ILPA

Tribunal Procedure Committee
Consultation on Possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules arising from Nationality and Borders Act 2022

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Introduction

1. The Immigration Law Practitioners' Association ('ILPA') is a professional association and registered charity, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

2. This is a response to the Consultation of the Tribunal Procedure Committee ('TPC')[1] on changes to rules arising from priority removal notices, accelerated detained appeals, age assessment appeals, Tribunal reasons and credibility decisions, and joint experts. The lack of detail or response to any specific question should not be taken as indicating that no issues arise in relation to the matter.

3. Our response to this Consultation should be read in conjunction and seen against the background of responses and briefings that ILPA has produced on these matters, over the years, including on Detained Fast Track. ILPA is deeply concerned that several provisions in the Nationality and Borders Act 2022 ('NBA'), and their implementation through the Tribunal Procedure Rules, will impact on the fairness and justice in appeals in the Immigration and Asylum Chamber of both the First-tier Tribunal ('FtT') and Upper Tribunal ('UT').

4. Furthermore, this response must be read together with our enclosed 2022 joint response[2] with the Public Law Project to the Consultation by the Ministry of Justice ('MoJ') on 'Immigration Legal Aid: A consultation on new fees for new services'[3]. Once in force, legal aid practitioners whose capacity is severely limited and whose very sustainability is in doubt will need to comply with any Tribunal Procedure Rules brought into force.

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[1] Tribunal Procedure Committee, 'Possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules arising from Nationality and Borders Act 2022' (27 October 2022) <https://www.gov.uk/government/consultations/possible-changes-to-the-first-tier-tribunal-immigration-and-asylum-chamber-rules-and-the-upper-tribunal-rules-arising-from-nationality-and-borders-a> accessed 17 January 2023 (hereinafter 'Consultation').

[2] ILPA and PLP, 'Response of ILPA and PLP to the Ministry of Justice's Consultation Immigration Legal Aid: A consultation on new fees for new services' (10 August 2022) <https://ilpa.org.uk/wp-content/uploads/2022/08/ILPA-and-PLP-Response-to-MoJ-Immigration-Legal-Aid-consultation-on-new-fees-for-new-services-10.08.22.docx.pdf> accessed 17 January 2023.

[3] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022) <https://www.gov.uk/government/consultations/immigration-legal-aid-a-consultation-on-new-fees-for-new-services> accessed 17 January 2023.

5. ILPA is concerned that the only fair procedural rules would result in great expenditure of resources by the Tribunal and practitioners, such that they may be unworkable in practice and further jeopardise the sustainability of the immigration legal aid sector. Given the grave limitations on the capacity of legal aid practitioners, and the inability of many appellants to afford private representation, ILPA is concerned that any Tribunal Procedures must be fair, accessible and secure justice not only for represented appellants but also for unrepresented appellants.

Priority Removal Notices

Question 1: Do you agree that rules relating to expedited and related appeals should be contained in a separate schedule? If not, why not?

6. ILPA neither agrees nor disagrees.

7. However, it should be clearly demarcated, particularly for litigants in person, which parts of and schedules to the Rules apply to ordinary appeals in the UT, and which pertain to expedited and expedited related appeals in the UT.

Question 2: What approach should the Tribunal Procedure Committee take to drafting rules for expedited and related appeals? Should the Tribunal Procedure Committee seek to replicate the current approach in the First-tier Tribunal Immigration and Asylum Chamber or apply a more traditional appeal structure? If so, why?

8. It is difficult for our members to respond to this question, in the abstract, without a clear understanding of the practical implications of either approach for expedited appeals.

9. We see advantages and disadvantages in both structures. However, on balance, with regard to the negative impact the traditional appeal structure could have on unrepresented appellants, we recommend the TPC take the current approach of the FtT when drafting rules for expedited and related appeals.

Traditional Appeal Structure

10. Our members note that the traditional appeal structure would have the benefit of providing an opportunity for the appellant to set out their case in the fullest from the outset, in detailed grounds of appeal. However, we have three concerns regarding this approach.

11. The first concern is that, if this approach is taken, appellants would need a lengthier time to lodge the notice of appeal than if the current approach in the First-tier Tribunal Immigration and Asylum Chamber ('FtT') were taken. We are unsure from the Consultation whether the appellant would have 21 days or 28 days to do so. The draft rule 2(1) in Appendix B provides 28 days after the appellant received the notice of decision against which the appeal is brought, and ILPA believes that theoretically a 28-day timeframe would be better than the 21-day timeframe the TPC is said to be considering at §58 of the Consultation. However, ILPA is concerned whether the 21 or the 28-day timeframe would comply with section 23 NBA for an appeal to be 'brought and

determined' more quickly than an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') would,[4] in the normal course of events.

12. The second concern is that appellants who are unrepresented may struggle with preparing and providing the UT with detailed grounds of appeal and the necessary evidence at an early stage in the appeal.

13. Bearing in mind our concern, raised at the outset of this response, regarding the sustainability, availability, and capacity of legal practitioners (particularly, legal aid practitioners), ILPA fears that a number of Priority Removal Notice ('PRN') recipients, who have missed the relevant cut-off date and may be subject to the expedited process, may be unrepresented.

14. We understand that the TPC was told that 'the current intention is that PRNs will be served only on Foreign National Offenders' (per §31 of the Consultation document). ILPA remains concerned as to whether "Foreign National Offenders ("FNOs")" will be able to access adequate legal representation. If such persons currently 'routinely' encounter difficulty in obtaining legal representatives to provide 30 minutes of free advice,[5] they may not find a legal representative willing to offer seven hours of legal advice or subsequently take on the case and respond to the PRN before the cut-off date (with the timeframe for such cut-off dates still unknown).

15. ILPA raised three concerns in its response to the MoJ's Consultation on Immigration Legal Aid fees regarding representatives taking on this work: (1) the sufficiency of remuneration for the seven hours of advice on receipt of a PRN, and follow-on work, at pitifully low hourly rates, particularly in the cost of living crisis; (2) the quality of such legal advice, and the mechanisms in place for the Legal Aid Agency to monitor it; and (3) that providers must make a 'determination as to whether the PRN recipient qualifies for legal aid funding that is in scope or through the exceptional case funding ('ECF') scheme. If the latter, providers must make an ECF application if they wish to undertake the follow-on work', but 'the PRN requires work to be done at speed, and the ECF application may be a barrier to providers taking on the work, and cause delays'.[6] Moreover, as ECF applications are extremely time consuming and "not financially viable" for

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[4] See First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014, rule 19(2): 'If the person is in the United Kingdom, the notice of appeal must be received not later than 14 days after they are sent the notice of the decision against which the appeal is brought.'

[5] HM Chief Inspector of Prisons, *The experience of immigration detainees in prisons* (September 2022) 5, at §2 <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2022/10/The-experience-of-immigration-detainees-in-prisons-web-2022.pdf> accessed 17 January 2023. Additionally, the report states at page 5: 'Obtaining adequate legal advice was a problem. Most establishments could provide a list of legal representatives, but many detainees said they had difficulties in contacting them and had struggled to find a representative who would take on their case. Detainees' access to new policy initiatives – such as an additional allowance that could be used to buy PIN phone credit to contact legal representatives and a free 30-minute appointment with a solicitor – was patchy. Not all prisons were aware of these entitlements, and some detainees had not received them at the time of our fieldwork.' Therefore, issues for persons in immigration detention in prisons persists following the case in *SM v Lord Chancellor* [2021] EWHC 418 (Admin).

[6] (n 2) §68.

providers, there may be difficulty in finding a provider willing to take on such a case. Furthermore, as we stated in the same response, '[w]ithout understanding the exact time frames to which providers would need to work, it is difficult to respond to the Consultation regarding the capacity and willingness of providers to undertake the work at the proposed remuneration, and the extent to which they would need to sacrifice possibly higher paying work in order to respond to a PRN at speed'.[7]

16. The lack of available legal (aid) representation may result in a larger number of the 2,000 initial "FNOs" served with PRNs missing the cut-off date, and resulting in a far greater number than the 200 expedited appeals estimated by the Home Office (at §35 of the Consultation document).

17. A traditional appeal structure is likely to place such unrepresented appellants at a disadvantage in their one and only chance to have the matters litigated at appeal. The TPC will be aware that section 23 NBA ousts the jurisdiction of the Court of Appeal to consider an appeal from a first-instance immigration decision of the UT. Therefore, it is all the more important that appellants have an opportunity to properly and fully make their case in an appeal which may be expedited.

18. Our third concern is that the traditional appeal approach proposed in Appendix B does not require the respondent to provide to the Tribunal and the appellant a written statement of whether the respondent opposes all or part of the appellant's case and if so the grounds for such opposition. Therefore, a great burden falls on the appellants to provide detailed grounds of appeal, without having any narrowing of issues, consideration of the matters raised in the grounds, or respondent's response prior to the day of the hearing. We cannot see that such an approach would further fair and efficient proceedings in the Tribunal, or result in expedition. The failure to narrow issues results in adjournments and/or hearings not being effective on the day. Accordingly, if the traditional approach is adopted, the respondent's statement of issues should be required (as is the case in rule 24A(3) of the First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014).

Reform Approach

19. There are several benefits of the reform approach.

20. First, the ability to lodge an appeal without detailed grounds of appeal, under the reform approach, would likely be an easier process for unrepresented appellants to complete. They would then have a lengthier period of time to find legal representation following the appeal being lodged.

[7] ibid §72.

21. Second, if the UT is to dispose of appeals in a very narrow timeframe, representatives are likely to want to frontload the preparation of the appeal as much as possible provided they are clear as to what evidence would need to be included. However, it may be the case that documents and information are required from the respondent before this frontloading can be done.

22. Third, it would also be simpler to have a single approach, where possible, for first instance appeals. Immigration, asylum and nationality law is already incredibly complex. Therefore, simplicity in procedure, where possible, would be welcome.

23. Fourth, ILPA has commented to the MoJ that ILPA members have found that under the post-reform approach there are fewer late adjournments in the FtT, and the Home Secretary's review can result in the withdrawal of the decision being appealed. These are both important improvements that save the Tribunal’s resources and are in the interests of justice. ILPA also shares the hope of the TPC that these benefits would apply to appeals in the UT if this approach is taken.

24. However, ILPA has also pointed out in the past several fundamental problems with the post-reform approach.

25. For example, in response to the MoJ’s Call for Evidence regarding the online appeal system, in December 2021, ILPA noted the respondent’s lack of compliance as a key problem:

> *There are three key differences between the online and the paper-based system noted by our members.*
>
> *In addition to the obvious differences, in terms of the digitisation of the system, the first key difference is that the online system requires extensive preparation much earlier in the process. The second key difference, which is related to the first, is the protracted, bureaucratic, rigid process between filing the appeal notice and the substantive hearing. However, without the data we have requested above, it is difficult to ascertain to what degree the length of the process can be attributed to the COVID-19 pandemic, and to what degree it is caused by the various stages in the new system, their associated timeframes, and the lack of compliance with directions which can cause delay. The third key difference is that the respondent is required to conduct a review, as a specific stage in the process, before the appeal reaches a substantive hearing.*
>
> *Different practitioners prepare appeals in different ways. This can vary due to the types of cases they take and the weight of their caseload, and, of course, not every organisation will instruct external counsel. Where external counsel is not instructed early in the process, a caseworker may feel pressured to prepare an Appeal Skeleton Argument (‘ASA’) even though this task may be one for which they would have previously instructed*

external counsel shortly before the hearing. This places greater demands on representatives, much earlier in the process.

