Equality and Human Rights Commission response to the Ministry of Justice consultation on proposals for an expedited appeals process for detained immigration and asylum appellants

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Executive summary

The Equality and Human Rights Commission ('the Commission') welcomes the opportunity to respond to the Ministry of Justice consultation on proposals for an expedited appeals process for detained immigration and asylum appellants.

The Ministry of Justice proposes to introduce a new revised fast track procedure for all detained immigration appellants, including Foreign National Offenders serving prison sentences (FNOs), with a timeframe of 25 days for the determination of appeals. The Commission acknowledges the legitimate and laudable aim of ensuring persons who are detained for immigration purposes have their cases dealt with in a fast and efficient manner in order to minimise time spent in detention. We also welcome the improvements to the detained fast track procedure suspended in July 2015 (the DFT), with proposals for an expanded timescale and the possibility of case management reviews.

However, the Commission is concerned that there is insufficient evidence that a detained fast track procedure will achieve the aim of reducing time in detention, or can be implemented without compromising justice for appellants. The proposed modifications do not adequately address the concerns about the structural unfairness inherent in the previous Fast Track Rules identified by the Court of Appeal in its judgment in July 2015[1], which led to the DFT's suspension. This consultation response aims to highlight the Commission's equality and human rights concerns with respect to the new proposals.

If the proposals for a new fast track appeal process are pursued, the Commission recommends:

- retention of Principal Rule time limits for detained appellants at all stages of their appeal, with stricter time limits for the Home Office to achieve expedition;
- consideration of the need for a tailored screening procedure to identify vulnerable groups or types of cases that should be excluded from the fast track process;

[1] R (Detention Action) v First-tier Tribunal [2015] EWCA Civ 840

- automatic legal aid and Tribunal fee exemptions for all appellants in the fast track process;
- consideration of the additional difficulties appellants in prison will face in trying to access legal advice, or legal representation, even where legal aid is available;
- automatic case management hearings;
- a revised Equality Impact Assessment that considers the impact of the proposals on all protected groups.

Background information

1. The previous DFT was suspended following a Court of Appeal ruling in 2015 that the tight time limits for appeals in the DFT rules made the appeal scheme 'structurally unfair and unjust.'[2] The Court concluded that a lawful fast track scheme must properly take into account the following factors:

    i. The complexity and difficulty of many asylum appeals;
    ii. The gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from their clients who are in detention.[3]

2. The Government proposes that the new fast track appeal process should apply to appeals based on human rights grounds, as well as asylum appeals. The Commission considers that where there is the potential for a breach of human rights, high standards of procedural fairness are required for non-asylum as well as asylum appeals.

3. The new proposals extend the old DFT time period of 7 days from initial decision to appeal hearing to a longstop of 25 days from initial decision to the giving of the judgment. The consultation document proposes two options: either letting the Tribunal decide how best to apportion the 25 days to each stage of proceedings in individual cases, or introducing specific time limits. The proposed time limits are 5 working days to lodge an appeal, 5 working days to lodge a response, 10 working days for the listing of the appeal and 5 working days for giving judgment after the hearing. These time limits are substantially tighter than those specified under the Principal Rules, which provide 14 calendar days to lodge an appeal, for example, and 28 calendar days for a respondent to lodge documents in response to the appeal.

4. Within the period leading up to the hearing, it is proposed that appellants could request a case management review on the papers, with a discretion for the Tribunal to order a case management hearing.

[2] *Ibid*, para. 45.
[3] *Ibid,* para. 45

5. In a 2014 challenge to the previous DFT process, the Court of Appeal stated its view that the automatic detention of asylum seekers while their appeals were being processed in the DFT system and when they posed no risk of absconding could not be justified.[4]

Consultation Response

Question One: Do you agree that specific Rules are the best way to ensure an expedited appeals process for all detained appellants which is fair and just? If not, why not?

6. No. The type of appeals that would be subject to fast track Rules settle matters of the utmost importance for the individuals concerned, touching on fundamental rights such as the right to life, and freedom from inhuman and degrading treatment. It is vital that the appeal process should be fair and ensure access to justice, including effective access to the Tribunal, independent legal advice, and adequate time for case preparation. People who are detained face additional barriers in relation to these factors, which would be exacerbated by tight time limits. Vulnerable detainees will be particularly affected.

7. The Commission is therefore concerned that the proposals for specific Rules contained in the consultation document may not be compatible with Articles 3, 5, 6 and 14 of the European Convention on Human Rights (ECHR). We note the following particular issues of concern with regard to fairness and justice:

Inherently unsuitable cases

8. The consultation document proposes that the fast track appeals process will apply to all appellants detained in Immigration Removal Centres (IRCs) or prison.

