, whether or not the case should go forward to a full hearing, after the Secretary of State has had an opportunity to make his comments in writing on the application. If the applicant is not granted permission on the papers, they can make further applications for permission at an oral hearing and thereafter to the Court of Appeal. An extension to the legal aid certificate must be applied for from the Legal Services Commission for each further challenge.
130. If permission is granted, it is possible that the Home Office could concede the case, and withdraw the certificate. If not, the application for Judicial Review will proceed to the second stage, an oral hearing of the full application. At this hearing argument will be heard from both parties as to whether the decision to certify was lawful. If the Judge decides it was not, he or she can “quash” the decision to certify; if the Judge decides the decision was lawful, then the decision will stand. Either party can appeal the decision of the Judge to the Court of Appeal.

The quality of legal representation

131. While the IAS and RLC generally provided an acceptable or good quality of advice and representation on the files I reviewed, I was sorry to observe this year once again that many applicants are ill served by other legal representatives within the NSA process. Standards of best practice commonly accepted by immigration and asylum lawyers were rarely adhered to. I saw examples of the following forms of unacceptable practice:
 - little or no understanding of the certification power, with representatives trying to assert a right of appeal under old legislation that was no longer in force after the claim had been certified;

- little or no work done on behalf of the applicant, other than attending the asylum interview – for example the opportunity to make written representations before the Home Office decision not taken up, and no attempt made to assemble evidence to support the application. This was particularly marked for human rights applications which went beyond asylum applications (see below);
 - applicants detained for a lengthy period of time prior to removal, due to difficulty obtaining travel documentation, but no application for temporary admission (i.e. release on conditions) or bail being made;
 - no attempt to challenge by way of judicial review Home Office decision letters where I considered this should have happened, because the decision to certify the application was not, in my opinion, justified.
132. All legal representatives should have a wide working knowledge of nationality, general immigration and asylum law in order to properly represent asylum applicants. This is particularly important in NSA cases, where there is no right of appeal which might otherwise allow time to identify such issues. In my view, the non-asylum aspects of cases were dealt with less well by all representatives, which may reflect lack of experience in dealing with general immigration cases as opposed to asylum cases.
133. As stated above, at Oakington Applicants are, as standard, allowed 2 working days following the interview to make written representations. In most cases where IAS or RLC were not the legal representatives there were no written representations at all, or if there were they were of very poor quality. Where detailed representations were made it was often useful to the decision maker (and to me as monitor). I have noted above how sometimes representations filled gaps in information elicited in interview due to poor interviewing technique. Sometimes they included factual background information that painted a different picture from that set out in the COIS Country Report. It is my observation that this evidence was often not addressed in the refusal letter, which relied heavily on the COIS Country Report and standard paragraphs. Where detailed background evidence is submitted by the Applicant in support of their claim, then it must be addressed, and reasons for preferring the COIS Country Report explained in the Reasons for Refusal Letter. However, certification will rarely be justified in such a case since faced with contradictory background evidence the Immigration Judge might prefer the material submitted by the representative.
134. There was clear evidence that many of the legal representatives did not understand the legal framework of s115 or s94: for example I saw files where legislation which was out of date was relied on to assert a right of appeal and it was clear that there was no understanding of the process of certification and the effect of certification on the part of the solicitor concerned. It was obvious to me that such applicants were not receiving adequate advice and representation, which may have impacted

on the applicant's understanding of the asylum process and what was required of them. As stated above the short timescales involved and the lack of an in country right of appeal mean that applicants need high quality advice and representation so that they are able to put forward their case, so assisting the Home Office decision-maker by ensuring they have the information they need to make the correct decision. It was evident to me that in many of the cases files I reviewed that legal representatives were not a safeguard against inappropriate certification.

135. It is important that applicants have access to independent legal advice and that they have confidence in those who represent them. In one case the applicant did not tell her lawyer the real basis of her asylum claim, because she was concerned that confidential information would be relayed to her husband who had arranged and paid for her lawyer.
136. Since April 2005, or in some cases August 2005, there has been a system of accreditation, whereby all those legal representatives doing publicly funded immigration and asylum work must pass an examination. The scheme is intended to ensure that legal representatives have an adequate level of knowledge about a wide spectrum of immigration and asylum law and practice, enhancing the quality of legal advice and representation received by applicants and hopefully ensuring that the poor quality representation of the sort described above no longer occurs. There are three different levels of accreditation. I did not review decisions made after this cut off point, and it may be that the standard of legal representation has improved amongst outside legal representatives. It is important to note however that those legal representatives who do not undertake publicly funded work have no requirement of accreditation, and it is not possible in most cases to tell from Home Office files whether work is being done on a private or legal aid basis.