[...]

Under the standard directions contained in Directions to Represented Appellants in Presidential Practice Statement No. 2 of 2020, '[n]ot later than 14 days after the Notice of Appeal is provided, the respondent must provide a bundle compliant with rule 24(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. This bundle must include the refusal decision and any material submitted in support of the application'.[8] *Although in certain cases, the appellant's representatives may have all of the documents upon which the Secretary of State intends to rely, the Secretary of State's bundle can be extremely important. For example, where the genuine and subsisting nature of a relationship is in question, or in revocation or deception cases, the Secretary of State's minutes, notes, transcripts, and other evidence to which the appellant does not have access can be crucial. The respondent's bundle is particularly important if there is insufficient time for a Subject Access Request of these documents. For example, the importance of the Secretary of State's evidence, where there is an allegation of deception, is crucial in determining whether the initial evidential burden of the Secretary of State has been discharged.*[9]

However, we have noted from our members that even upon being repeatedly directed to serve her bundle, the Secretary of State often fails to do so. Under the online system, this is a significant concern as it can delay progression of the case and service of the ASA (which under the standard directions must be served not later than '28 days after the respondent's bundle is provided, or 42 days after the Notice of Appeal, whichever is the later'). Tribunal caseworkers are often sympathetic to this delay by the Secretary of State and are willing to grant extensions for compliance or ask if the requirement can be waived altogether. The failure of the Secretary of State to provide timely service of her bundle can leave appellants blindsided as to the evidence against them. If appellants attempt to serve their bundle and ASA, without sight of the respondent's bundle, to avoid any further delay in the hearing and review process, this results in an unjust system where there is only one-sided compliance with directions. It can also result in a more drawn out process in the online system, attributing to the second key difference noted by members.

[8] Annex 1 First-tier Tribunal (IAC) On-line Directions (Using "MyHMCTS"), *Directions to Represented Appellants (Presidential Practice Statement No 2 of 2020)* <https://www.judiciary.uk/wp-content/uploads/2020/06/Annex-1-FINAL-11-June-2020.pdf> (accessed 30 November 2021).

[9] See, for example, *Secretary of State for the Home Department v Shehzad & Anor* [2016] EWCA Civ 61 [30].

A benefit of the online system is that as a matter of course, the Secretary of State should conduct a review prior to the substantive hearing. Under the ordinary directions, within 14 days of the ASA being provided, the Secretary of State must undertake a meaningful review of the appellant's case considering the appellant's bundle and ASA. The Secretary of State must provide the result of that review and particularise the grounds of refusal upon which she relies. As this is built into the process, at an earlier stage, it should have the effect of reducing the late and ad hoc withdrawals by presenting officers and counsel for the Secretary of State which were a common feature of the paper-based system.

ILPA members have found that under the new online system, there are fewer late adjournments and the Secretary of State's review can result in the withdrawal of the decision being appealed. These are both important improvements that save the Tribunal's resources and are in the interests of justice.

However, one of our members, who was a part of the pilot scheme, has noted significant delays since the roll out of the online system nationally. They have experienced significant delays in the Secretary of State uploading her bundle (waiting approximately 3 months for a corrected bundle to be uploaded in one case, with the dates for compliance with directions pushed back without penalisation). They provided an example of two cases in which the Secretary of State withdrew the decision on the day prior to the hearing, meaning that the appellant had to attend the hearing the following day. In both of these cases, the withdrawal could have taken place during the respondent's review but it did not.

The Secretary of State must meaningfully engage in the review process if the purpose is to narrow the issues in an appeal and allow for withdrawals and reconsiderations of decisions in advance of hearings. If the Secretary of State merely goes through the motions of a review, and provides generic responses, then the review is pointless and simply results in delaying the date of the appeal hearing. One of our members, who has drafted a large number of ASAs since the rollout of the online system, has seen a noticeable decline in the quality of the respondent's reviews. We recommend the MoJ enquire with the Home Office as to the reason for this. Additionally, it is not always the case that appellants receive a review of their case or response to an ASA within the timeframe directed, or at all. If a case is only withdrawn very shortly before the substantive hearing, or on the day of the hearing itself, then this is akin to the prior paper-based system where errors and concessions would happen when the case was reviewed by a presenting officer or counsel for the Secretary of State shortly before the hearing.

The system was built around affording the Secretary of State the opportunity to review her decisions at a specific juncture in the appellate process. It requires compliance by both parties. If the Secretary of State does not comply with directions, she hampers the

very system that has been built for her review. Therefore, we recommend that a more stringent approach is taken by the Tribunal with regard to non-compliance by the Secretary of State, including regarding the admissibility of late material. The Tribunal also has powers under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chambers) Rules 2014 to make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings,[10] *which operates in conjunction with section 29 of the Tribunal, Courts and Enforcement Act 2007 for wasted costs against legal or other representatives.*[11] *If the current procedure is to continue in the online system, the Tribunal should consider whether the Secretary of State has acted unreasonably in her defense of the appeal, and consider an order for unreasonable costs of its own initiative. In legal aid cases, it will of course be public funds that are at risk of being wasted. We are in no way encouraging the Tribunal to make frequent wasted or unreasonable cost orders, and are alive to the chilling effect frequent orders may have on legal representatives, who are likely to become overly cautious or conservative. Nevertheless, we encourage the MoJ and the Tribunal to consider what reasonable action can be taken, to limit the protracted and rigid nature of the online procedure resulting from the Secretary of State's failure to comply with directions, in furtherance of the overriding objective.*[12]

26. Second, due to the extensive front-loading of preparation under the new system and the length of the process, overall, practitioners have noted that they do more work under the post-reform system than they did under the previous traditional appeal structure and yet this is not adequately remunerated in legal aid cases. For example, ILPA also wrote in its response to that Call for Evidence:

Previously, counsel would typically be instructed at shorter notice to represent an appellant at an appeal hearing. They would draft a skeleton argument (if they wished to

[10] In *Cancino (costs – First-tier Tribunal – new powers)* [2015] UKFTT 00059 (IAC) it was held in the head note that '[o]rders for costs under Rule 9 will be very much the exception, rather than the rule and will be reserved to the clearest cases'. In Presidential Guidance Note No.2 of 2018, *Further guidance on wasted costs and unreasonable costs and on the correct approach to applications for costs made in proceedings before the First-tier Tribunal (IAC)* <https://www.judiciary.uk/wp-content/uploads/2018/07/costs-guidance-2018.pdf> (accessed 30 November 2021), states at paragraph 2.7(viii), 'in every case the Secretary of State must undertake an initial assessment of the viability of defending an appeal within a reasonable time following its lodgement. Where this does not result in a concession or withdrawal or something comparable, this duty, which is of a continuing nature, must be discharged afresh subsequently'.

[11] There are also several wider ranging powers to impose orders or charges on the Secretary of State, her representatives, and their employees contained in clauses 75 and 76 of the Nationality and Borders Bill, as amended in Public Bill Committee, page 76 <https://publications.parliament.uk/pa/bills/cbill/58-02/0187/210187v1.pdf> (accessed 25 November 2021).

[12] ILPA, 'ILPA's Response to MoJ Call for Evidence: Immigration legal aid fees and the online system' (2 December 2021) pp 4-7 <https://ilpa.org.uk/wp-content/uploads/2021/12/ILPA-Response-to-MoJ-Call-for-Evidence-Legal-Aid-Online-System-02.12.21.pdf> accessed 17 January 2023.

use one) at the same time as the preparation for the oral hearing. They would have had a conference with any present instructing solicitor, appellant, and witnesses, prior to the hearing. Ordinarily, counsel would only need to prepare for the appeal, and become acquainted with the appeal bundle once, shortly before the appeal hearing. A skeleton argument would be served very commonly on the morning of the hearing itself, or, in accordance with directions, shortly before the hearing.

Conversely, under the online system, advocate members note that they must often prepare for an appeal multiple times. They may have an initial conference with an instructing solicitor and/or appellant. They then prepare when drafting an ASA. Many months or even a year may elapse between the service of the ASA and the appeal hearing. Before the appeal hearing, an advocate must refresh their memory. If significant time has passed, this will require the advocate to re-read the bundles in their entirety, which - in the case of large bundles - can take several hours. It is the circumstances at the date of the hearing which are relevant to the determination of the issues in the appeal. If, due to the passage of time since the appellant's bundle and ASA were served, circumstances have changed, these must be addressed through the provision of further evidence, potentially an updated Witness Statement and medico-legal, expert, or other reports, and, if necessary, an addendum skeleton argument. There may also be a change in circumstances in the country of origin, with Afghanistan being a clear and recent example of this. Uploading evidence results in a new consolidated bundle with new page references, to which judges often expect the ASAs and counsel to refer. Cross referencing page references from the original bundle served with the ASA is time consuming.

Equally, if the Secretary of State does maintain her decision following her review, but for further reasons, then this may need to be addressed in further evidence in the appellant's bundle, resulting in a new consolidated bundle, which may need to be cross-referenced in an updated, amended or addendum ASA or Reply to the Respondent's Review.

If the decision is withdrawn, there is no need to proceed to a substantive hearing. However, it is crucial that the Secretary of State does not delay in making a decision following withdrawal. Once a decision is withdrawn, an appellant is left in limbo anxiously awaiting the outcome of the decision. If there are lengthy delays, an appellant may have been better served - in terms of achieving a quicker outcome - if the appeal had been granted following a substantive hearing.[13]

27. Therefore, it will be necessary for the Tribunal to appreciate this additional work and the need for there to be adequate time for it to be carried out. Although not a matter for the TPC, ILPA would also urge the Government to consider that if this approach to expedition is taken by the

[13] ibid 7-8.

TPC, urgent reform to immigration legal aid continues to be needed to ensure there are legal aid representatives to assist the Tribunal, particularly in such complex expedited appeals.

28. On balance, whilst we are supportive of the reform approach over the traditional appeal approach, we are keen for the TPC to consider what measures would be appropriate to ensure that the Home Secretary complies with the relevant timeframes; what would be realistic timeframes for the Home Secretary's compliance; and what other steps the Tribunal would need to take to ensure appellants are not disadvantaged by the Home Secretary's non-compliance. The subsequent steps in the process—serving an appellant's skeleton argument and respondent's statement of issues—are contingent upon receipt of the respondent's response to the notice of appeal.

Question 3: Do you agree with the timeframes suggested by the Tribunal Procedure Committee? If not, what alternative timeframe would you suggest and why?

Overall Comments

29. ILPA is deeply concerned by the proposed approach of the TPC: to impose tighter deadlines in respect of case management. The Nationality and Borders Act 2022 does not require this. Section 82A(4) of the Nationality, Immigration and Asylum Act 2002 only requires that 'Tribunal Procedure Rules must make provision with a view to securing that expedited appeals are brought and determined more quickly than an appeal under section 82(1) would, in the normal course of events, be brought and determined by the First-tier Tribunal.'