9. The Commission considers that a general fast track policy may be unlawful as arbitrary and incompatible with Article 14 ECHR when read with Article 5 and/or Article 3 ECHR if it has a different and

[4] Detention Action v Secretary of State for the Home Department [2014] EWCA Civ 1634 (16 December 2014), para. 96

adverse impact upon vulnerable groups. The vulnerability of particular claimants disproportionately impacts on their ability to effectively access and participate in a fast track process in light of its additional rigours, demands and pressures, in comparison with those who not share the same characteristics or vulnerability. The definition of vulnerability should not be limited to protected characteristics under the Equality Act 2010.

10. Such vulnerable groups include, but are not limited to, people with a mental or physical disability, women with claims based upon gender-specific forms of persecution such as rape, other forms of sexual or domestic violence and honour based crimes, victims of torture or human trafficking. Women, for example, are more likely to face multiple disadvantages in this system, given difficulties in effectively articulating and advancing claims of gender-specific harm which are often traumatic, shameful and stigmatising.[5]

11. The Commission also considers that there are types of appeals for which a fast track procedure is inherently unsuitable. These include appeals that involve the following features:

    i. the appellant has no legal representation;
    ii. there are concerns about the ability of the claimant to participate effectively in the appeal process;
    iii. the appeal concerns sensitive and distressing past events or fears which may be difficult for appellants to disclose without time to establish trust or rapport with their legal representative;
    iv. additional supporting evidence from witnesses, documents or expert evidence are required.

Screening process

12. The consultation is silent on whether a screening process will be applied to identify persons unsuitable for inclusion in the new fast track appeal process.

13. It may be that the Government seeks to rely on the new guidance on the detention of vulnerable adults[6] (DVA) introduced in August

[5] Ejon v Secretary of State for the Home Department [1998] I.N.L.R. 195
[6] Home Office guidance on adults at risk in immigration detention. The policy as laid in August 2016: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/547519/Adults_at_Risk

2016 to identify individuals unsuitable for immigration detention. However, this general policy is not tailored to include the specific factors relevant to whether persons should be included in a detained fast track appeal procedure. For example, previous fast track exclusion criteria included persons, "who clearly lack the mental capacity or coherence to sufficiently understand the asylum process and/or cogently present their claim." Such persons would not be presumed unsuitable for detention under the DVA policy unless they are considered at risk of harm in detention. At this early stage of its introduction, the efficacy of the DVA policy for ensuring vulnerable adults are not detained is also uncertain.

Legal Assistance

14. The extension of the fast track to non-asylum claims means that it will include many appellants who are not eligible for legal aid, unless granted Exceptional Case Funding (ECF). The ECF Team currently aim to process urgent applications within 5 working days[7], which is unlikely to assist appellants who have only 5 working days in which to submit their appeal. The success rate of ECF applications is also very low. While approval rates have improved, in the first year of the ECF scheme, less than 1% of applications were granted.[8] Many of the people subject to the fast track may therefore lack legal assistance, a feature that courts have noted as an important safeguard for justice in previous fast track processes.[9]

15. In the previous DFT challenge, the Court of Appeal acknowledged the difficulties faced by legal advisers taking instructions from clients detained in IRCs to very tight timeframes. As a consequence of their detention, appellants in IRCs and their legal representatives have limited access to each other, which can impede case preparation.

16. In extending the fast track to appellants in prison it is not apparent that consideration has been given to the additional barriers to

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_August_2016.pdf, and later version published in September 2016: - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/552490/Adults-at-risk-policy-guidance_v1_0.pdf

[7] https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding

[8] Cuts that hurt: The impact of legal aid cuts in England on access to justice'. Amnesty International, October 2016, available at: https://www.amnesty.org.uk/sites/default/files/aiuk_legal_aid_report.pdf

[9] Saadi v UK , Application No. 13229/03, para. 78, and The Lord Chancellor v Detention Action v Secretary of State for the Home Department [2015] EWCA Civ 840

access to justice for prisoners as opposed to appellants in IRCs. There is currently no dedicated firm of solicitors with a legal aid contract to provide immigration advice in prisons and prisoners face additional practical barriers to identifying and communicating with legal advisers. For example, prisoners are required to submit an application to add a lawyer's telephone number to their approved call list, which can take days or longer to process. They are also unable to take incoming phone calls from legal advisers to give instructions or receive advice.

17. In light of the problems highlighted above, the Commission suggests that the risk of unfairness arising in a fast track process could be mitigated by retaining the Principal Rule time limits for appellants at all stages of their appeal. The Ministry of Justice could propose shorter time limits for Home Office and Tribunal actions in the appeal process, which would still achieve a considerably abridged timescale than that provided for under the Principal Rules.

Question Two. Do you think that an expedited immigration appeals process should apply to all those who are detained? If not, why not?

18. No. See in particular paragraphs 8 to 11 above.

Question Three. Do you have any other proposals for alternative criteria to select groups who would benefit from an expedited immigration appeal process?