Section 5 - The quality of NSA decision making

137. Reviewing files was a time consuming task, since in most cases there was more than one file, with documents scattered between the files and duplicated between files. I thought the files I reviewed this year were on average better organized than those I reviewed last year. However I continued to observe that caseworking notes were divided between files on what seemed in some cases to be a random basis. All this made it difficult to work out what was going on, and to follow the progression of the case. Although I understand that there should from 2004 be only one file, I saw many examples where duplication of files persisted. This way of organizing files must make it more difficult for caseworkers dealing with the file to work out what is happening, and will contribute to errors being made. *I recommend that continuing efforts are made to rationalize Home Office files.*

Appeals

138. As I stated last year, I do not consider the outcome of appeal hearings in certified cases as a particularly good guide as to whether the case was properly certified, since, as noted above, the appellant is not in the UK to attend their hearing, making the task of establishing their credibility almost impossible. Many appellants are also unrepresented. Most significantly, even where an appeal is dismissed, this may well not indicate that the claim was properly certified – the test is whether the claim is “clearly unfounded”, and there will of course be a group of weaker claims which are not “clearly unfounded” but where it is likely that any appeal would be dismissed.

Country Information

139. The quality of decision-making is to some extent determined by the background evidence that is available, usually information about conditions in the country concerned. For each of the designated countries, a Country of Origin Information Service (COIS) Country Report is available; that is a report drafted by researchers based within the Home Office’s own Research Development and Statistics Section. This is not usually the result of the Home Office’s own research, but a compilation of information drawn from a wide range of other sources, although on occasion the section does conduct a fact finding mission to the countries concerned. For each country designated under s94 an Operational Guidance Note (OGN), a shorter document, is also available, produced by the IND’s Policy Unit and summarizing parts of the COIS Country Report thought to be most relevant for decision making. The COIS Country Report and / or the OGN are the main source of information on country conditions for caseworkers and senior caseworkers, who can access these documents from their computer desktop. I was told that the OGN was more useful to caseworkers, since it is shorter, focuses on issues most likely to arise in asylum cases. A direct link to the US State Department Report was also provided to caseworkers, and is also used as a source for further information.

140. I saw very few examples of the COIS being consulted about individual cases, but recommend as I did in my first report that it be used more frequently as a resource by NSA caseworkers, in order to ensure their decisions are fair and well reasoned. It is impossible for the COIS Country Reports to deal with every factual issue that might arise.
141. Home Office caseworkers inevitably assume information contained in COIS Country Reports to be correct. One of the difficulties with this approach is that the Country Report might provide contradictory information about a particular issue, noting that while some evidence points in one direction, there is also evidence pointing in the opposite direction. This is often left unresolved, with no indication as to which view is preferred. This may well reflect an inevitable uncertainty about a particular issue in the country concerned, or regional variation within the country, or a situation of change and flux. The other reason for leaving such issues unresolved is that the COIS does not see its role as one of offering opinion, to retain its position of relative independence, offering a summary of available information but not policy advice. I believe that, in accordance with general NSA decision making principles laid down by the Courts (see paragraph 22 above), the benefit of the doubt must be given to the applicant in such circumstances, adopting the view most favourable to the applicant. Once again, this is not what I observed in the case files I reviewed this year, and is a serious flaw in Home Office decision making. This may be exacerbated in cases where the decision maker has relied on the OGN for information on which to base their decision, which as a shorter policy document tends to be selective about which of the contradictory sources it relies upon.
142. It is also vital that the COIS Country Reports are accurate, especially given the almost complete reliance on it for objective information by NSA decision makers. The Advisory Panel on Country Information (APCI) has been established to help to ensure that this is the case, and I note that the APCI has commented on the improved quality of COIS Country Reports they have evaluated recently, whilst continuing in some cases to criticise their clarity, their accuracy, and the selectiveness of their quotations from other sources. As stated above the APCI has been asked to comment on Country Reports prior to new country designations, and this is to be welcomed.
143. However, evaluation of Operational Guidance Notes is not part of the function of the APCI. This is because the Operational Guidance Note is a policy document, and to review OGN's would have distorted the role of the panel. However, I understand that the United Nations High Commissioner for Refugees (UNHCR) has agreed to provide comments on newly published OGNs and their accuracy, and this is something I welcome. As stated above, it is vital that the materials which inform decision making are accurate and balanced.