30. We query the correct interpretation of this provision. Must it be both 'brought' more quickly and 'determined' more quickly, or must the sum of the time taken to bring and determine the appeal be less than the sum of the time it would take to bring and determine an appeal under section 82(1) of the 2002 Act in the normal course of the events? It appears the TPC has taken the latter approach. However, if the former interpretation is found to be correct, the Tribunal Procedure Rules must ensure that an expedited appeal is *brought* more quickly than one in the FtT. This would mean that a notice of an expedited appeal would need to be received by the UT less than 14 days after the appellant is sent the notice of the decision against which the appeal is brought.

31. In our opinion, a Rule that the 'notice of appeal must be received not later than 13 days after they are sent the notice of the decision against which the appeal is brought' would satisfy this more conservative interpretation of the statutory requirement.

32. On the basis of this narrow interpretation, the Tribunal Procedure Rules must also make provision to secure an expedited appeal is determined more quickly than a 'normal' appeal in the FtT. This is a strange statutory provision, as there is no set timetable for determinations in the FtT. The length of time required for an appeal to be determined by the FtT varies depending

on the circumstances of the case, which may include the grounds, complexity of the law, and availability of the evidence.

33. Accordingly, one way to interpret the provision would be to have regard to MoJ, HMCTS, or other relevant statistics and determine the current average time for an FtT appeal. An expedited appeal need only be determined more quickly than that current average. If it is determined one day more quickly, it would still comply with the statutory provision to be determined 'more quickly'. For example, the MoJ's most recent 'Tribunal Statistics Quarterly: July to September 2022' state that '[i]n the FTTIAC, the mean time taken to clear appeals across all categories is at 41 weeks this quarter, which is 2 weeks more than compared to the same period a year ago. Asylum/Protection, Human Rights and EEA Free Movement had mean times taken of 54 weeks, 51 weeks and 37 weeks respectively'.[14] On the basis that it currently takes nearly a year for disposal of human rights appeals, and more than a year for protection appeals, ILPA can see no reason for shortening the timetable for such expedited appeals in the UT.

34. The Consultation paper states at §49 that an FtT 'case is expected to have completed the standard case management steps within approximately 98 days of the decision under appeal'. However, the 'timescales for the standard case management steps in the F-t Tribunal IAC' in §48 are more generous than those which actually apply, and provide only 14 days for lodging the notice of appeal, and 14 days for the respondent's bundle.[15] Accordingly, the standard case management steps for the FtT should be completed within 70 days, the same period as those proposed in §54. If case management steps could actually be completed within 70 days then, subject to efficient listing of substantive hearings and decisions following the hearing, which would be dependent on the MoJ adequately resourcing the Tribunal, cases could be disposed of far more quickly than the 51-54 weeks normally taken for human rights and protection appeals. However, as indicated in our response to prior questions, much is dependent on the respondent's compliance with directions.

35. Instead of providing truncated timeframes for case management steps, the Tribunal Procedure Rules could require for a review of the relevant statistics by a judge, and for that to be taken into regard when listing and setting directions for the final hearing. Accelerated detained appeals are likely to require a case management review at the outset to determine a timetable for the appeal appropriate to the circumstances of the case, to ensure it is determined more quickly than it would 'in the normal course of events, be brought and determined by the First-tier Tribunal'. However, we have seen no evidence to suggest a departure from the standard case

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[14] Ministry of Justice, 'Tribunal Statistics Quarterly: July to September 2022' (published 8 December 2022) <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2022/tribunal-statistics-quarterly-july-to-september-2022#immigration-and-asylum> accessed 17 January 2023.

[15] See Tribunals Judiciary, 'First-tier Tribunal (Immigration and Asylum Chamber) User Guide – April 2021 Update' page 14 §3, which applies to represented appellants <https://www.judiciary.uk/wp-content/uploads/2021/04/IAC-User-Guide-April-2021-Appendices-1-3-NH.pdf> accessed 17 January 2023.

management steps in the FtT is necessary. During the life of the case, the UT could undertake further case management reviews to ensure the directions for the remaining case management steps and final hearing were appropriate.

36. Therefore, in our opinion, the TPC has gone beyond what is required in statute by proposing a truncated timeframe for case management following receipt of the notice of appeal.

37. There are other ways to secure that an appeal is determined more quickly. For example, expedited appeals could be listed for hearings with high priority (subject to there being sufficient resources) or there could be a shorter timeframe for judges to make a decision following a substantive hearing. There is no reason to believe that shortening the timeframe for compliance with various stages of case management will result in an appeal being determined more quickly. Our members' experience, reflected in the most recent Tribunal Statistics, is that appeals take far longer than 98 days from the decision to completion of the case management steps. Our members express reservation as to whether the Home Secretary will be in a position to comply with directions containing truncated timeframes, and query whether she has set aside additional resources to do so. In our opinion, this concern is legitimate given that members have reported the Home Secretary's failure to comply with case management timeframes currently in place in the First-tier Tribunal.

38. We agree there must be balance between expedition and practicality, but we are concerned both with the practical ability of legal representatives to meet truncated timeframes for submission of grounds, evidence and the skeleton argument, and the practical ability of the Home Secretary to comply with the requirements for serving information, documentation and a statement on issues.

Specific Comments

39. ILPA has raised with the Secretary to the TPC issues identified with the timeframes in the Consultation, and sought clarification.

40. From §41-42 of the document, it appears the TPC considered two potential approaches: (1) an approach replicating the current system, and (2) a more traditional appeal structure.

41. In relation to the first potential approach, replicating the current system, it appears that the TPC considered two possible timetables at §53-54.

> *53. The TPC is therefore considering two potential timetables. The first would adopt the suggestion of shorter deadlines for the lodging of the notice of appeal and the Respondent's statement on the issues. It would be as follows:*
> *a. Lodging NoA: 14 days from the decision under appeal*
> *b. Respondent's Response to NoA: 21 days from being sent NoA*

c. Skeleton argument: 21 days from receiving the response or 35 days from the lodging of the NoA, whichever is later
d. Respondent's statement on issues: 10 days from provision of skeleton argument.

54. The second potential timetable would maintain divide time more equally and be as follows:
a. Lodging NoA: 14 days from the decision under appeal
b. Respondent's Response to NoA: 14 days from being sent NoA
c. Skeleton argument: 21 days from receiving the response or 35 days from the lodging of the NoA, whichever is later
d. Respondent's statement on issues: 21 days from provision of skeleton argument.

55. The TPC believes that this provides a more appropriate balance between expedition and practicality. It would require cases to complete the standard case management steps within approximately 66 days.

42. First, in §55 it is not clear what the TPC means when it says it believes "this" provides a more appropriate balance. The second half of that paragraph appears to refer to the first potential timetable, which sums to 66 days, while the second potential timetable sums to 70 days for completion of the standard case management steps. We understand from the clarification we received upon querying this with the Secretary to the TPC that the intended meaning is that the TPC believes both possible timetables set out in §53-4 provide a more appropriate balance than the Government's suggested timescale outlined at §50. We understand that, at this stage, the TPC does not have a view as to which of §53 or §54 is preferable.

43. Second, neither §53 nor §54 fully align with the draft rules proposed in Appendix A to the Consultation, which contains the following rules:
    i) Rule 2(1) aligns with both timetables: 'A notice of appeal must be made in writing and received by the Upper Tribunal no later than 14 days after the appellant received the notice of decision against which the appeal is brought.'
    ii) Rule 3(2) aligns with the first timetable: the Respondent's response 'must be provided within 21 days of the date on which the respondent received the notice of appeal and any accompanying documents or information provided under paragraph 2.'
    iii) Rule 4(2) aligns partly with both timetables in that it refers to 21 days, but the 28 days differs from the 35 days in §53 and §54: 'The appellant must provide the documents specified in sub-paragraph (1) no later than 21 days after receipt of the documents under paragraph 3 or, as the case may be, or no later than 28 days after the date the notice of appeal was received by the Upper Tribunal, whichever is the later.'
    iv) Rule 4(3) aligns with neither timetable: 'The respondent must no later than 7 days after receipt of the appellant's documents under sub-paragraph (1) provide to the Upper Tribunal and the appellant a written statement which complies with any relevant practice direction, of whether the respondent opposes all or part of the appellant's case

and if so the grounds for such opposition.' Moreover, it is confusing as to why Rule 4(3) proposes 7 days for the Respondent's statement, when at §52 the TPC expressed its concern that the Government's 7-day 'proposed deadline in relation to the Respondent's statement on the issues may also be too short for there to be proper consideration at this stage.'

44. Upon querying the apparent mismatch between the body of the Consultation and the Draft Rules in Appendix A, we were informed "where there is any divergence the days given in the body of the consultation should be preferred". ILPA believes the timescales in the body of the Consultation to be preferable in providing a period of 35 rather than 28 days after the date the notice of appeal was received by the UT to provide the appellant's skeleton argument, and in providing a 10 or 21-day period for the respondent's statement on issues.

45. ILPA is concerned that lodging the notice of appeal within 14 days from the decision under appeal, as proposed in Rule 2(1) of Appendix A, and in §53(a) and §54(a), may not comply with any statutory requirement that the appeal is brought more quickly. Perhaps, any error has arisen from considering that the requirement is 28 days (in §48(a)).

46. As above, we recommend a 13-day timeframe for lodging a notice of appeal. This would comply with a conservative interpretation of the statutory provision whilst providing the greatest amount of time for appellants to find legal representation.

47. In relation to the Government's proposed timetable of 7 days for appellants to lodge and 14 days for the respondent to respond, ILPA considers it inappropriate for an appellant to have less time in which to appeal a decision than the respondent has to respond to an appeal.

48. If an appellant is unrepresented, which the draft Tribunal Procedure Rules accept may be the case, and nothing in the NBA exempts unrepresented appellants from this expedited process, then seven days from a decision may be far too short of a period of time to find a legal representative, particularly if entitled to legal aid. This is rightly acknowledged in the Consultation at §52: 'Obtaining representation and arranging legal aid is likely to take longer than 7 days.' The TPC should consider that if this will be certificated work, the Legal Aid Agency ('LAA') also has to be able to act quickly and grant certificates for providers. Accordingly, we would recommend that the TPC consult the MoJ on the relevant timeframes to which the LAA can commit to ensure that the proposed timetables can be met.

49. Furthermore, ILPA agrees with the TPC's comment at §52 that 'setting timescales that are so short is likely to work against expedition in these cases by creating additional work and delays when deadlines cannot be met'. This has been the experience of our members in relation to many appeals under the post-reform approach. Where the Home Secretary has not complied with the short deadlines already in place for the First-tier Tribunal post-reform approach, this can create additional work for legal practitioners, who must update evidence, statements, and

skeleton arguments already served, in advance of the respondent's review and/or any substantive hearing.