19. No.

Question Four. Do you think the introduction of an overall timeframe is preferable to specific time limits for each stage? Please give reasons for your answer

20. While an overall timeframe would enable more flexibility for the Tribunal in setting timescales in individual cases, the Commission remains concerned that this would necessarily require the Tribunal to impose shorter timescales for detained appellants than those under the Principal Rules. We refer to our proposal at paragraph 17 above.

Question Five. Do you think 25 working days is sufficient time to dispose of an appeal in the First-tier Tribunal, and a further 20

working days sufficient time to determine whether an appellant has permission to appeal to the Upper Tribunal? If not, do you have a view on how long should be allowed for an appeal to be determined in the First-tier Tribunal and/or to determine whether an appellant has permission to appeal to the Upper Tribunal? Please give reasons for your answer

21. No response.

Question Six. Do you think every appeal should have a case management review on the papers, with discretion for a judge to hold an oral case management review? Please give reasons for your answer

22. The Commission welcomes the proposal to introduce a case management review (CMR) as an explicit part of the fast track process. This could provide an important opportunity for judges to consider whether a case is suitable for the fast track appeal procedure. However, the proposal is to introduce CMRs by application rather than as an automatic part of the process, with the expectation they will normally be considered by a judge on the papers. Consequently, appellants may either fail to apply for a CMR, or to provide the relevant information required to alert a judge to the unsuitability of their case for the fast track. There is therefore a risk that this safeguard may fail the appellants who need it the most, for example those who do not have legal representation and have learning disabilities or mental health issues that are not identified in the case papers.

23. While the possibility of CMRs may mitigate potential unfairness by enabling judges to remove cases from the fast track process, the Commission notes the Court of Appeal's observation in the previous DFT challenge that, "it is likely (to put it no higher) that judges will consider the FTR time limits to be the default position."[10] This leads to the risk of a presumption by judges that cases should normally proceed under the specified time limits.

Question Seven. Do you think the options the First-tier Tribunal has for adjourning cases at the case management review are right? If not, what options should the First-tier Tribunal have? Please give reasons for your answer

[10] R (Detention Action) v First-tier Tribunal [2015] EWCA Civ 840, Lord Dyson MR, para 44.

24. No response.

Question Eight. Should appellants subject to the proposed new expedited appeals process be required to pay a fee in order to bring their appeal to the Immigration and Asylum Chamber of the First-tier Tribunal? Please give reasons for your answer

25. No. The Commission considers that there should be an automatic fee exemption for all detained appellants. By virtue of their detention or imprisonment, many appellants will either struggle to obtain documentation to prove their eligibility for an exemption, or to access accounts in the community, within the proposed timescales.

Question Nine. Do you agree that the Government should take a power in primary legislation to introduce and vary time limits for different types of immigration and asylum appeals? Please give reasons for your answer.

26. No. The Tribunal Procedure Committee (TPC) is the expert body established by statute to make rules governing the practice and procedure for the First-tier and Upper Tribunals, including time limits. The Commission considers that the TPC, and judges applying the Tribunal rules in individual cases, are better placed than the executive to balance the need for a speedy determination with the requirements of justice in deciding the appropriate timescales for detained appeals.

27. Enshrining immigration appeal time limits in primary legislation would deprive appellants of the important safeguard of judicial review if, as with the previous DFT rules, it transpires that the overall scheme does not operate fairly in practice.

28. The precedent cited by the Government for using primary legislation to impose set time limits for determination of appeals is the overall time limit of 26 weeks for disposing of applications for care or supervision orders in the Children and Families Act 2014 (CFA). The statutory timescale in the CFA provides judicial discretion to extend the timescale where necessary to enable the court to resolve the proceedings justly, where specific justification is provided. Care or supervision orders may also be subsequently discharged or varied by the court by an application under section 39 of the CFA, whereas in the vast majority of immigration appeals to the First-tier Tribunal (FtT) the outcome will be final with no recourse to further

appeal to the Upper Tribunal except on the limited basis that the decision of the FtT Judge discloses an error on a point of law. In appeals concerning asylum and human rights claims, it is particularly important that there should be no executive fetter on the court's ability to deal with cases justly, given the severity of the impact on individuals of these decisions.

Question Ten. Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please provide any empirical evidence relating to the proposals in this paper.

29. No. The assumption that the proposals will not compromise access to a fair and effective appeals process is not accepted. The Commission echoes the concern expressed by the TPC in January 2016[11] that further evidence is required as to the necessity of introducing a fast track process in order to ensure that appeals for those in detention are dealt with as expeditiously as possible without sacrificing justice and fairness.

30. The Principal Rules allow either party to apply for expedition[12], and require judges to avoid delay, while managing cases in accordance with the interests of justice.[13] Appeals for detained appellants already receive priority listing by the FtT, and take a mean time of 61 days to determine.[14] There is no analysis in the consultation document to suggest that judges could manage these appeals any faster while also ensuring justice and fairness to the appellant and/or respondent.