Reasons for Refusal Letter

144. Standard paragraphs are widely used by caseworkers as a basis to draft Reasons for Refusal letters. There are standard paragraphs in use for all NSA countries, covering the most common scenarios for asylum and human rights claims. These are useful in ensuring consistency of approach, and assist in more efficient decision making. In my first report I commented on their clumsy drafting, for example citing contradictory information from different sources about a country, usually taken from the COIS report, but failing to state explicitly which is preferred and to give reasons for this. However, I did continue to note lack of adaptation of standard paragraphs to fit the facts of the individual cases to which they were applied, and therefore *I recommend once again that standard paragraphs be more closely tailored to individual cases.*
145. Most refusal letters begin with a factual summary of the claim as advanced by the applicant. I generally found that this was accurate, with a small number of exceptions. However, failure to properly grasp the factual basis of a claim can impact on the quality of decision making – for example it is not relevant to state that the civilian population have nothing to fear from enquiries by police when the applicant is not a civilian.
146. The refusal letters end with paragraphs certifying the claim, and I found that the technicalities of certification were correctly complied with in that there was a certificate in relation to both the Human Rights and Asylum claims, and the certification was stated to have taken place with reference to the relevant legal powers and with correct references to the empowering legislation.
147. There were in general two main bases for certification, often used together, that an internal flight alternative existed and that there was sufficiency of protection. I will look at each reason separately.
148. Often, where it was used, I considered Internal Flight Alternative to be justified as a basis for certification, and to be a stronger basis than sufficiency of protection. It can only be used where the applicants fear relates to a particular area of their country, and not the whole territory, and thus moving away from the area where they fear persecution might protect them. Thus it is more likely to apply where a non state agent is feared, for example a neighbour or a local gang. If the applicant's fear is localised, the current legal test used by the Home Office is the one set out in the case of Robinson, requiring applicants who assert that internal flight is not a possibility for them to show that it would be “unduly harsh” to relocate elsewhere in their country. This is a high test to meet; while it does not require that applicants relocate to barren and isolated areas of a country, other factors such as not speaking the language, inclement weather conditions, and lack of opportunities in your chosen career will not be regarded as sufficient to justify refugee status abroad.
149. I was concerned however about applicants who asserted if they were returned now they would be too poor to relocate; this was not taken seriously. It may be that without money and with no relatives or friends

in the destination area an applicant required to relocate would be left in conditions of destitution which would meet the unduly harsh test.

150. Turning now to sufficiency of protection, in many refusal letters I noted that the Home office asserted that if the applicant had problems with their local police station, perhaps because of corruption, they would be able to make a complaint in another area's police station. However, the COIS report relating to the countries concerned did not mention the availability of such a procedure, and I suggest that further research is required on this issue before it is used as a basis for decision.
151. Reasons for refusal letters also frequently asserted that applicants should and could turn to Non Governmental Organisations, particularly human rights organisations, for assistance with any persecutory treatment they might suffer. While I can understand that such organisations might see it as being within their remit to assist an individual who had been tortured by the authorities, I am less convinced that such organisations would really intervene to assist an individual who fears a non state agent for example the mafia, a relative or a neighbour, and where the issue is either inadequacy of state protection or police corruption. There was no mention in the COIS reports for the countries where I saw this being used that such complaints fell within the remit of human rights organisations, and once again I think further research is required on this point.
152. I was also concerned by the number of cases where the Home Office's assertion that sufficiency of protection existed was based on Country Reports which included many examples of initiatives to address, say, corruption but little or no evidence that this was producing results. As one expert stated, "adopting good laws ... is not a problem; rather the problem lies with implementing them".
153. I was concerned to see that there were a sizeable number of cases in which the refusal letter took issue with the applicant's credibility, either explicitly or implicitly. Such reliance on credibility, in my view, should not be included in a refusal letter which contains a clearly unfounded certificate, except perhaps in exceptional cases where the content of the claim is for some reason not capable of belief. This is because an Immigration Judge could take a different view about credibility in most cases, and this means that the case is not clearly unfounded. The most frequent credibility challenge in refusal letters was based on the immigration history of the applicant and / or a delay in claiming asylum after their arrival in the UK. In my view in many cases the reliance on credibility issues was unnecessary, since there were other strong grounds on which to certify, and its inclusion potentially undermined the integrity of the whole decision. It is vital that caseworkers are clear that they are deciding the case at its highest, i.e. on the basis that it is true, and that certification can only be justified if it is still clearly unfounded.¹⁶

¹⁶ Section 8 of the 2004 Act requires a deciding authority, including the Secretary of State, to take into account certain behaviour as damaging the claimant's credibility in determining a human rights or asylum claim. This legal obligation potentially causes a problem for NSA decision makers because of the guidance

I was surprised that Senior Case Workers had not picked up the inclusion of credibility issues in the Reasons for Refusal Letters and amended them accordingly. I note that since I raised this issue with Home Office officials, guidance on NSA Reasons for Refusal Letters has been issued to caseworkers which, *inter alia*, gives clear guidance on the minimal role credibility should play in NSA decision making, and is broadly in line with my comments. This issue needs to be monitored in the future, to ensure the Guidance is being followed.