50. Accordingly, ILPA recommends the following timescale for expedited appeals:
    i) Lodging Notice of Appeal ('NoA'): 13 days from the decision under appeal;
    ii) Respondent's Response to NoA: 14 days from being sent NoA;
    iii) Appellant's skeleton argument: 28 days from receiving the response or 42 days from the lodging of the NoA, whichever is later;
    iv) Respondent's statement on issues: 14 days from provision of skeleton argument (although ILPA expresses no further opinion on the other proposals of 7, 10 or 21 days for this last step, other than that it be reasonable and complied with by the Home Secretary).

51. Our proposed approach aligns more closely with the timetable in the First-tier Tribunal:[16]

3 Timetable

Period within which step is to be taken	Action
Day 1	Notice of appeal provided to Tribunal by MyHMCTS
Not later than 14 days after notice of appeal	Respondent's bundle ("RB") must be provided
28 days after provision of RB or 42 days after notice of appeal, whichever is later	Appellant must provide: (i) Appeal Skeleton Argument (ii) Bundle of evidence in support
14 days after provision of appellant's ASA and evidence	Respondent must provide: Review with counter-schedule

52. In relation to the second potential approach, a more traditional appeal structure, it appears from §58 that the TPC is considering a 21-day deadline for both the Notice of Appeal and Respondent's response. However, Appendix B proposes a 28-day deadline for both:
    i) Rule 2(1): 'A notice of appeal must be made in writing and received by the Upper Tribunal no later than <u>28 days</u> after the appellant received the notice of decision against which the appeal is brought.'
    ii) Rule 3(2): 'The documents and information listed in sub-paragraph (1) must be provided within <u>28 days</u> of the date on which the respondent received the notice of appeal and any accompanying documents or information provided under paragraph 2.'

[16] (n 15).

53. As above, ILPA is concerned about the compliance of Rule 2(1) of Appendix B with the statutory requirement for an appeal to be brought more quickly. Moreover, ILPA is concerned whether appellants (particularly if they are unrepresented) would be able to provide detailed grounds of appeal within a timeframe of less than 14 days.

Question 4: Do you agree with the proposed Rule 6? If not, why not?

54. Section 82A(5) of the Nationality, Immigration and Asylum Act 2002 to be introduced by section 23 NBA states, 'Tribunal Procedure Rules must secure that the Upper Tribunal may, if it is satisfied that it is the only way to secure that justice is done in the case of a particular expedited appeal, order that the appeal is to be continued as an appeal to the First-tier Tribunal and accordingly is to be transferred to that Tribunal.'

55. ILPA opposes the use of the permissive 'may' in Rule 6(2): 'The Upper Tribunal <u>may</u> on its own initiative or upon an application from a party <u>consider</u> whether to make a determination in accordance with sub-paragraph (1)' (emphasis added).

56. If a party makes an application for a determination under Rule 6(1), as currently drafted, the UT arguably would be entitled to do nothing on that application. It can decide not to consider whether to make a determination under Rule 6(1). This cannot be right.

57. ILPA recommends that Rule 6(2) state 'The Upper Tribunal <u>must</u> on its own initiative or upon an application from a party consider whether to make a determination in accordance with sub-paragraph (1).'

Question 5: Do you agree with the proposed Rule 7? If not, why not?

58. ILPA is concerned whether Rule 7 may result in multiple timescales for case management in a case with an expedited and an expedited related appeal. Accordingly, this is a further reason for the standard FtT timescales for case management, following an appeal being lodged, to apply to UT expedited appeals. If the timescales were the same, then unless the FtT has issued non-standard directions in the related appeal, the same set of timescales would apply to both the expedited and the expedited related appeal. As above, we do not consider that truncated timeframes, following an appeal being lodged, are necessary under the NBA.

59. Upon an expedited related appeal being transferred to the UT, we consider that the first appropriate step is for a case management review hearing to be automatically listed in relation to both the expedited and any related appeal, and for directions to be set at that hearing.

Question 6: Do you agree with the proposed First-tier Tribunal Rules? If not, why not?

60. We assume by this question, you are asking whether we agree with the proposed *Upper Tribunal* (rather than First-tier Tribunal) Rules in Appendices A and B to the Consultation.

61. Other than the points we have raised in our responses to Questions 1-5, and our comments in our response to Question 7, we have the following comments on the proposed Rules:
    i) In Rule 2(c), in Appendix A, and rule 3(c) in Appendix B, would it be better to specify 'the appellant is' rather than 'they are' such that it reads: 'if no representative is named under sub-paragraph (b), an email address and the postal address where **the appellant is** living, if they have one where documents for the appellant may be sent or delivered' (emphasis added)?
    ii) Rule 2 in Appendix B contains two sub-paragraphs numbered (5).
    iii) We note Appendix B contains 'Rule 5(1) Written Reasons'. It is unclear if this is a full rule, given it contains only one sub-paragraph. However, we also note that it does not appear to be contained in Appendix A.

Question 7: Do you have any other comments on the suggested rules relating to Priority Removal Notices?

62. Many of the figures provided by the Government as to the number of anticipated expedited appeals appear to be vague and changing estimates. ILPA is concerned that in addition to already stretched legal practitioners being overwhelmed, the UT's resources may be overwhelmed. As recognised in the Consultation at §61, 'circumstances in which the Upper Tribunal would conclude that it was unable to ensure justice could be done in relation to an appeal, such that the only way of obtaining a just result was to transfer an appeal to the First-Tier [...] [h]ypothetically [...] might arise if the number of expedited appeals overwhelmed the Upper Tribunal's resources to the point where potential delays meant that justice could not be done'.

63. ILPA notes that in the TPC Minutes of the meeting on 9 June 2022, it is stated at §2.13: 'Mr Justice Lane, the President of the Immigration and Asylum Chamber of the Upper Tribunal (IAC-UT), had raised an administrative concern to the IACSG. This concerned whether the annual forecast of 400 appeals provided by the HO was in fact an accurate and reliable basis on which to plan the distribution of his judicial resources. The IAC (UT) Chamber President had also queried the methodology used by the HO to calculate this estimate and had further questions on the cohort of cases to be directed to the IAC (UT).'[17]

[17] Tribunal Procedure Committee (TPC), 'Meeting Minutes: Thursday 09 June 2022' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091570/tpc-mins-9-jun-2022.pdf> accessed 17 January 2023.

64. The figure of 400 appeals queried in June 2022 differs from that given by the Home Office in this Consultation of '200 expedited appeals between July 2023 and July 2024'.[18] It is unclear how the Home Office has come to this new figure, and whether it accounts for the number of claims which might be certified by the Home Secretary as clearly unfounded or considered not to amount to a fresh claim[19]. Such cases may still result in judicial review claims in the UT against these decisions, and thus would still require the resources of practitioners and the Tribunal, prior to any expedited appeal process in the UT.

65. ILPA notes that in the Impact Assessment to the MoJ's Immigration Legal Aid Consultation, it was 'assumed that 11,000 people would receive a PRN from the Home Office',[20] whereas this Consultation notes that 'the Home Office estimates that in the first year (April 2023 to March 2024) approximately 2,000 PRNs will be issued'[21] and 'the number of PRNs issued may increase in 2024/25 and 2025/26 beyond 2,000 per year, but is not expected to exceed 6,000 per year'[22].

66. With these changing and varying estimates from the MoJ and Home Office, our members cannot begin to properly forecast or imagine how many expedited and related appeals they might have to conduct at any given time. In practice, this may impact which approach they consider to be superior and their position as to the proposals in this Consultation.

67. The intentions, expectations, estimates and assurances of the Home Office are further detailed in the Consultation:
    i) At §31: 'In principle, it would be possible for anyone who is liable to removal or deportation to be served with a PRN. In practice, the TPC has been told that the current intention is that PRNs will be served only on Foreign National Offenders ("FNO") who do not have an ongoing application, appeal or modern slavery referral.'
    ii) At §32: 'The TPC has been told that the expectation is that once the PRN system is fully established most new FNO referrals will be issued with a PRN, provided the Home Office expects that they can be removed.'
    iii) At §36: 'The TPC has also been told that, if volumes of expedited appeals were to exceed 200 to any significant extent in the first year the Home Office would review their policy on the volume of PRN's being issued in 2024/25 or beyond. The outcome of such a review would depend on why expedited appeal volumes were higher than anticipated. It might involve delaying any increase in the number of PRNs issued, extending the cut-off dates or other changes to Home Office case work practices'.

[18] Consultation §35.
[19] Immigration Rules, para 353.
[20] Ministry of Justice, 'Impact Assessment for Immigration Legal Aid: A consultation on new fees for new services' (3 May 2022) 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081511/immigration-legal-aid-fees-impact-assessment-signed.pdf> accessed 17 January 2023.
[21] Consultation §35.
[22] ibid.

iv) At §38: 'The TPC has also been told that it is expected that there will only be a small number of related appeals. This is because related appeals will only occur if an expedited appeal arises in a situation where there is an existing appeal before the First-tier. Since the Home Office does not intend, as a general rule, to serve PRNs on individuals with existing claims, this will be rare.'

68. The current assertions, estimates, and intentions of the Home Office, which could change at any time, are no basis for a set of procedural rules with which both parties must comply. The Tribunal Procedure Rules must comply with the statutory provisions laid down by Parliament, but need not go further. Additionally, the TPC's powers must be exercised with a view to securing the matters in section 22(4) of the Tribunals, Courts and Enforcement Act 2007. ILPA would be concerned if expediency were prioritised at the expense of accessibility and fairness of the tribunal system, and ensuring that justice is done in proceedings before the First–tier Tribunal and Upper Tribunal.[23]

69. The TPC should aim to ensure that whilst complying with statutory provisions, the Rules contain sufficient in-built flexibility, given the ambiguities and lack of accurate predictability of the process, so that the Tribunal may regulate its own processes and resources to ensure proceedings are handled quickly and efficiently without sacrificing accessibility, fairness, or justice being done.

[23] Tribunals, Courts and Enforcement Act 2007, s 22(4)(a)-(b).

Accelerated Detained Appeals

70. As noted in our 2016 response to the MoJ Consultation on Proposal to Expedite Appeals by Immigration Detainees,[24] ILPA has had significant involvement in commenting on the various detained fast track, expedited and now accelerated proposals over the years:

> *Prior to the suspension of the detained fast track, ILPA participated in the group set up by the Home Office, following the Detention Action litigation, to discuss the changes it made to the fast-track. ILPA has also been represented at related meetings, including with the Home Office on asylum screening; on Rule 35 of the Detention Centre Rules, the rule pertaining to reports by medical practitioners in detention centres; on the guidance pertaining to reports by the Helen Bamber Foundation and by Freedom from Torture; on equality, including LGBT and disability discrimination; on detention and enforcement generally and on human trafficking. ILPA is represented at meetings with the Legal Aid Agency where the provision of legal advice in detention centres is discussed. ILPA intervened in the cases of* R (JM and ors) v Secretary of State for the Home Department *which, with the* Detention Action *litigation, precipitated the suspension of the detained fast-track. As recorded in the Ministry of Justice consultation paper, ILPA was consulted by the Tribunal Procedure Committee which had already held lengthy consultations with the Home Office and received detailed representations from them before we were brought into the picture.*[25]

71. Accordingly, ILPA's response in this Consultation should be read against the vast background of our prior responses and engagement on this matter. We maintain our position that the decision on how best to balance speed and fairness in a case is one properly made by the tribunal judge in charge of the case, for which the principal rules allow.