31. It is also not clear whether the fast track proposals will achieve the purported benefit of reducing overall time in detention for appellants. The Impact Assessment (IA), for example, acknowledges that the policy 'may have the effect of prolonging immigration detention for appellants in IRC's many of whom are currently released shortly after lodgement of their appeals', and it is 'not clear how the expedited process would affect mean detention time for IRC detained appellants'.[15] The IA states that where IRC appellants

[11] Consultation document, para. 16
[12] Rule 4(3)(a), Case Management: "In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may— (a) extend or shorten the time for complying with any rule, practice direction or direction…" Available at: http://www.legislation.gov.uk/uksi/2014/2604/contents/made
[13] *Ibid,* Rule 2, Overriding objective and parties' obligation to co-operate with the Tribunal
[14] Consultation Impact Assessment, para. 18
[15] *Ibid,* para. 26

spend less time in detention under the expedited appeals process, this time would be 'back-filled' by other claimants who would either be brought into detention or held in detention for longer.[16]

Question Eleven. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the Government should consider? Please give data and reasons.

32. Please see paragraphs 9 to 10 above, which highlight the equality impacts on individuals with particular protected characteristics, or who are otherwise vulnerable. A potential mitigation would be to automatically exclude such persons from the fast track process. However, as noted at paragraphs 11 to 12 above, the Commission is concerned about the lack and/or efficacy of screening procedures to ensure such individuals are identified and excluded.

33. The Commission is concerned that a full equality impact assessment (EIA) sufficient to comply with the Government's duty under section 149 of the Equality Act 2010 has not been completed prior to the formulation of the fast track proposals. For example, the current impact assessment fails to consider the particular and special needs of protected groups who were identified as unsuitable for inclusion in previous fast track processes, such as women or disabled people.

34. The EIA is also based on poor quality data from a voluntary survey of immigration appellants who lodged an appeal in the FtT during the survey period with a 3.3% response rate. The consultation document acknowledges the results may not be representative of the Tribunal users who did not complete the survey. Only 5% of respondents stated that they had a disability, for example. This figure does not reflect the reported prevalence of disabilities, such as mental health problems, in the immigration detention estate or amongst the prison population.[17]

[16] *Ibid,* para.32

[17] See eg. 'Positive Duty of Care? The mental health crisis in immigration detention, (BID & AVID, 2012) available at: http://www.biduk.org/sites/default/files/BID_MHIDP%20Mental%20health%20briefing%20May%202012.pdf, and Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system, 2009, available at: http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_098694

Question Twelve. What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider? Please give data and reasons.

35. The Commission takes the view that the fast track policy should not be applied to cases where this would require a departure from the general detention policy for families. Decisions to detain persons under immigration powers are subject to the Governments' duty under section 55 of the UK Borders, Citizenship and Immigration Act 2009, to have regard to the need to safeguard and promote the welfare of children in the UK in carrying out immigration functions. This statutory duty reflects the requirement to consider the best interests of children under the UN Convention on the Rights of the Child (CRC). There must also be individual consideration of the rights of family members under Article 8 of the ECHR and the impact on the welfare of children before a decision is taken to separate a family for the purpose of immigration detention.

Conclusion

36. The Commission is supportive of the Government's aim of ensuring that the cases of individuals subject to immigration detention have their cases dealt with expeditiously so that detention is used for the shortest period possible.[18] However, as established in legal challenges to previous detained fast track processes, 'fairness must not be sacrificed on the altar of speed and convenience, much less of expediency'.[19]

37. The Commission considers that fast tracking the processing of immigration appeals for all detained appellants entails an inherent risk that vulnerable applicants and complex cases will be inappropriately included in the system. The Commission does not consider there is adequate analysis and evidence with regard to the stated necessity and benefits of the proposed fast track procedure, or sufficiently clear and detailed safeguards, to justify its potential to compromise fairness and justice for immigration appellants.

[18] UK Visas and Immigration. 2013.Enforcement Instructions and Guidance: www.gov.uk/government/uploads/system/uploads/attachment_data/file/400022/Chapter55_external_v19.pdf

[19] Sedley LJ in the Refugee Legal Centre case [2005] 1 WLR 2219, para 8

38. Immigration detention should also only be used as a last resort, and not for administrative convenience. We agree with the views of the All Party Parliamentary Group on Refugees and the All Party Parliamentary Group on Migration that there needs to be a presumption towards community-based resolutions rather than detention, and that the UK Government should learn from international best practice where alternatives to detention have been found to be an effective and more holistic solution.[20]

[20] See for example, A Joint Inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration. 2015. The report of the inquiry into the Use of Immigration Detention in the United Kingdom. https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf