

ASYLUM APPEAL HEARING – ISSUES RAISED AT THE HEARING IN RELATION TO TAPE RECORDED INTERVIEWS

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Introduction

This Section sets out guidance for New Asylum Model Case Owners on how to deal with any issues that may arise at appeal in relation to tape recordings of the substantive interview.

The guidance follows the Court of Appeal's judgement in the case of *Dirshe, R v Secretary of State for the Home Department* (2005) which states that because of the withdrawal of Legal Aid funding for representatives attending interview, our then policy of refusing to allow asylum applicants to tape record their interview was unfair, unreasonable and therefore unlawful.

See Asylum Instruction on Conducting the Asylum Interview for detailed guidance on tape recording interviews of asylum applicants

The interviews that took place without being tape recorded

Representatives may argue that as a consequence of the Dirshe judgement, any notes from an interview that was not tape recorded are unreliable, because the interview was unfair.

The Case Owner must counteract this claim by pointing out that although

- The Court of Appeal's finding states that it was unfair to **refuse** an appellant the opportunity to tape record their interview 'if they so wish,
- The Court of Appeal's finding does **not** state that **all** interviews must be tape recorded

The Case Owner must pose the question to the Court 'Did the appellant **ask** to have their interview tape recorded?'

If they did not then the Case Owner must argue that the Dirshe principle does not apply, since the Home Office will not have refused to allow tape recording of the interview and therefore will not have treated the appellant unfairly.

The Case Owner should note that the Dirshe judgement is based on the withdrawal of Legal Aid funding for representatives to be present at interviews.

If a representative is present at the interview, the Court of Appeal found that a representative provides 'a real, practical safeguard against faulty interpreting or inadequate record keeping, and sufficiently protected the appellant's interests to ensure the required standard of fairness.

Therefore in these cases, where a representative is arguing that the interview was unfair, due to it not being tape recorded, the Case Owner must argue that:

- In any case where a representative was present at the interview, the lack of tape recording does not mean unfair treatment.
- Only in cases where no representative was present **and** the Home Office was unable to provide a request for tape recording interviews, then the Case Owner may accept that the Home Office treated the appellant unfairly. However, the Case Owner must point out that this does not mean that the interview record is unreliable. If the representative disputes this, then the Case Owner must ask the AIT to weigh up this point along with other evidence.

Interviewing a child

Case owners should be aware that Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

For further guidance on interviewing children, presenting officers should refer to the Asylum Instruction: Processing Asylum Claims From Children.

Request to re-interview the appellant using a tape recorder

If the representative requests a re-interview, with a tape recorder, the Case Owner must resist such a claim strongly, stating that such a request would not relate to the 'conduct of the appeal' and therefore would fall outside of the AIT's powers.

Alleged discrepancies between the tape recorded interview and the written record of the interview

The representative may state that there are differences between the tape recorded interview and the written records and consequently ask for the taped interview to be transcribed or be played in court.

The Case Owner must be aware that this action would discredit the interview record and therefore must point out to the Court that the Dirshe judgement made it clear that the tape should only be used (or transcribed) **strictly for the purposes of determining the appeal.**

The Case Owner must resist this claim:

- Stating that there needs to be a **specific, identified dispute** over the accuracy of the interview record or interpretation, before it is appropriate to refer to the tape or a transcription
- Stating that the dispute must relate to an issue that is crucial to the determination of the appeal i.e. it must be strictly necessary to refer to the tape
- Asking the representative to state exactly where in the interview they believe there is an error and how this alleged error is crucial to the determination of the appeal
- And strongly resist any application to refer to the tape in cases where no specific dispute has been identified. The Case Owner must bear in mind that the Dirshe judgement does not mean a 'fishing' trip' by the appellant
- If a specific dispute has been identified, the Court should be urged (in line with paragraph 30 of the Dirshe judgement) to restrict any order for transcription to the issue in dispute

The Case Owner should be aware that at present, UK Border Agency does not have the resources for transcribing significant numbers of tapes quickly, as they only have a few copy typists available. POU's do have some audio typing facilities, but transcription is a specialist job, and transcribing anything other than a very small part of a tape would be very time consuming.

In order to maintain independence it is not advisable to use UK Border Agency interpreters. Therefore, when such requests are made we should send the work to an independent translation/transcription company, with whom the UK Border Agency has a contract.

Alleged discrepancies between the tape recorded interview and the written record of the interview where a child was interviewed

Where a child has been interviewed, case owners must ensure:

- The interview was conducted by a specifically trained Case Owner
- The child was accompanied by a responsible adult, and/or representative, and/or social services were present when the interview was conducted
- Child sensitive and child appropriate techniques were employed

Further guidance on interviewing children can be found in the Asylum Policy Instruction on Processing Asylum Applications from Children.

If the above has been applied but the representative raises a dispute between the tape recorded interview and the written record, Case Owners should apply sensitivity when considering the reasons for disputing the record of interview.

Document Control

Change Record

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2.0	EG	04/11/08	Update branding only
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