Question 8: Do you agree that rules relating to accelerated detained appeals should be contained in a separate schedule? If not, why not?

72. Yes, we agree that, if rules relating to accelerated detained appeals are introduced, they should be contained in a separate schedule.

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[24] Ministry of Justice, 'Immigration and Asylum Appeals: Consultation on proposals to expedite appeals by immigration detainees' (12 October 2016-22 November 2016) (hereinafter '2016 Consultation') <https://consult.justice.gov.uk/digital-communications/expedited-immigration-appeals-detained-appellants/supporting_documents/consultationdocument.pdf> accessed 19 January 2023.

[25] ILPA, 'Response to Ministry of Justice Consultation on Proposal to Expedite Appeals by Immigration Detainees' (22 November 2016) <https://ilpa.org.uk/wp-content/uploads/resources/32713/16.11.22-ILPA-response-to-Ministry-of-Justice-consultation-on-proposal-to-expedite-appeals-by-immigration-detainees.pdf> accessed 18 January 2023.

Question 9: Do you agree that accelerated detained appeals should follow a similar approach to that currently operating in the First-tier Tribunal Immigration and Asylum Chamber, rather than a more traditional sequence? If not, why not?

73. Yes, we agree that 'rather than being required to produce detailed grounds of appeal to bring a case', the initial notice of appeal should require only limited information, given the short timeframe for lodging in section 27(3)(a) of the Nationality and Borders Act 2022: 'any notice of appeal must be given to the First-tier Tribunal not later than 5 working days after the date on which the appellant was given notice of the decision against which the appeal is brought'.

74. As with expedited appeals, we are concerned whether appellants will have access to legal representation and be able to obtain it within five working days. As above, we would emphasise the limited scope of legal aid funding. Applications to the LAA for ECF involve considerable work by legal practitioners, and are done at risk, as practitioners are not remunerated unless the application is successful. The LAA then takes time to decide such applications. Legal practitioners may be unable and/or unwilling to make such successful applications in the short timeframes contemplated for the accelerated detained process. In our 2016 Consultation response, we detailed at length the issues arising in relation to legal aid representation in an accelerated process.[26] We would urge the TPC to engage with the MoJ and LAA on this matter, to ensure that the other government departments can meet the timescales proposed by the TPC, and those in the NBA.

75. It may be the case that many appellants lodging accelerated detained appeals are unrepresented. Accordingly, it would be inappropriate to require a more traditional sequence when they will struggle to prepare detailed grounds of appeal. Unrepresented appellants, as well as appellants with mental health problems, other vulnerabilities, or IT literacy difficulties, may also struggle to complete even a more simple appeal form containing a tick box for the statutory ground of appeal.

76. While we note that regulations are 'likely' to include *'consideration* of the ability of the individual to be able to fairly present their case, give evidence on their appeal and instruct lawyers within the ADA timescales', such 'likely' consideration based on the Home Office's current intention is an insufficient safeguard. The rules should be drafted with a view to the system being fair and accessible and ensuring justice is done, without regard to such Home Office intentions or potential safeguards.

77. Moreover, we repeat our comment above in relation to the Home Secretary's prior lack of compliance with the reform process. If she has not complied with the lengthier timeframes in the current FtT reform process, we are concerned whether she can and will comply with the proposed truncated timeframes to respond and serve evidence in accelerated detained appeals.

[26] ibid 4-7.

For all parties, and for the Tribunal, the accelerated process will absorb considerable resources. Therefore, what additional resources are being made available to ensure the expedition sought is achieved?

78. If the Home Secretary does not comply with directions, what does the TPC propose the Tribunal should do to ensure that an appellant can properly make their case, and that the procedural rules can be operated fairly?

Question 10: Do you agree with the deadlines proposed in the draft rules? If not, why not?

79. No, we do not agree. ILPA is deeply concerned by the overall timescale, which we acknowledge is set in statute, of 25 working days for the FtT's decision in an accelerated detained appeal. It is the same overall timeframe proposed at §31 of the 2016 Consultation (with the possibility of extending to 28 working days)[27], as are the timeframes for lodging the initial notice of appeal and the permission to appeal applications:

	Provisional Fast Track Rules	Principal Rules
Time to lodge notice of appeal after receipt of decision	5 working days	14 calendar days (Rule 19(2))
Time for respondent to file documents after receipt of notice of appeal	5 working days	28 calendar days (Rules 23-24)
Time for listing appeal from day on which respondent provides documents	10 working days	No time limit
Time for giving judgment after hearing	5 working days	No time limit
	25 working days	
Re-listing after an adjournment in the FtT	15 working days	No time limit

[27] Tribunal Procedure Committee, 'Consultation on Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to detained appellants' (published 12 July 2018, updated 11 June 2019) (hereinafter '2019 Response') §17 <https://www.gov.uk/government/consultations/consultation-on-tribunal-procedure-first-tier-tribunal-immigration-and-asylum-chamber-rules-2014-and-tribunal-procedure-upper-tribunal-rules-200> accessed 17 January 2023.

Time for making application for permission to appeal, from judgment in the FtT	5 working days	28 calendar days (Rule 33(2) and (3))
Time for the FtT to give its decision whether to grant permission to appeal	5 working days	
	10 working days	
Time for renewing application for permission to appeal to the UT, from FtT refusal of permission	5 working days	14 calendar days (Rule 21(aa)(i) of the UT Rules)
Time for the UT to give its decision whether to grant permission to appeal	5 working days	
	10 working days	
Time for listing appeal in the UT from notice of permission being given	No time limit	No time limit
Time for UT giving judgment after hearing	No time limit	No time limit

80. Accordingly, we would direct the TPC to ILPA's response to Question Five of the 2016 Consultation.[28]

81. We are concerned that the proposed timescales in the draft Rules may limit the flexibility of judges. In the correspondence preceding the 2016 Consultation, Mr Justice Langstaff, then Chair of the Tribunal Procedure Committee, wrote to Rob Jones, Head of Asylum and Family Policy on 12 February 2016, and stated:

> 'An important aspect of justice is the ability of a judge to tailor make directions for the particular circumstances before him. Every case is different. Though some rules as to timetabling are inevitable in any fair system, they tend to be long stop provisions. To introduce particular timetables for classes of case within the broad scope which those provisions give as to time prescriptively prejudices the flexibility of response. This runs counter to the statutory obligation at s22(e) of the 2007 Act to confer *on members of the tribunal* the responsibility of ensuring that proceedings are handled quickly and efficiently. Moreover the TPC wonders what evidence there is that, taken case by case, judges have provided too generous an allocation of time with the result that the appellant concerned has spent unnecessarily long in custody. Prescribing a tight timetable for a particular type of case requires resource to be allocated to meet the tighter time-limits. This means that those resources are not as readily available for other cases, which may also concern those in detention'.[29]

[28] (n 25) 10-19.
[29] Ministry of Justice, 'Letter from the Tribunal Procedure Committee chairman, Mr Justice Langstaff' (12 February 2016)

82. In the 2016 Consultation, one option contemplated by the MoJ was for there to be no specific time period for each case management step:

> *33. An alternative approach however is for new fast track rules to introduce an overall 'long-stop' timeframe for detained appeals, setting the maximum time that may elapse between the Home Office's decision and the FtT's determination (except where the appeal is transferred out of the fast track), without specifying a time period for each stage of the appeal (save the time to lodge an appeal at the Tribunal). While this would provide certainty for all parties as to the length of the appeal process, it would require further, more detailed, judicial guidance for parties or an individual case management review for each case.*[30]

83. Accordingly, if this accelerated detained system were implemented, we would support a flexible timeframe for the interim steps between lodging and a decision. ILPA maintains that timescales should be set with regard to the particular circumstances of the individual case and that fixed timescales, whether overall or for particular case management steps, are not conducive to the just disposal of cases. We are concerned that any 'certainty' gained from the stipulation of timeframes for interim steps between lodging and a decision is at the expense of justice and a tailored response to the particular circumstances of a case. Therefore, as per our 2016 Consultation response to Question 6: 'We consider that an oral case management review hearing should be timetabled in all cases, and voided only by agreement between the parties.'[31]

84. The TPC accepted the need for such an oral case management review hearing at §69-§71 of its 2019 Response:

> *69. The TPC considered that, if new fast track rules were to be introduced, there would need to be an early oral case management hearing for all cases where an appellant was in immigration detention. A key function of that case management hearings would be to decide whether the appeal should be heard under the Principal Rules or any fast track rules. The TPC concluded that such a system was capable of offering an adequate safeguard, by ensuring that unsuitable cases were not placed within any fast track system.*
>
> *70. However, such hearings would absorb a substantial amount of judicial and administrative resource, which would then not be available to be used to resolve cases. It would delay the hearing of cases that were taken out of any fast track process, since any 'fast track' hearing that had been listed would need to be cancelled and a new hearing*

<https://ilpa.org.uk/wp-content/uploads/resources/32128/16.02.12-DFT-letter-from-Tribunal-Prodcedure-Committee-to-Home-Office.pdf> accessed 18 January 2023.

[30] (n 24) 11.

[31] (n 25) 19.

listed. There was a real prospect that a substantial proportion of detained cases that entered a 'detained fast track' would need to be removed from the system as unsuitable. There was also the danger of satellite litigation being created around the tribunal's case management decisions, causing further delay.

71. The need for robust safeguards also means that specific rules would not lead to any greater certainty in relation to how long an appeal would take to conclude. An inevitable consequence of such safeguards would be that many cases would be dealt with outside the fast track timescales, since the purpose of such safeguards would be to identify unsuitable cases and ensure they were dealt with differently. Specific rules would therefore create no greater certainty than the existing Principal Rules.[32]

85. Nevertheless, we note that the draft Rules in Appendix C contain no such oral case management hearing for all cases, and that there is a limited amount of flexibility in Rule 14:

14 Variation of timescales
(1) Sub-paragraph (2)(a) of rule 4 of the Principal Rules has effect subject to the modification in paragraph (2).
(2) The Tribunal may extend or shorten the time for complying with any rule, practice direction or direction within the timescales provided by the Accelerated Detained Rules if the Tribunal considers that such extension or shortening would secure that justice would be done.

86. First, we query whether Rule 14(1) instead should refer to sub-paragraph (3)(a) of rule 4. Second, we would query whether the test need be so high as 'would secure that justice would be done' if the variation to the timescales does not result in the case ceasing to be an accelerated detained appeal. For example, if the timeframe for serving the skeleton argument and bundle were extended by a single day, this would not necessarily take an appeal out of the accelerated detained system. Therefore, we would recommend greater flexibility in Rule 14 and in the timeframes, not mandated by statute, imposed by Appendix C.

87. Furthermore, we note that there is no similar rule in Appendix C to the prior detained fast track Rule 12, which gave the Tribunal the power to postpone or adjourn the hearing for no more than 10 days if it cannot be justly decided on the date fixed under the Rules. In the draft Rules in Appendix C, there is less flexibility. Unless an appeal is ordered to be transferred out of the accelerated detained appeal process (under Rule 17(1)), Rule 15(1) stipulates that 'the Tribunal may not adjourn the final hearing.'