154. In a significant number of cases the applicant asserted that his or her persecutors had a certain motive or intention, or were responsible for an anonymous attack on them in the context of past threats. In some cases I noted that the refusal letter included an assertion that the applicant was incorrect about these matters. Again, an immigration judge might agree with applicant, and thus this is not a safe basis on which to certify the claim. Decision makers should be weighing up whether applicant's assertion that they had been attacked on the orders of a certain person, or for a particular reason, is capable of belief, and only certifying if it was not.
155. In my first report I commented on what I thought to be a particular weakness in assessing cases where there was an Article 8 ECHR component, i.e. a claim that removal would interfere in a disproportionate way with the family or private life of the applicant. Firstly, I noted there was a tendency to refuse to accept that family life existed where the applicant had produced no evidence that this was the case. This is in contrast to the general approach of accepting the applicant's assertions about their asylum claim at face value. I think the same approach must be taken to family life; evidence may not be forthcoming either because the applicant may not have realised that confirmatory evidence is required, or has had difficulty obtaining it whilst they are detained. On the other hand if evidence is required, then they should be told this by the Home Office in interview and given a chance to obtain it.
156. Secondly, the legal test in respect of Article 8 has been in flux for some time, with a series of decisions from the higher courts containing a variety of different legal formulations. The current legal authority from the Court of Appeal is being challenged by way of a petition by the Home Office to the House of Lords. In my view, while legal uncertainty reigns, a cautious approach should be taken to decision making in NSA cases.
157. I am pleased to note that in November 2005 the Home Office issued specific guidance about Article 8 ECHR and NSA certification. This sets out detailed guidance about the sorts of questions that need to be asked at interview, and the relevant legal issues to be considered. It

instructing them not to rely on credibility issues in decision making. However, the Home Office's view, set out in the Guidance on NSA Reasons for Refusal Letters, is that "Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 is not applicable where we are not deciding whether to believe a statement by the applicant."

stresses a cautious approach should be taken to certification in such cases. I hope this will help caseworkers and senior caseworkers to reach high quality decisions in this area.

Judicial Review

158. One of the best guides to the quality of Home Office decision making is, in my view, the number of applications for Judicial Review which result in the certificate that the application is “clearly unfounded” being quashed by the High Court or withdrawn by the Home Office. I take this view because the immigration appeal process is not such an accurate assessment as Judicial Review because it does not directly consider whether the decision to certify was correct, but rather whether overall there is sufficient merit to allow the appeal. It also has other limitations identified above, so the low number of successful appeals is not in any way an accurate guide to this issue.
159. I understand that there have been many fewer applications for judicial review than the Home Office anticipated. One interpretation would be that the quality of decision making is high, and that legal representatives do not think that it is possible to bring proceedings. However, from discussions with IAS and RLC their perspective is that the problem is locating legal representatives of sufficient quality to take on such cases. Also, applications for legal aid are more likely to fail if the legal representative is of poor quality, and where legal aid is refused expensive JR proceedings are unlikely to be brought. In other cases the legal representative has thought the case merited an application for Judicial Review, but the possibility of a lengthy spell in detention was sufficient to deter the applicant from bringing an application. Legal representatives commented that for some individuals, and especially those from certain nationalities and ethnic groups, and those with children, detention is a terrible experience, and one that they find almost unbearable. Since lawyers are unable to give guarantees about the outcome of legal proceedings, spending further time in detention in the UK may be in vain from the applicant’s point of view. *I recommend that if, following a decision to certify, the legal representative indicates that they are making efforts to refer the case to a solicitor so that Judicial Review Proceedings can be brought that Removal Directions be suspended for a period of 10 working days rather than the current period of 3 working days. This would make it more likely that a good quality solicitor would accept the referral since the additional time would make it more likely that they would be able to take on the case and complete the work involved in lodging proceedings.*
160. As stated in the opening paragraphs of this report, between the date when the NSA system was introduced on 7 December 2002, up until the end of September 2005, there had been 181 applications for Judicial Review which resulted in the certificate being withdrawn by the Home Office. Of these, 34 decisions to withdraw the certificate were taken in the first 9 months of 2005. There were 7 applications for judicial review where the certificate was quashed by the High Court out of 20 cases that had proceeded to full hearing, 2 of these in the first 9 months of 2005.

161. Between 7 December 2002 (the start of certification) and the end of September 2005 there were 303 cases where the certificate was challenged by Judicial Review proceedings that proceeded as far as a permission hearing only. In 269 of these cases the certificate was not quashed and permission to proceed to a full hearing was refused. In the remaining 34 cases the Secretary of State withdrew the certificate after permission was granted. In the same period 2 cases resulted in the certificate being quashed the High Court at a full JR hearing.
162. A breakdown is available for cases where a decision was reached on judicial review applications between January and September 2005:
- Judicial Review was threatened but no court reference was received (indicating no application for judicial review was lodged) in 12 cases,
 - the Judicial Review application was lodged but no legal grounds were received from the applicant / their lawyers in 6 cases,
 - the certificate was withdrawn by the Secretary of State before a permission decision was made by the Court in 19 cases,
 - permission was refused by the Court in 78 cases,
 - permission to proceed to a full hearing was granted by the Court in 14 cases, and then the certificate was withdrawn by the Secretary of State,
 - the application was substantively allowed after a full hearing in 2 cases, and
 - the application was substantively dismissed after a full hearing in 4 cases.
163. These 2005 cases can be broken down by nationality as follows:

	2005
JR threatened but no court reference received Total: 12 cases	2 Nigerian 4 Sri Lankan 2 Bangladeshi 1 Serbian and Montenegrin 1 Ukrainian 2 Jamaican
JR was lodged but no grounds received	1 Bangladeshi 1 Indian 1 Nigerian 1 Ghanaian

Total: 6 cases	1 Jamaican 1 Turkish
Certificate withdrawn by the Secretary of State pre-permission Total: 19 cases:	3 Jamaican 2 Albanian 2 Kosovan 8 Sri Lankan 1 Pakistani 2 Turkish 1 Bangladeshi
Permission Refused Total: 78	23 Sri Lankan 23 Bangladeshi 10 Nigerian 6 Jamaican 4 Ecuadorian 4 South African 2 Romanian 1 Philippino 1 Ukrainian 1 Afghani 1 Ugandan 1 Mongolian 1 Malyasian
Permission Granted (Did not proceed to substantive as certificate withdrawn) Total: 15	5 Bangladeshi 4 Jamaican 3 Sri Lankan 1 Indian 1 Nigerian 1 Kenyan
Substantive Allowed Total: 2	1 Sri Lankan 1 Kosovan
Substantive Refused Total: 4	1 Ukrainian 1 Sri Lankan 1 Jamaican 1 Bangladeshi (although this case was substantively refused, the applicant was successful in relation to their challenge to the fact that Bangladesh is designated)

164. I understand that since June 2004 there has been a regular casework forum that has been held where issues raised by Judicial Review cases

are discussed in depth and guidance issued accordingly. I also understand that since August 2004 there has been a formal procedure for feeding back information to caseworkers every time a certificate is withdrawn, and that these are collected and analysed centrally to identify whether there was an error with the decision to certify or whether it has been withdrawn because the facts of the claim have altered significantly following the decision. The same process applies where appeals are allowed. This is a welcome development, because it is vital that lessons are learned where mistakes are made. However, as noted above, I found one example where what I consider to be obvious failings in the system were not identified. *I recommend that attention needs to be paid to ensuring that the procedures already established to learn from past mistakes (the casework forum and analysis of decisions to certify which turn out to have been incorrect or mistaken) operate robustly and non-defensively.*

165. Given the barriers to bringing Judicial Review applications mentioned above, as I have explained it is not a particularly robust or universally available remedy. The issue for me as Monitor is whether sufficient safeguards exist in the current system to ensure that no-one is returned to face serious human rights abuses; the availability of Judicial Review is not always going to provide, in practice, an adequate remedy. Thus it is crucial that the Home Office decision is taken cautiously, and that it is based on sound information regarding country conditions, accurate understanding of the law, and careful assessment of the facts as advanced by the applicant. I consider that the number of decisions to withdraw certificates following the instigation of Judicial Review proceedings continues to call into question whether the power to certify is being used properly and safely.
166. I reviewed a small number of the case files where the certificate was withdrawn after Judicial Review proceedings were threatened or lodged by applicants. I was disappointed that I was only sent 3 such files to examine, despite requesting a significant number should be sent to me. By contrast I was provided with 18 cases where the application for Judicial Review was not successful, either because the Court refused permission (14 cases), or because the applicant withdrew their application (3 cases) or because the application was refused at a full hearing (1 case).
167. In the first of the 3 cases where the certificate was withdrawn, the applicant was from Ukraine and had claimed asylum based on his fear of a businessman from whom he had borrowed money and who connections to the mafia. The applicant's home was attacked by a rocket and he was beaten up. He said he could not get protection from the police because of endemic corruption in his country, and could not internally relocate because he would be required to register his new address with the authorities, meaning any corrupt police official could discover his new address and because organized crime networks spanned the country. His claim was refused on the basis that he could move elsewhere to escape this individual, and because the police would provide protection. Reliance was placed on attempts to tackle crime and

corruption in his country, and the existence of Human Rights Organisations and the availability of recourse to the European Court of Human Rights. The case was conceded, after his lawyers obtained a report from an independent expert, because (despite the assertions in the refusal letter to the contrary) “the COIS could not provide any objective evidence to show there would be a sufficiency of protection”. What was interesting to note was that the expert report drew heavily on the IND’s operational guidance note, and in my view all the information to indicate the case should not have been certified was available to the initial decision maker.

