Statement of Reasons

INTRODUCTION

1. These applications for judicial review concern the lawfulness of the operation of Detained Fast Track (DFT) process.

2. By an agreed Order made by Master Gidden on 19 March 2015 these 4 Claimants were selected as representative lead cases in which to decide the following issues:

    1. *Whether since 5 January 20015 the DFT has and is being operated lawfully and fairly in identifying and ensuring release of cases unsuitable for fair determination and detention in the DFT process.*

    2. *This involves the following questions in respect of each Claimant's case:*
        - *i) Whether the screening process was lawful and adequate;*
        - *ii) Whether Rules 34/35 of the Detention Centre Rules 2001 and the policy in Chapter 55.8 EIG were lawfully and adequately applied;*
        - *iii) Whether a lawyer was allocated with sufficient time and in circumstances where he/she could act as a sufficient safeguard to prevent unfair determination of the claim and/or unlawful detention in the DFT;*
        - *iv) The correct interpretation of the Asylum Process Instruction (API) on Medico-Legal Reports from the HBF and/or FfT (the Foundations);*
        - *v) Whether the First Defendant lawfully and/or or fairly refused to release a detainee from the DFT who has been assessed by the specialist Foundations as having a prima facie claim of torture or other serious ill-treatment which required further clinical investigation because they cannot offer an appointment date due to capacity issues arising from the operation of the DFT.*

    3. *Whether the First Defendant's decision to maintain the claim within the DFT and to continue to detain the Claimant in the DFT following a substantive decision on the claim and pending an appeal is lawful and in compliance with the decision of the Court of Appeal in R (Detention Action) v Secretary State Home Department [2014] EWCA Civ 1634 ('Detention Action 2') and that decisions to detain post refusal are lawful and consistent with general policy criteria contained in Chapter 55 EIG.*

3. Three other lead cases were selected to address separate issues relating to the compatibility of the DFT with the law relating to human trafficking, the Equality Act 2010 and Article 5 read with Article 14 ECHR.

4. 21 other cases raising the same or similar issues were stayed pending resolution of the lead cases. The equivalent of a Group Litigation Order was made in the proceedings.

Background

5. In December 2013, at the hearing of the *Detention Action* case, Ouseley J heard evidence of the immense strain placed on the Helen Bamber Foundation ('HBF') and Freedom from Torture ('FfT') as a result of increasing numbers of referrals to the Foundations from the DFT. In judgment handed down on 9 July 2014, Ouseley J observed at [136] that the concession that a detainee is released from the DFT, if he or he has obtained an appointment with either Foundation operated "as a *seemingly more effective safeguard*" than the other DFT safeguards, including screening and rule 35 even though it ought to be a "*back-up*" rather than "*making up for the inadequacies of rule 35 reports in relation to torture*".

6. The Foundations safeguard referred to by Ouseley J is set out at paragraph 2.11 of the API on Medico-Legal Reports which states:

> *2.11 Detained Fast Track processes*
> *Applicants routed into the Detained Fast Track (DFT) can be referred to the Foundations by legal representatives in the same way as other applicants who are not detained. If either Foundation agrees to accept an applicant for pre-assessment before a substantive decision is made, the applicant will be taken out of the DFT process providing confirmation of the appointment is received. The referral is usually accepted within 24 hours. It is Home Office policy to remove from DFT processes any applicant who is accepted by the Foundations for a pre-assessment appointment. In such cases, unless there are other reasons for the applicant to remain detained he or she should usually be released and the case transferred to the Asylum Casework Directorate (ACD) who will take responsibility for the case management and decision making process*

7. Due to the significant increases, HBF had to close to community referrals at the end of 2013. The increase in the number of referrals from the DFT continued throughout 2014. It significantly increased following the *Detention Action* judgment which gave lawyers more time prior to interview to identify potentially vulnerable applicants whose claims required further clinical investigation and seek the release of unsuitable cases. By a letter of 10 December 2014, HBF informed the Defendant that due to these capacity issues, starting on 5 January 2015, it would no longer be able to offer an appointment date for an initial assessment

where it had accepted a referral from the DFT. It informed the Defendant that it would continue to consider referrals from the DFT, and if the person met the referral criteria, it would issue a letter confirming this and confirming that his case was one which required further clinical investigation and should be removed from the DFT.

