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Government Legal Department

DX 123242 KINGSWAY 6

Also by email to

29 July 2015

Dear Madam

R ( ) v. SSHD, CO/12203/2013

We write in relation to the above referenced claim, which is due to be heard by the Administrative Court on 5-6 October 2015.

In light of the judgments in the various litigation on the detained fast track (DFT) over the last 18 months, your client can have no reasonable expectation of defending this claim. We therefore write to propose that this matter is settled on the basis that your client will:

1. Reconsider our client's asylum claim without regard to your client's decision dated 16 July 2013 or the First-tier Tribunal's determination dated 29 July 2013;
2. Consent to an Order declaring that the Claimant was unlawfully detained from her entry into the DFT on 8 July 2013 until her release on 31 October 2013, with an entitlement to compensatory damages to be assessed if not agreed;
3. Pay the Claimant's costs to date, to be assessed on the standard basis if not agreed.

We **enclose** a draft consent order.

In *R (Detention Action) v SSHD* [2014] EWHC 2245 (Admin) ('DA1') Ouseley J held that as at 9 July 2014 the DFT was operating unlawfully for vulnerable or potentially vulnerable applicants "who did not have access to lawyers sufficiently soon after induction to enable instructions to be taken and advice to be given before the substantive interview". The judge identified failings in the safeguards for identifying vulnerable individuals and claims that may be unsuitable for the DFT and suggested that provided there was sufficient time before the substantive interview, advice and representation by a lawyer may be sufficient to cure the unlawful fairness inherent in the process. The group of vulnerable or potentially vulnerable applicants the judge identified included

applicants who claimed to be victims of domestic violence (see, in particular, judgment paras 150-151).

This case falls squarely within Ouseley J's judgment:

- At screening, the Claimant stated . No follow up questions were asked about her past treatment and the impact on her. Her account at her substantive asylum interview was that she had been subjected to threats and violence by her family.

- These are allegations of domestic violence. They meet the statutory definition of domestic violence in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, para 28:

  ' *"domestic violence"* means any incident, or pattern of incidents, of controlling, coercive or threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other (within the meaning of section 62 of the Family Law Act 1996).'

  According to s62 of the Family Law Act 1996, a person will be regarded as associated with another person if:

  '…(c) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder;

  (d) they are relatives…'

- The Claimant was not identified as a putative victim of domestic violence whose allegations required further investigation because of failings earlier in the process, including screening and Rule 34/35, which were well documented in the evidence before Ouseley J and described in his judgment. Your client allocated her a duty representative whom she only met on the day of the interview. The representative did not have sufficient time to take instructions, provide advice and make representations to have the Claimant removed from the DFT before the interview and a decision was taken on her case.

A structurally unfair decision making process was applied to the Claimant's case and there was actual unfairness in the decision making process in her case. The availability of an appeal is not sufficient to cure the unfairness suffered by the Claimant in the initial decision making process: *DA1* at paras 198-199 and *Refugee Legal Centre v SSHD* [2005] 1 WLR 2219 at para 15. Moreover, the appeal in the Claimant's case was conducted unfairly and procedure rules were applied which were more restrictive than rules which

have been held to be structurally unfair and unlawful: *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 (29 July 2015).

The only cure to the unfairness that the Claimant was subjected to is to reconsider her asylum claim without regard to the refusal dated 16 July 2013 and the First-tier Tribunal's determination dated 29 July 2013.

In relation to detention, from entry into the DFT on 8 July 2013 until the refusal on 16 July 2013, the Claimant was detained in order to have her asylum claim decided in a structurally unfair and unlawful process; and the decisions in her case were actually unfair. Her claim was not identified as too complex for the DFT and she was not identified as a victim of torture or serious ill-treatment because of failings in the processes and safeguards in the DFT. The decisions to detain her in the DFT were flawed and unlawful because of material breaches of public law which bore and were relevant to the decision to detain (*Lumba* and *Kambadzi*).

From 16 July 2013, the decision to detain the Claimant was pursuant to your client's unlawful policy that detention pursuant to the DFT detention policy continued during the appeals part of the process (*R (Detention Action) v SSHD* [2014] EWCA Civ 1634 (16 December 2014). Moreover, her detention was not and could not be justified thereafter under general detention criteria.

Finally, in *R (IK & Ors) v SSHD & Ors* (CO/678/2015, CO/747/2015, CO/814/2015) (20 July 2015) your client conceded that the DFT had never been the subject of an equality impact assessment. We **enclose** a copy of the final Order and Statement of Reasons in those cases, which were read into the court record by Blake J on 20 July 2015. The Order includes a declaration that as at 2 July 2015 the DFT was operated without full compliance with section 149 of the Equality Act 2010 because certain vulnerable groups were at unacceptable risk of unfairness. It was also accepted that section 149 was breached in relation to the individual claimants. The Statement of Reasons records your client's agreement that in any review of the DFT she will comply with her public sector equality duties and specifically have due regard to the matters set out under section 149.

The decision to detain the Claimant in the DFT breached section 149 and is a further reason why her detention was unlawful: *R (D) v SSHD* [2012] EWHC 2501 (Admin) (20 August 2012).

We are copying this letter to the Administrative Court Office.

We await hearing from you.

Yours faithfully

Bhatt Murphy