168. In this case I identified that a lengthy delay had taken place. Following the withdrawal of the certificate, there had been no follow up action, for example drafting and service of an appealable decision. Apparently this situation occurred because of a filing error, with the file placed in the wrong hold. The unit concerned was, I am told, extremely upset that this was allowed to happen and an urgent review was taken of all other cases of this type. Steps are apparently being taken to prevent this problem happening again, and the Home Office is confident that they will be able to put in place effective preventative measures very soon. Administrative errors of this type have a significant impact, potentially, on the applicant’s ability to prepare and present their case, and can leave a meritorious claimant in limbo for a considerable period of time.
169. In the second case, the applicant was from a town located outside of Kosovo, within Serbia and Montenegro. However, the caseworker who made the decision assumed this town was within Kosovo and refused and certified the claim on this basis. The error was not identified by the senior caseworker. The applicant was also Roma, and at the time the decision was made ethnic Roma cases were on hold and there was a policy not to certify them. This was ignored. For these reasons the decision to certify was withdrawn, in January 2005. The errors were only identified once JR proceedings had been commenced by the applicant’s solicitors.
170. In the third case the applicant was from Sri Lanka and had claimed asylum on the basis of his support for the Colonel Karuna faction of the LTTE. He had a close connection with the Colonel. He had been asked by the Colonel and the Sri Lankan authorities to gather intelligence about LTTE members who were not part of the Karuna faction, and agreed under duress. He was placed in a safe house, and left the country when another safe house was blown up killing those accommodated there. The Home Office decided to withdraw the certificate after judicial review proceedings were started, and I agree that this was a case that should not have been certified.
171. In none of these cases was the decision to withdraw the certificate the result of a change in caselaw or policy guidance. The reasons advanced for refusing and certifying the claim reveal, I believe, an over-reliance on standard paragraphs, and a failure to examine the claim in the round and

consider it carefully against the background country information. However, given the small number of cases passed to me for review it is very difficult to draw general conclusions about such cases.

Section 5: Conclusions

1. Whether the power to certify claims will continue to be available to the Secretary of State is a question ultimately for Parliament, of course. However, I am aware that the United Nations High Commissioner for Refugees maintains that accelerated processes have a higher likelihood of errors, and require the procedural safeguard of a suspensive appeal. While I would observe that while it is important that there is time for the applicant to prepare their cases properly and marshal all the relevant evidence, it is possible for in-country appeals to be determined relatively quickly. Within the fast track process at Harmondsworth detention centre, it is aimed to process asylum claims from arrival to the determination of the appeal within 10 days, although there is flexibility to make decisions more slowly where this is warranted by the complexity of the case or the need to collect evidence.
2. As Monitor, my concern is whether the system offers adequate procedural safeguards against errors in Home Office decision making. In my view, the four successful appeals and much larger number of successful Judicial Review applications indicate that it does not. For the reasons set out above, the numbers involved may well be the “tip of the iceberg”.
3. While I considered that many of the decisions I reviewed as justified overall (even if some of the points made in the refusal letter were not well made) there were a sizeable minority where I did not consider this to be the case. I think a more cautious approach to the task of certification would be advisable. This cautious approach should be applied to all aspects of the case, from the applicant’s assertions as to their claim (for example their age, the reasons for their difficulties), country conditions (especially whether changes to legal structures and policy has had an impact on the ground), as well as the current law (if this is unsettled and in the process of being litigated it would be fairer to apply the version that favours the applicant).

ANNEX A

Summary of Recommendations in the Report

1. Paragraph 6

I repeat the recommendation made in my first report that there be no delay in the appointment of my successor.

2. Paragraph 16

I recommend that consideration be given to allowing the monitor access to files that are at various stages of the casework procedure, especially where there are challenges to the certificate.

3. Paragraph 40

I recommend that in future the senior caseworker who “vets” any case where case-by-case certification is being considered minutes this on the file, and that it is clear from the file when this vetting process took place.

4. Paragraph 41

I continue to recommend the consultation of the APCI regarding the accuracy of the relevant Country of Origin Information Report where there has been a policy decision to begin considering claims from new nationalities for case-by-case certification, or where statistical information indicates that a significant number of case-by-case certifications are from a particular nationality.

5. Paragraph 47

I continue to recommend that the policy of detaining families with children in order to consider their claims under the NSA system should be reviewed.

6. Paragraph 48

I believe that the Secretary of State could and should do more in terms of monitoring children detained within the NSA procedure, and I recommend once again that statistics are kept about the numbers of children involved and the length of time for which they are detained.

7. Paragraph 49

i) I therefore recommend that in all family cases a clear note is placed on the file confirming the Assistant Director’s involvement in the decision to detain, in line with Home Office guidelines.

ii) I recommend that the Secretary of State introduces a procedure requiring that the welfare of any dependent children be separately considered after 7 days and at frequent intervals thereafter, and that a note should be made of this on the file, which should include the steps that have been taken to ascertain information relevant to assessing the child’s welfare.

8. Paragraph 58

I recommend that a supply of leaflets advising detainees about trafficking and how to seek help should be made freely available in Oakington in a variety of languages.

9. Paragraph 59

I continue to recommend that urgent steps are taken to ensure that staff involved in the NSA process, particularly but not exclusively those at Oakington, take appropriate steps where trafficking comes to light or is suspected, and that steps are taken to try to ensure trafficking victims detained at Oakington are protected.

10. Paragraph 63

I recommend therefore that women accepted by the Poppy Project are released immediately and not interviewed at Oakington, and that the policy is amended so that it states this explicitly; I make this recommendation because I believe that many of those accepted by the Poppy Project will benefit from their support before being interviewed about their asylum claim.

11. Paragraph 64

I recommend that the “Victims of Trafficking” policy is formulated more clearly to make it clear that traumatized victims of trafficking who request additional time to prepare their claims will be given this.

12. Paragraph 76

I recommend once again that all requests for an interpreter for an asylum interview are acceded to in NSA cases where the highest standards of fairness must be complied with – 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.

13. Paragraph 86

I recommend that systems are put in place to ensure that in all certified cases the correct procedure is followed, including the involvement of a “second pair of eyes”, and that to confirm this clear, consistent memoranda, in the same format in all cases are placed on file.

14. Paragraph 87

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

15. Paragraph 95

I recommend that clear procedures be established for applicants detained other than at Oakington to ensure that applicants do not spend unnecessary time in prison.

16. Paragraph 96

I therefore recommend that the issue of funding for legal representation at interview for those detained (but not at Oakington) and being considered under the NSA system receives further attention, since it would seem anomalies still remain. Proper procedures must be put in place for notifying any legal representative of the fact that such a case is being considered under fast track procedures by the Home Office. The LSC should also amend the Immigration Contract Specification to make clear that the funding regime for such

cases is equivalent, so that legal representatives are aware that funding is available to attend the asylum interview. This is important to ensure fair and equal access to legal advice for all those detained whose cases are being considered within the NSA process.

17. Paragraph 104

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

18. Paragraph 119

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

19. Paragraph 126

I recommend that the Home Office establishes whether there are likely to be similar problems securing the return of applicants from other designated countries, if it has not already done so, and where such difficulties come to light finds out how they can be dealt with now, in advance.

20. Paragraph 137

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

21. Paragraph 144

I recommend once again that standard paragraphs be more closely tailored to individual cases.

22. Paragraph 159

I recommend that if, following a decision to certify, the legal representative indicates that they are making efforts to refer the case to a solicitor so that Judicial Review Proceedings can be brought that Removal Directions be suspended for a period of 10 working days rather than the current period of 3 working days. This would make it more likely that a good quality solicitor would accept the referral since the additional time would make it more likely that they would be able to take on the case and complete the work involved in lodging proceedings.

23. Paragraph 164

I recommend that attention needs to be paid to ensuring that the procedures already established to learn from past mistakes (the casework forum and analysis of decisions to certify which turn out to have been incorrect or mistaken) operate robustly and non-defensively.

ANNEX B – relevant legislative provisions

94 Appeal from within United Kingdom: unfounded human rights or asylum claim

(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).

(2) A person may not bring an appeal to which this section applies in reliance on section 92(4) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.

(3) If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded.

(4) Those States are-

- (a) the Republic of Cyprus,
- (b) the Czech Republic,
- (c) the Republic of Estonia,
- (d) the Republic of Hungary,
- (e) the Republic of Latvia,
- (f) the Republic of Lithuania,
- (g) the Republic of Malta,
- (h) the Republic of Poland,
- (i) the Slovak Republic, and
- (j) the Republic of Slovenia.

(5) The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that-

- (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
- (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.

(6) The Secretary of State may by order remove from the list in subsection (4) a State or part added under subsection (5).

(7) A person may not bring an appeal to which this section applies in reliance on section 92(4) if the Secretary of State certifies that-

- (a) it is proposed to remove the person to a country of which he is not a national or citizen, and
- (b) there is no reason to believe that the person's rights under the Human Rights Convention will be breached in that country.

(8) In determining whether a person in relation to whom a certificate has been issued under subsection (7) may be removed from the United Kingdom,

the country specified in the certificate is to be regarded as-

(a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion, and

(b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.

(9) Where a person in relation to whom a certificate is issued under this section subsequently brings an appeal under section 82(1) while outside the United Kingdom, the appeal shall be considered as if he had not been removed from the United Kingdom.

111 Monitor of certification of claims as unfounded

(1) The Secretary of State shall appoint a person to monitor the use of the powers under sections 94(2) and 115(1).

(2) The person appointed under this section shall make a report to the Secretary of State-

(a) once in each calendar year, and

(b) on such occasions as the Secretary of State may request.

(3) Where the Secretary of State receives a report under subsection (2)(a) he shall lay a copy before Parliament as soon as is reasonably practicable.

(4) The person appointed under this section shall hold and vacate office in accordance with the terms of his appointment (which may include provision about retirement, resignation or dismissal).

(5) The Secretary of State may-

(a) pay fees and allowances to the person appointed under this section;

(b) defray expenses of the person appointed under this section.

(6) A person who is employed within a government department may not be appointed under this section.

115 Appeal from within United Kingdom: unfounded human rights or asylum claim: transitional provision

(1) A person may not bring an appeal under section 65 or 69 of the Immigration and Asylum Act 1999 (human rights and asylum) while in the United Kingdom if-

- (a) the Secretary of State certifies that the appeal relates to a human rights claim or an asylum claim which is clearly unfounded, and
- (b) the person does not have another right of appeal while in the United Kingdom under Part IV of that Act.

(2) A person while in the United Kingdom may not bring an appeal under section 69 of that Act, or raise a question which relates to the Human Rights Convention under section 77 of that Act, if the Secretary of State certifies that-

- (a) it is proposed to remove the person to a country of which he is not a national or citizen, and
- (b) there is no reason to believe that the person's rights under the Human Rights Convention will be breached in that country.

(3) A person while in the United Kingdom may not bring an appeal under section 65 of that Act (human rights) if the Secretary of State certifies that-

- (a) it is proposed to remove the person to a country of which he is not a national or citizen, and
- (b) there is no reason to believe that the person's rights under the Human Rights Convention will be breached in that country.

(4) In determining whether a person in relation to whom a certificate has been issued under subsection (2) or (3) may be removed from the United Kingdom, the country specified in the certificate is to be regarded as-

- (a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion, and
- (b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.

(5) Where a person in relation to whom a certificate is issued under this section subsequently brings an appeal or raises a question under section 65, 69 or 77 of that Act while outside the United Kingdom, the appeal or question shall be considered as if he had not been removed from the United Kingdom.

(6) If the Secretary of State is satisfied that a person who makes a human rights claim or an asylum claim is entitled to reside in a State listed in subsection (7), he shall issue a certificate under subsection (1) unless satisfied that the claim is not clearly unfounded.

(7) Those States are-

- (a) the Republic of Cyprus,
- (b) the Czech Republic,
- (c) the Republic of Estonia,
- (d) the Republic of Hungary,
- (e) the Republic of Latvia,
- (f) the Republic of Lithuania,
- (g) the Republic of Malta,
- (h) the Republic of Poland,
- (i) the Slovak Republic, and
- (j) the Republic of Slovenia.

(8) The Secretary of State may by order add a State, or part of a State, to the list in subsection (7) if satisfied that-

- (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
- (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.

(9) The Secretary of State may by order remove from the list in subsection (7) a State or part added under subsection (8).

(10) In this section "asylum claim" and "human rights claim" have the meanings given by section 113 but-

- (a) a reference to a claim in that section shall be treated as including a reference to an allegation, and
- (b) a reference in that section to making a claim at a place designated by the Secretary of State shall be ignored.

27 **Unfounded human rights or asylum claim**

(1) Section 94 of the Nationality, Immigration and Asylum Act 2002 (c. 41) (no appeal from within United Kingdom for unfounded human rights or asylum claim) shall be amended as follows.

(2) After subsection (1) insert-

"(1A) A person may not bring an appeal against an immigration decision of a kind specified in section 82(2)(c), (d) or (e) in reliance on section 92(2) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) above is or are clearly unfounded."

(3) In subsection (2) for "in reliance on section 92(4)" substitute "in reliance on section 92(4)(a)".

(4) In subsection (4) omit paragraphs (a) to (j).

(5) After subsection (5) insert-

"(5A) If the Secretary of State is satisfied that the statements in subsection (5) (a) and (b) are true of a State or part of a State in relation to a description of person, an order under subsection (5) may add the State or part to the list in subsection (4) in respect of that description of person.

(5B) Where a State or part of a State is added to the list in subsection (4) in respect of a description of person, subsection (3) shall have effect in relation to a claimant only if the Secretary of State is satisfied that he is within that description (as well as being satisfied that he is entitled to reside in the State or part).

(5C) A description for the purposes of subsection (5A) may refer to-

- (a) gender,
- (b) language,
- (c) race,
- (d) religion,
- (e) nationality,
- (f) membership of a social or other group,
- (g) political opinion, or
- (h) any other attribute or circumstance that the Secretary of State thinks appropriate."

(6) For subsection (6) substitute-

"(6) The Secretary of State may by order amend the list in subsection (4) so as to omit a State or part added under subsection (5); and the omission may be-

(a) general, or

(b) effected so that the State or part remains listed in respect of a description of person."

(7) After subsection (6) insert-

"(6A) Subsection (3) shall not apply in relation to an asylum claimant or human rights claimant who-

(a) is the subject of a certificate under section 2 or 70 of the Extradition Act 2003 (c. 41),

(b) is in custody pursuant to arrest under section 5 of that Act,

(c) is the subject of a provisional warrant under section 73 of that Act,

(d) is the subject of an authority to proceed under section 7 of the Extradition Act 1989 (c. 33) or an order under paragraph 4(2) of Schedule 1 to that Act, or

(e) is the subject of a provisional warrant under section 8 of that Act or of a warrant under paragraph 5(1)(b) of Schedule 1 to that Act."

(8) After section 112(5) of that Act (orders, &c.) insert-

"(5A) If an instrument makes provision under section 94(5) and 94(6)-

(a) subsection (4)(b) above shall apply, and

(b) subsection (5)(b) above shall not apply."