88. The main hurdle for appellants and their legal representatives is likely to be obtaining evidence, drafting the appeal skeleton argument, and preparing the appellant's bundle within nine working

[32] (n 27).

days of receipt of the respondent's response (i.e. 12 working days after the appeal has been lodged). We anticipate that this timeframe will be unworkable for many appellants.

89. At §22 of the High Court *Detention Action* decision,[33] Mr Justice Nicol described some of the steps required between a refusal decision and a substantive hearing:

   i) *Checking whether the general detention criteria have been properly applied. [...]*
   ii) *Making representations, where appropriate, that the appellant is unlawfully detained.*
   iii) *Applying for bail which itself involves identifying sureties, taking instructions from them, and checking their availability for any bail hearing and finding a bail address.*
   iv) *Taking instructions from the appellant on the refusal letter. Restrictions on visits to detainees may mean this has to be done over more than one day.*
   v) *Preparing the appellant's statement, checking it with the appellant and having it signed.*
   vi) *Arranging the translation of any necessary documents.*
   vii) *Arranging for any expert evidence, including identifying an appropriate expert, applying for an extension to the controlled legal representation certificate to fund this or any other additional expense, further representations to the legal aid authorities (if necessary in the event of initial refusal), arranging for the expert to attend the appeal hearing.*
   viii) *Making an application where appropriate for the appeal to be transferred out of the Fast Track appeal procedure. Considering the response to such an application from the SSHD.*

90. In addition, as noted at §23 by the High Court, a legal representative may need to challenge the lawfulness of detention, apply for bail, and prepare for both any review regarding transferring the appeal out of the system and the substantive hearing. ILPA listed a series of further tasks to be accomplished in a detained case from pages 11 to 14 of its 2016 Consultation response.[34]

91. We accept that any lengthening of time at one stage will require a commensurate shortening of time at another in order to comply with the overall statutory limit of 25 working days. However, given the anticipated unworkability of that timeframe, we anticipate that the only way to secure that justice is done in many cases will be for the Tribunal to order that a relevant appeal is to cease to be an accelerated detained appeal.

Question 11: Do you agree with the approach to removal of an appeal from the accelerated detained rules contained in draft Rule 17? If not, why not?

92. Yes, we agree that the Tribunal should be able to make a determination under Rule 17 at any time, on its own initiative as well as on application by a party.

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[33] *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin).

[34] (n 25) 11-14.

Question 12: If you believe there should be any rule in addition to draft Rule 17, what rule would be desirable and why?

93. We agree with the TPC that the Tribunal will likely need to consider a wide range of circumstances.

94. It is difficult to anticipate how section 27(5) NBA and Rule 17 will be applied in practice. Our members consider that detail, in guidance and/or rules, regarding the exercise of the general power would assist. If the detail includes a set of relevant factors a Tribunal should consider in reaching its decision, the list of factors should be non-exhaustive to cover the wide range of underlying factual scenarios. A general power to remove an appeal from the accelerated process, on the basis that it is not possible for justice to be done in relation to the appeal within the Accelerated Detained Rules, will inevitably end in more litigation due to legal uncertainty.

95. It should be clear within Rule 12(1) that the Rule also applies where the Tribunal makes a decision not to make an order under Rule 17. An appellant should have notice of the decision and written reasons for any decision not to transfer the appeal out of the Accelerated Detained Rules procedure.

96. Furthermore, in addition to Rule 17, we consider that there should be an additional suitability review process. Suitability is likely to be a central point of contention between the parties.

Question 13: Do you agree with the requirement of a suitability review contained in draft Rule 10? If not, why not?

97. ILPA agrees with the TPC that it is important and appropriate for the Rules to provide for an initial assessment of an appeal to determine whether it is suitable for the accelerated detained process. We agree that 'in applying an accelerated process to an important category of appeals there is a risk of serious injustice if it is applied to inappropriate cases'.[35] We also agree that there are practical advantages to a standard practice and consistent approach to judicial consideration of whether a case is unsuitable for the accelerated process.

Question 14: If there is to be a suitability review contained in the rules, when should it take place, and why?

98. Theoretically, we agree that it would be best for parties and the Tribunal to know whether an appeal is suitable for the accelerated detained process as early as possible, and for such appeals to be removed from the process. However, this benefit must be balanced against the time needed for both parties to put forward their case as to the suitability or otherwise of a case to

[35] Consultation §100.

be decided in the accelerated detained system. We agree with the TPC's view at §101 that, '[a] review that occurs too early in the process is unlikely to be effective. It is also likely to lead to further applications to remove an appeal from the accelerated process later in the process on the grounds that the circumstances have changed or relevant matters have not been fully considered'.

99. Nevertheless, we should note at this juncture, we are of the view that such further applications may be necessary, in any case, including for appellants who are only able to obtain evidence (including Rule 35, medico-legal and other expert reports) nearer to the end of the 25 working days, and for appellants who are initially unrepresented, but later find representation. Therefore, the suitability review should not be envisaged as a singular review, but rather as forming part of a continuing duty on the Home Secretary to consider the suitability of a case for the accelerated detained process. If a further suitability review is required on the papers or in a hearing, the process should be sufficiently flexible to accommodate this.

100. In our opinion, the suitability review is likely to be a key procedural step for which the appellant and/or their legal representative will need sufficient time to prepare, and it is thus sensible for it to follow the appellant's skeleton argument.

101. Given that the respondent will likely have considered whether a decision is of a description prescribed by her regulations, and whether any appeal would be likely to be disposed of expeditiously, before certifying the decision, the respondent will likely have more evidence and documentation readily available to support her claim that a particular case is suitable to be heard under the accelerated process and explain to the Tribunal and appellant what (if any) safeguards she has implemented in the case. Therefore, the initial evidential burden of proving suitability should be borne by the respondent.

102. Section 27 NBA does not require the respondent to provide detailed (or any) reasons for believing the appeal would be disposed of expeditiously. Therefore, ILPA would recommend that the Tribunal Procedure Rules require the provision of such reasons, and supporting evidence, at the earliest opportunity. This would then give the appellant a foundation for the certification, and a better opportunity to rebut such reasons, including with their own evidence, as part of the suitability review process.

103. Accordingly, we recommend that the Home Secretary be required to serve all information and evidence in relation to her decision to detain and/or continue detention of the appellant, her assessment of the suitability of detention, and suitability for the accelerated detained appeal process as part of her 'Respondent's response', together with the documentation listed at Rule 8(1) of Appendix C, as soon as possible following receipt of the notice of appeal.

104. It is difficult to comment in abstract whether the suitability review should be 16 days after the Tribunal receives a notice of appeal, as proposed in draft Rule 10. In our view it is likely to be a

key procedural step for which the appellant and/or their legal representative will need sufficient time to prepare, and it is thus sensible for it to be following detailed suitability reasons from the respondent, to which the appellant has an opportunity to respond.

105. It would likely assist the Tribunal if the appellant's response were in writing and/or supported by any relevant evidence. However, the timeframes proposed are too short to permit that. Unless the TPC envisages that an appellant would prepare simultaneously for both the suitability review and the appeal skeleton argument / substantive hearing, the suitability review would need to take place before a represented appellant is required to serve the skeleton argument (i.e. nine working days following receipt of the respondent's response), and there would need to be sufficient time following the review hearing for the appellant's representative to draft the skeleton argument and gather the evidence. Nine working days for all of this is likely to be rarely—if ever—feasible.

106. The current draft Rule 10 would *mandate* the suitability review two working days after the proposed timeframe for service of the respondent's written statement. Accordingly, there would be almost no time following receipt of the respondent's written statement (assuming all parties take the full time allotted in the Rules) for the appellant to make any further submissions and evidence two working days prior to the suitability review. For that reason, any of the respondent's reasons for arguing the suitability of the case should be advanced far earlier, as part of her Rule 8 response.

107. The current proposal of a 16-working day timeframe, which would require the review to be after the appellant's representative had served their skeleton argument and supporting evidence, would also suffer from the mischief identified at §43 by the Court of Appeal in *Detention Action*: 'The appellant is placed in a very difficult position. The stronger the case he seeks to advance for a transfer on the footing that there are material gaps in his evidence which he needs time to fill by obtaining further evidence, the more he damages his prospects of succeeding in his appeal if the tribunal refuses to transfer the case out of the fast track. In short, in order to explain why the time scales are unjust, the appellant has to identify all the evidential gaps in his case. But if the application to transfer is refused, the appellant will then have to persuade the judge that the appeal should be allowed notwithstanding these gaps.'[36]

108. ILPA is unable to propose a suitably early timeframe for the suitability review, that would permit the appellant and their representative to be adequately prepared, and still provide sufficient time following the review for service of an appellant's skeleton argument, evidence, respondent's written statement, and a substantive hearing within the 25 working day limit. This is particularly the case given that a bail hearing may also need to take place within this timeframe, and possibly at the same time as the suitability review. Therefore, it ought to be a matter for the individual judge hearing the case to consider, on the basis of the particular

[36] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

circumstances in that case, when the suitability review and other interim steps ought to take place. We recommend the TPC leave the timeframe for the suitability review, and other interim steps, flexible within the Rules, so that it can adapt to the particular circumstances of a case. As noted by the Court of Appeal at §44 of the same decision, 'it is likely (to put it no higher) that judges will consider the FTR time limits to be the default position. [...] the expectation must be that the time limits will usually be applied. Otherwise the object of the FTR would be defeated. There is bound to be a reluctance to postpone or transfer an appeal on the day of the hearing'.[37]

Question 15: If there is to be a suitability review contained in the rules, to what extent should the rules require it to take place at a hearing, rather than being considered on the papers? Why?

109. ILPA recommends that the presumption be that a suitability review invariably take place at an oral hearing, unless the appellant specifically requests for the review to take place without a hearing. This is particularly important for unrepresented appellants, who may not know to expressly seek such a hearing and who may not have the ability to make adequate representations on paper.

110. While we recognise that an oral hearing places considerable burdens on the stretched resources of both the Tribunal and practitioners, we agree with the TPC that 'an oral hearing is likely to be more effective than a paper determination in assessing whether a case is suitable for accelerated determination'.[38] Accordingly, we believe that it is a necessary procedural safeguard.

111. Furthermore, at §69 of its 2019 Response the TPC itself considered 'if new fast track rules were to be introduced, there would need to be' an oral hearing 'to decide whether the appeal should be heard under the Principal Rules or any fast track rules'. ILPA recommends that the TPC maintain that position.

Question 16: Do you have any further comments on the suitability review issue or the drafting of Rule 10?

112. We have no further comments, other than that we recommend Rule 10 is amended to make clear the presumption for an oral hearing.

Question 17: Do you agree with the draft Rule 13? If not, why not?

113. We could see no justification in the Consultation for the TPC's interpretation of section 27(3)(c) of the Nationality and Borders Act 2022:

[37] ibid.
[38] Consultation §106.

‘Tribunal Procedure Rules must secure that the following time limits apply in relation to an accelerated detained appeal—

[...]

(c) any application (whether to the First-tier Tribunal or the Upper Tribunal) for permission to appeal to the Upper Tribunal must be determined by the tribunal concerned not later than 20 working days after the date on which the applicant was given notice of the First-tier Tribunal’s decision.’

114. The TPC has interpreted it to mean that both the application to the FtT *and* the UT must be determined by the tribunal concerned not later than 20 working days after the date on which the applicant was given notice of the FtT’s decision: ‘This means that the First-tier and Upper Tribunal rules must be drafted in such a way that any application for permission to appeal is, overall, dealt with within 20 working days’.

115. However, it could be interpreted to mean that the FtT must determine the application for permission to appeal not later than 20 working days after the date on which the applicant was given notice of the FtT’s decision, and that the UT must determine the application for permission to appeal within a further 20 working days. On this latter reading, Rule 13(1) and 13(3) could both stipulate a timescale of 10 rather than five working days, or any other permutation that would overall sum to 20 working days between the two steps.

116. Aside from statutory interpretation, ILPA is concerned that five working days is insufficient time to prepare an application for permission to appeal, particularly if a party wishes to change their legal representative, bearing in mind all we have said about capacity and sustainability in the sector. Accordingly, we recommend a lengthier period than five working days for making an application for permission to appeal.

Question 18: Do you agree with the proposed changes to the Upper Tribunal Rules? If not, why not?

117. For the reasons given in our response to Question 17, section 27(3)(c) NBA could be interpreted to impose a 20 working day requirement for the application to the UT for permission to appeal to the UT. On this reading, new Rule 21(3)(ab) could stipulate a timescale of 10 working days, as could new Rule 22B(1). Alternatively, there could be a different permutation such as 12 and eight working days. In any case, as above, we recommend a lengthier period than five working days for making an application for permission to appeal.

118. Moreover, there are errors in the drafting of Rule 1 at §112 of the Consultation, the references to section 28 should be to section 27 in the definition of “Accelerated detained appeal”.

119. We agree that it would be desirable to have an express rule to make clear that the Tribunal has the power to extend time in relation to applications for permission to appeal in ADA appeals, transferring the appeal out of the ADA process.

Question 19: Do you have any other comments on the rules relating to Accelerated Detained Appeals?

120. Yes.

121. We have two overall comments.

122. First, we are concerned that the accelerated detained appeal process, as with the Detained Fast Track process before it, will be systematically unfair and unjust, as the respondent to an appeal will place appellants in a serious procedural disadvantage. Whilst we appreciate that the provision for accelerated detained appeals is contained in primary legislation, it has yet to be commenced (other than for the purposes of making (and, where required, consulting on) regulations).[39] We are concerned that once in effect, the system will be unfair and unworkable, and that in the majority of cases, removal from the process will be the only way to secure that justice is done.

123. In his above-referenced letter of 12 February 2016, Langstaff J stated, 'The TPC also believes that it is important to ensure that any rules that we make would withstand legal challenge. First, and most simply, we cannot make rules that we believe to be unlawful. Second, any successful challenge creates substantial, and expensive, disruption to the system both for the Home Office and the MoJ, together with a significant human cost to litigants, and defeats rather than aids the achievement of our statutory objectives'.

124. The TPC has stated in the Consultation, at §76, that the accelerated detained appeal system 'established by the NBA has some pertinent differences' to the Detained Fast Track system, but then only goes on to list only two: 'In particular the cohort of detainees who will fall within the accelerated process will be limited by regulation, and by certification by the Secretary of State of the relevant decision, as appropriate for accelerated determination'.

125. We are not persuaded that the certification by the Home Secretary of the relevant decision and the prescription of relevant decisions in regulations will be adequate procedural safeguards to insulate the system from the conclusions of the High Court and Court of Appeal in 2015[40] or the TPC in its 2019 Response.

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[39] Nationality and Borders Act 2022, s 87(4).

[40] *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin); *Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

126. We have seen no identification of fair selection criteria which would not put individual cases at risk of injustice through their inclusion in the accelerated detained process. Theoretically, the Home Secretary could attempt to certify and include in regulations all relevant appeals brought by persons in detention at the time they are given notice of the decision, and who remain in detention. Therefore, there is potential for a great number of appeals from detained persons to be subjected to this system.

127. We note that the TPC has interpreted section 27(2) NBA, which states the 'Secretary of State may only certify a decision under this section if the Secretary of State considers that any relevant appeal brought in relation to the decision would likely be disposed of *expeditiously*', as 'a decision can only be certified if the Secretary of State considers that any appeal to the decision in question would be likely to be determined by the Tribunal *within the accelerated timescales*' (per §85, emphasis added). Whilst we agree that would be a logical approach to certification, it remains unclear if that will be the Home Secretary's approach.

128. Our ability to comment fully on the Rules is impaired as there is a continuing lack of clarity regarding the decisions which would be subject to the accelerated system. Section 27(1)(b)(ii) NBA defines an "accelerated detained appeal" as an appeal against a decision that is of a description prescribed by regulations made by the Secretary of State. Such regulations have still not been made. We understand from §86 of the Consultation that the TPC has been informed that they have not been finalised, but that the Home Office's "current intention" is that they will "include":

   i) The criteria by which a case will be considered when determining whether it is suitable for the ADA process. This is likely to include consideration of the ability of the individual to be able to fairly present their case, give evidence on their appeal and instruct lawyers within the ADA timescales.

   ii) A requirement that once a case is certified as suitable for ADA that their place of detention has the required facilities to support an individual during that process. This is likely to include requirements in relation to the provision of legal advice / legal aid, interpretation services, IT infrastructure, videoconferences facilities, access to phones and meeting rooms.

129. We are presently in a more difficult position than we were in 2016, as at the time of Langstaff J's letter it was clear that the Home Office wished to 'focus on cases which, in general, appear to be necessarily late, opportunistic, abusive or highly likely to fail'. The TPC was able to comment that '[e]ven if it were true that claims meeting the criterion could be resolved more quickly than others, we do not believe that it could be applied effectively at the point that appeals are received by the tribunal'. It may be the case that the Home Secretary's regulations, to be subject to minimal parliamentary scrutiny under the negative resolution procedure, stipulating the type

of decision, may impose criteria that similarly cannot be applied effectively upon receipt by the tribunal.

130. We believe the conclusion of Langstaff J remains correct: 'the criteria for entry into the relevant cohort need to be clear and workable, but no such criteria have yet been identified'.

131. Therefore, we would suggest that the TPC may wish to revisit the proposed Rules upon any regulations being laid and any safeguards being decided. As noted at §89 of the Consultation, '[t]he TPC will however, need to consider to what extent the government safeguards will prevent unsuitable appeals entering the accelerated detained system and the implications of this for the appropriate rules.'

132. Neither we nor, we would suggest, the TPC have had an opportunity to properly consider the extent to which the safeguards are sufficient to prevent unsuitable appeals entering the system. Therefore, it would appear that neither ILPA nor the TPC can properly assess the implications for the Rules at this time.

133. Furthermore, we note that the MoJ has only an "expectation" that hearings will only take place in person at Harmondsworth and Yarl's Wood Hearing centres, and that the Home Office and MoJ have only "indicated they intend" to implement the following safeguards detailed at §88 of the Consultation:

> • *The Home Office will ensure an effective screening process is in place before entry into the accelerated process;*
> • *Decisions to detain will be made in accordance with the Home Office Detention Policy and Adults at Risk in Detention Policy, which seek to identify potential vulnerability and take it into account when deciding whether to detain;*
> • *Decisions to detain will be reviewed by the operationally independent Home Office Detention Gatekeeper team;*
> • *The Home Office will regularly review detention in accordance with Home Office Detention policy*

134. ILPA is concerned whether these safeguards will be sufficient to ensure that only suitable cases are certified for the accelerated detained process. There is no detail as to the "effective screening process" the Home Office will ensure, so we cannot comment on its adequacy. The three other measures in §88 are currently employed by the Home Office, but have not prevented unlawful detention. ILPA's members have noted with concern failures in the Rule 34 and 35 process, and thus in the identification of vulnerable detained persons. These concerns are shared by the Independent Chief Inspector of Borders and Immigration ('ICIBI'), whose third

inspection of the 'Adults at risk in immigration detention' policy,[41] reported in January 2023, focused on 'the effectiveness and efficiency of Rule 35 of the Detention Centre Rules 2001' and found that the important safeguard of Rule 35 'was not working consistently or effectively'[42]:

> *'3.2 Inspectors found perceptions of the purpose and operation of R35 to be contentious amongst stakeholders, IRC and Home Office staff alike. Echoing the findings of the first and second annual inspections of the 'Adults at risk in immigration detention' policy, the majority considered that R35 was no longer achieving its aim, mired by disproportionally high volumes of R35(3) reports, concerned with torture, in comparison with exceptionally low volumes of R35(1) and R35(2) reports relating to health and suicidal intentions respectively. Inspectors and stakeholders alike also highlighted the impact of some poor quality R35 reports by doctors not meeting the policy requirements, a lack of Home Office feedback on these reports, weak quality assurance mechanisms for Home Office R35 responses, Home Office concerns that R35 was being abused by detainees and legal representatives, and the under-resourcing of the R35 team, on the effective delivery of Rule 35.*
>
> *3.3 Inspectors visited 3 IRCs, speaking to detainees, healthcare and contractor staff, as well as Home Office staff based in IRCs and in Croydon. The picture observed on the frontline reflected that outlined above and was further shaped by a significant increase in detainees during the inspection's timeframe, high volumes of specific nationalities (Albanians, in particular), the pressure applied by charter flights for removals, and difficulties with the recruitment and retention of Detention Engagement Team (DET) officers. Across the board, staff and stakeholders shared their concern that these factors meant that vulnerable detainees, deteriorating in detention, may not be identified and safeguarded effectively.*
>
> ***Opportunities to identify vulnerable detainees***
> *3.4 Inspectors found missed opportunities, by Home Office, healthcare and contractor staff, to identify vulnerable detainees for whom the R35 mechanism might be appropriate. On arrival, the assessment of detainees' English language skills was not always sufficient, meaning literature, and the induction process, may not be easily understood as interpreters were not identified as being required. The health screening appointment, held within 2 hours of arrival, while asking questions about an individual's vulnerabilities, was not considered by medical practitioners to be an environment supportive or suitable for the disclosure of sensitive personal information. The Rule 34 appointment, provided within 24 hours of arrival, and considered by the Home Office to*

[41] ICIBI, 'Third annual inspection of 'Adults at risk in immigration detention' June – September 2022' (January 2023) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1128198/Third_annual_inspection_of_Adults_at_Risk_Immigration_Detention_June_to_September_2022.pdf> accessed 18 January 2023.
[42] ibid 2.

be both a key opportunity for a GP to identify concerns which may engage R35 and signpost a detainee to R35, had low detainee attendance rates, with no follow-up by the Home Office or healthcare on this failure to attend. In 2 IRCs, DET officers were running significantly behind schedule in terms of delivering individual inductions to detainees within the 48-hour required timeframe, and broader engagement activity was largely limited to the service of legal documents. No literature or posters were available in any of the IRCs, in English or any other languages, explaining what R35 was or how it could be accessed. As a result, R35 was mostly only highlighted to detainees by legal representatives and other detainees, leading to a level of confusion about its purpose. This was subsequently considered (by Home Office staff in particular) to be an indication that the detainee was seeking to misuse R35 simply as a method of getting out of detention, rather than a flag to an individual's vulnerability and an indication that continued detention may be detrimental.'[43]

135. We would further draw the TPC's attention to Medical Justice's briefing on key issues arising from the Brook House Inquiry, which summarises evidence given at the public hearings in relation to 'Systemic defects in detention and clinical safeguards' at Brook House.[44]

136. Therefore, ILPA is concerned that these potential government safeguards and expectations may not come to fruition, or may not prevent unsuitable appeals, including from persons who should not be held in detention, from entering the accelerated detained system.