8. The Defendant considered that this was contrary to the API which required a specified appointment date to be given. The Defendant continued to apply the express provisions of the API.

9. In each of these Claimants' case the HBF and/or FT accepted the case as meeting their referral criteria and required further clinical investigation but the Defendant refused to release them from the DFT.

10. Interim relief was granted in each case by the High Court suspending the DFT in the individual claims.

11. On 3 March 2015, Singh J granted permission in each of 11 linked cases then before the Court.

Interim Relief

12. At a case management hearing on 19 March 2015 an interim order was agreed between the Claimants and the Defendant stating the following:

> *Pending these judicial reviews and determination of the lead cases… , the DFT shall be suspended in all cases considered by the First Defendant on or after 19 March 2015, at any stage of the process before any appeal is heard by the First-Tier Tribunal (Immigration and Asylum Chamber), where the First Defendant is provided with written notification that the Helen Bamber Foundation or Freedom from Torture have confirmed that the case has been referred to them and assessed as requiring further clinical investigation into the claims of torture and other serious ill-treatment. For the avoidance of doubt, such consideration by the First Defendant will include consideration of written notification produced by an appellant at any time before his or her appeal is heard.*

13. On the 01 June 2015 the Defendant conceded in the detailed grounds and evidence that the DFT had operated unlawfully between 05 January 2015 and 19 March 2015 on the basis that the refusal to release on receipt of a HBF/FfT acceptance letter was contrary to the purpose (if not the strict

wording) of the Foundations API, in respect of acceptance letters received before an asylum decision was made.

Individual Facts

14. JM's arrived in the United Kingdom (UK) on 23 December 2014. He claimed asylum on arrival and was granted temporary admission and directed to present at the Asylum Screening Unit in Croydon on 30 December 2014.

15. At a screening interview conducted on 30 December 2014, JM gave details of his claim which was based upon based upon perceived sexuality and/or support for the rights of homosexuals and lesbians in Cameroon. He gave a history of past persecution and torture and he disclosed that he *"has had depression from 2002 on and off"* and *"have nightmares and anxiety."* [V4/JM/21]. When asked why his claim might not be suitable for quick determination he made express reference to both his mental health problems and his experience of torture [V4/JM/24].

16. JM was released on temporary admission after screening, but detained in the DFT when he reported on 14 January 2015 as required.

17. At his reception medical screen [V4/JM/62], JM was noted to be taking antidepressant medication, to have a history of anxiety and depression, to have previously self-harmed, and to have back problems due to torture in Cameroon. He was recorded on the disability questionnaire as having mobility problems due to his back and to having mental health issues [V4/JM/64]. He was referred for a Rule 35 assessment. A mental health referral on 16 January 2015 [V4/JM/69] referred to his experience of torture and to mental health problems including depression, nightmares and poor sleep and low mood.

18. On 16 January 2015, a General Practitioner issued a Rule 35 report in respect of JM was made [V4/JM/71 giving a detailed account of his torture and described symptoms of depression, anxiety and nightmares. The doctor commented that his account sounded *"plausible"* and that the doctor was going to refer JM to a psychiatric team for assessment for post-traumatic stress disorder. On the accompanying body map the report writer had written *"multiple well-healed scars"*.

19. The Defendant rejected that report [V4/JM/74] on 19 January 2015 and the detention in the DFT was maintained.

20. A referral of JM's case was made and accepted by the Helen Bamber Foundation on 22 January 2015 [V4/JM/35] as giving rise to a prima facie case of torture or other CIDT that required further clinical investigation but the Defendant refused to remove the case from the DFT because no appointment date was provided.

21. On 26 January 2015, Carr J directed the suspension of the DFT in JM's case. [V1/B/514]. JM was released from detention on 27 January 2015. He had been detained in the DFT for 14 days.

KW

22. KW is a Sri Lankan national. She arrived in the UK on a Tier 4 student visa in 2009. She subsequently extended her leave on two occasions. Her application to extend leave was rejected in November 2014. She was apprehended during the course of immigration enforcement and detained on 21 December 2014 with a view to removing her from the UK. She claimed asylum on 7 January 2015. Removal directions were cancelled.

23. On 19 January 2015, KW had an asylum screening interview [V4/KW/471] in which she disclosed past experiences of torture in Sri-Lanka including interrogation and rape by police officers [485]. She also referred to documents from the Sri Lankan police which she wished to rely on to support her claim. [484] When asked why her claim might not be suitable for the DFT she referred to her health (being in pain and stressed) [486].

24. On 2 February 2015, a G.P. issued a Rule 35 report detailing a history of rape by police officers and being burned with a hot stick, and gave symptoms of sleeplessness and feeling worthless. The report noted visible scars from self-harm on her arm and stated that KW would be referred to the mental health team. The attached body map also noted self-harm scars to KW's arms and a burn from a stick on her leg.

25. On 3 February 2015, a request was made to put KW on an ACDT [V4/KW/577].

26. On the same day, the Defendant rejected the Rule 35 report [511] (inter alia) on the basis of her immigration history and her delayed disclosure of torture.

27. KW was referred to and accepted by HBF on 5 February 2015 [V4/KW/492]. The Defendant rejected the request for release on 6 February. [505]

28. On 10 February Sweeney J ordered that the DFT procedure be suspended in relation to KW [V1/B/516] but the Defendant did not release and suspend the DFT until 19 February 2015. She was held in the DFT for 32 days.

MY

29. MY is a Cameroonian national who arrived in the UK on 13 July 2014 as a student. She contacted the Home Office on 18 December 2014 to indicate her wish to claim asylum. This was before her 6-month student visa expired. She was asked to attend on 19 December 2014 for a screening interview.

30. At MY's screening interview [V4/MY/616] on 19 December 2014 she explained that her claim for asylum was based on her sexuality. She disclosed a history of depression and stress and that she was HIV positive status [622].

31. MY was granted temporary admission following screening but was subsequently detained in the DFT on 16 January 2015 when she returned reported as required. She was placed in the Detained Fast Track on that day.

32. MY had a substantive asylum interview on 26 January [V4/MY/639] during which she disclosed a detailed account of her sexual relationships in Cameroon and the UK, and disclosed her experience of torture [639, 642, 643].

33. On 20 January 2015, a GP made a Rule 35 report [679], detailed MY's history of being beaten, and being burnt with a cigarette. The report noted that MY was tearful and not sleeping well, had flashbacks and low mood. The attached body map noted discoloured skin on her shoulder, a cigarette burn on her arm, and scarring to her leg and groin.

34. The Defendant rejected the Rule 35 report [683] on 23 January 2015, (*inter alia*) relying on MY's immigration history.

35. On 28 January 2015, the Defendant refused MY's asylum claim.

36. On 9 February 2015, judicial review proceedings were issued and by an order of Supperstone J dated 11 February 2015, the DFT process was suspended in respect of MY. She was released on 16 February 2015. She was held in the DFT for 32 days.

RE

37. RE is an Egyptian national who arrived in the UK and claimed asylum on 11 November 2014. He was granted temporary admission and later screened on 8 December 2014.

38. At his screening interview, RE explained that his case was based on persecution because of his membership of the Muslim Brotherhood. He disclosed a history of repeated detention and provided documents that required translation related to his detentions. He was advised to submit documents with English translation to his case owner "*ASAP*". When asked why his claim should not be processed within the DFT, he answered that it would remind him of being detained by the Egyptian authorities from whom he is fleeing.

39. RE was again given temporary admission but on 29 December 2014 the Defendant detained him in the DFT. RE was allocated a lawyer from Thompson Solicitors who did not meet him until the day of the substantive asylum interview on 5 January 2015. The Defendant agreed that the documents he had required translations but made a decision to refuse RE's claim on 6 January 2015 without translated documents.

40. The Defendant refused his claim for asylum on 6 January 2015 and Thompson & Co withdrew from representation of RE. RE was unrepresented. With the help of another detainee he lodged an appeal against the asylum refusal.

41. On 15 January 2015, RE instructed Duncan Lewis as his solicitors for his appeal.

42. On 20 January 2015, RE made a request for a Rule 35 report but did not obtain an appointment for the assessment until 2 February 2015 when a GP issued a Rule 35 report That report set out the forms of torture which it was said RE had experienced, including having two toes broken by prison officers. The report noted that he had a deformity of the toes of the right foot, which was indicated on the body map attached to the report.

43. By an order of Carr J dated 2 February 2015, a stay and suspension of RE's appeal was granted.

44. The Defendant rejected the Rule 35 report on 4 February (inter alia) relying on the adverse credibility findings in the refusal letter.

45. The Defendant did not remove RE from detention until 5 February 2015. He was held in the DFT for 38 days.

46. A 20-week study carried out by HBF of referrals received from the DFT between 5 January and 31 May 2015 revealed that in 200 of 304 referrals received, significant issues of vulnerabilities were apparent in the screening interview; of these 69 had a rule 35 report that did not result in release. Out of 104 of the cases which did not identify vulnerabilities at screening, 25 had a rule 35 report that did not result in release. Of 79 cases which did not have any indicators of vulnerabilities at screening or a rule 35 report, 54 identified a history of torture or ill-treatment or other related indicators of vulnerability in the substantive asylum interview. In total of 304 referrals, 279 individuals revealed indicators of torture, ill-treatment or other related vulnerability in the DFT process.

REASONS FOR THE AGREED ORDER

47. The Defendant accepts that the DFT was operated unlawfully as at 2 July 2015 because of an unacceptable risk of unfairness in respect of those vulnerable or potentially vulnerable whose claims were not suitable for a quick decision in the DFT.

48. The safeguards in the DFT including screening and Rule 35 of the Detention Centre Rules 2001 did not operate sufficiently effectively to prevent an unacceptable risk of vulnerable or potentially vulnerable individuals, whose claims required further investigation, being processed in the DFT.

49. The Defendant accepts that applicants whose cases require further investigation into their claims of torture, or ill- treatment or other vulnerability which cannot be obtained in detention are not suitable for quick determination in the DFT.

50. The Minister has announced a suspension and review of the operation of the DFT from 2 July 2015.

51. The Defendant accepts that each of the lead Claimants was vulnerable; but the DFT systems operated by the Defendant failed to identify them as such and/or as consequentially unsuitable for a fair and quick determination in the DFT in accordance with the DFT Policy.

52. In each of the Claimants' cases, it is accepted that the Claimant's case could not have been fairly determined in the DFT because each required further clinical investigation into their claims of torture, ill-treatment or other vulnerability which could not be obtained in the DFT process.

53. The Defendant accepts that in each of these Claimants' cases this should have been apparent at screening. The Defendant also accepts that in each of these Claimants' cases, the Rule 35 report should have resulted in release from the DFT because it was clear that a quick decision could not be taken fairly and the Claimants required an opportunity for further investigations into their claims for torture, ill-treatment or other vulnerability.

54. Each claim was, therefore, wrongly processed in the DFT. In RE and, MY the refusals of asylum under the DFT will be withdrawn and reconsidered. The Defendant will reconsider the case of KW, if requested within 28 days to do so.

55. It is accepted that all four Claimants are entitled to substantive damages for unlawful detention from the dates on which they entered DFT.

3 July 2015