137. If, once introduced in secondary legislation, policy or guidance, the safeguards remain insufficient, the timetable for accelerated detained appeals will need to be more generous for the process to be fair.

[43] ibid 7-8.
[44] Medical Justice, 'The Brook House Inquiry: Briefing on Key Issues' (December 2022) 20-25 <https://medicaljustice.org.uk/wp-content/uploads/2023/01/2022_12BrookHouseInquiryBriefingKeyIssues_Final.pdf> accessed 19 January 2023.

Age Assessments

138. ILPA understands that HMCTS has undertaken a research project to inform its new "Age Assessment Appeal Service" in preparation for age assessment appeals coming within the jurisdiction of the First-tier Tribunal. We understand from one of our members who contributed to this work that they took part in several calls which included discussions about how age disputes currently work in the Administrative Court as judicial review claims; more detailed discussion about interim relief; and a further session on the current design of the online appeals portal and how that would have to be changed to accommodate age dispute appeals. Our member's experience throughout these calls, which we understand was shared by other lawyers active in this field, was that the Age Assessment Appeal Service did not have a clear sense of how age disputes currently work, which had led to some points being missed or misunderstood. For example, this included the importance of an equivalent to the duty of candour provisions which are so significant in the judicial review sphere. Regrettably, we are concerned that some of the points which we understand were raised with HMCTS do not appear to have been translated into this Consultation document and the proposed Rule changes.

139. We note that the Nationality and Borders Act 2022 provides that an adverse age assessment conducted for a local authority or for the Home Secretary is subject to a right of appeal to the First-tier Tribunal, but the Act does not specify which chamber of the First-tier Tribunal. During the passage of the Nationality and Borders Bill through Parliament, ILPA raised concerns about the absence of proper pre-legislative scrutiny in relation to bringing age disputes into the First-tier Tribunal, noting a lack of consultation as to forum, suitability, or resource implications. In our briefing for the House of Lords Committee stage, we observed that:

> '*Age assessment hearings are – for all practical purposes – trials where both sides call witnesses of fact (social workers, adult carers, etc.) and expert witnesses; trials that may last for a day or more. They are not like the ordinary matters heard by the First-tier Tribunal (IAC): relatively brief immigration appeals that may last a couple of hours, where only the person appealing calls witness evidence.*
>
> *[...]*
>
> *The First-tier Tribunal (IAC) currently suffers from a significant backlog. If age assessment appeals are added to it, there would need to be provision to ensure they were prioritised to avoid unduly delaying the processing of asylum claims. Additionally, consideration would need to be given to the appeal deadline. Under the current regime, a judicial review may be lodged within three months of an age assessment decision, while an appeal has only a 14 day deadline, a very short time for a traumatised young person to seek legal advice, and lodge an in-time appeal, particularly if it is concurrent with being*

dispersed into accommodation in a different area in the UK. There appears to be no consideration of any of these matters in the Bill.'[45]

140. We note that the minutes of the Tribunal Procedure Committee meeting on 5 May 2022 record that it was the understanding of Shane O'Reilly that '*the Senior President of Tribunals and the President of the (IAC-First-tier Tribunal (FtT)) had approved the designation of AAA to the IAC (FtT)*' and that an action was agreed for the TPC Secretariat to '*seek clarification from the MoJ policy lead in respect to seeking the TPC's view for chamber designation for Age Assessment appeals'*, Mrs Justice Joanna Smith having queried *'the appropriateness of the question posed in the paper by the MoJ to the TPC, namely whether the TPC agreed that the AAA would fall within the remit of the IAC*' and the TPC having '*noted that this request for their input was not within their statutory remit*'.[46] The Consultation document presents the designation of age assessment appeals to the Immigration and Asylum Chamber of the First-tier Tribunal as a *fait accompli*. We are not aware of any public consultation having been undertaken with stakeholders as to which chamber of the FtT should hear age assessment appeals since the Nationality and Borders Bill received royal assent and prior to a decision having been taken that these appeals should fall within the remit of the Immigration and Asylum Chamber. We, therefore, wish to express our regret that we did not have an opportunity to provide feedback to inform this decision, particularly as ILPA's Legal Director had on several occasions expressed a willingness to engage on this question in the context of the Home Office's Strategic Engagement Group.

141. We consider the proposed amendments to Rules 1, 16 and 19 to be necessary to bring age dispute appeals within the scope of the Tribunal Procedure Rules and explain that the rules on abandonment and the requirement to be in the UK equally apply. However, we believe the amendment to Rule 16(2) proposed at §129 contains a drafting error and the reference to *'section 55(2) of the Nationality and Borders Act 2022'* should be to *'section 55(**3**) of the Nationality and Borders Act 2022'* (emphasis added).

Question 20: Do you agree with the proposed Rule 24B? If not, why not?

142. Yes. We also agree with the TPC's view expressed at §134 of the Consultation document that it is not appropriate to require applications for interim relief to be made at a particular time. There can, of course, be cases where a local authority agrees to maintain accommodation during the course of an appeal/challenge to an age assessment and so an interim relief order is not needed at the outset but the local authority's position could change necessitating such an application.

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[45] ILPA, 'ILPA's Briefing for the House of Lords Committee Stage for the Nationality and Borders Bill – Part 4: Age Assessments Amendments' (22 January 2022) 6-7 <https://ilpa.org.uk/wp-content/uploads/2022/01/ILPA-Briefing-Part-4-Age-Assessments-Amendments.pdf> accessed 17 January 2023.

[46] 'Tribunal Procedure Committee (TPC): Meeting Minutes: Thursday 05 May 2022' 2 [2.7]-[2.8] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1082581/tpc-mins-5-may-2022.pdf> accessed 17 January 2023.

Alternatively, some young people can be accommodated by friends or family and do not therefore apply for interim relief when the claim is issued, but those arrangements could become unsustainable and break down later, such that there can be reasons for an interim relief application not to be needed at the inception of a claim but necessary and appropriate later.

Question 21: Do you believe that any further rules changes are needed to deal with interim relief applications? If so, what changes and why?

143. Yes. Given that FtT judges might not be accustomed to dealing with interim relief applications, we believe the addition of a further rule could assist in ensuring interim relief applications are dealt with properly, and that a clear procedure is in place.

144. We would also note that whilst we understand the point made at §135 of the Consultation document that the Tribunal's existing case management powers could cover an instruction to provide evidence, submissions and/or to attend hearings, we are concerned that there may be a gap where the duty of candour obligations that existed in judicial review challenges fall away, and that without a decisive order by the FtT, a young person may be left in a difficult position without evidence to support an interim relief application.

145. By way of example, in judicial review proceedings as they currently operate, when an application for interim relief is made, the local authority will normally put in submissions in the course of their summary grounds of defence and may at the same time apply to admit evidence. Commonly, however, the local authority will not submit evidence but a young person may want particular evidence to be before the Court/Tribunal when considering the application for interim relief. This could include medical evidence (such as initial health assessments of CAMHS documents which go to a young person's vulnerability), or documents such as placement reports which confirm that while in the local authority's care, there were no concerns about behaviour, age, or interaction with other children. In the judicial review context, the young person's solicitor could request this be provided urgently and in advance of any interim relief hearing, in line with the local authority's duty of candour. We are concerned that without this overarching duty, local authorities may simply withhold relevant evidence, which undermines a young person's case.

146. Whilst we recognise that the general case management powers could provide for a young person's solicitor to apply to the FtT for a direction of disclosure of relevant documents, we are concerned that these kinds of points and sources of evidence, in which public law and community care solicitors currently undertaking age dispute judicial reviews are very well versed, may not be so familiar to some immigration practitioners who will begin to pick up these cases, which may result in detriment to young people. We, therefore, wish to reiterate the importance of the duty of candour in judicial review proceedings and to highlight a need for the FtT to take active steps in terms of directions for disclosure of relevant evidence to fill this gap.

Question 22: Do you think that there should be an interested party rule in age assessment cases? Why?

147. Our members had mixed views as to whether there should be such a rule. Some members were concerned that it may effectively create two respondents in certain appeals. Other members thought it necessary for fairness or to cover all possible permutations of appeals.

148. ILPA can see why it would be appropriate to permit interested parties in some age assessment appeals.

149. In relation to the first basis put forward by the MoJ, we agree with the TPC that it is not necessary for any person to be an interested party for the decision to be binding on them. If there is to be an interested party rule, the TPC may therefore wish to consider requiring prospective interested parties to apply to the Tribunal showing that beyond being bound by the outcome, they would make a positive contribution to the appeal, to preclude proceedings being protracted unnecessarily.

150. In relation to the second basis, some members agreed that for fairness, if there were legal consequences for a party that was not the respondent to an appeal, they should have an opportunity to be interested parties. Therefore, the test could be narrower than that contained in Part 54 of the Civil Procedure Rules of a person who is 'directly affected by the claim'. This could perhaps help mitigate our member's concern that the interested party rule may act to the detriment of appellants in the majority of cases, by effectively creating two respondents, both raising issues and evidence.

151. In proceedings in the FtT, it could be the local authority who is the respondent to the appeal. Section 50(3) NBA records that a local authority can either refer a young person to the Secretary of State for the Home Department for an age assessment or conduct an age assessment for itself and notify the Home Secretary. It remains to be seen how frequently local authorities utilise the National Age Assessment Board ('NAAB') or continue to conduct age assessments for themselves.

152. The experience of one our members who was involved in training and a conference with 13 East of England local authorities coordinated by Essex County Council was that most of the social workers and social care managers with whom our member spoke were concerned about the NAAB and said although it was possibly a useful resource if a local authority was at capacity or did not have sufficient trained social workers to conduct age assessments in house, they would likely continue to conduct age assessments themselves. Even if some local authorities refer to the NAAB and some do not, there will be cases in which it is the local authority who has assessed or the Home Secretary who is the decision maker. There will, therefore, be cases where both the Home Secretary and a local authority will be respondent to the appeal. This is a substantial change from the judicial review sphere where other than in a few cases (with the

Kent Intake Unit being an example) the defendant in judicial review proceedings is the local authority, not the Home Secretary.

153. As a result, given these additional permutations of cases, we can see reason for there to be scope to join the Home Secretary and/or the local authority (depending on how the claim is brought) as an interested party. Some permutations of how such cases may look could be:

   i) If one envisages a case where the respondent is the Home Secretary but the local authority is the authority who previously had the child in care prior to the assessment, the local authority would have an interest in the outcome of proceedings. We think this would extend beyond the local authority being required (say pursuant to Rule 4(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014) to provide documents, to where individuals from the local authority would want to attend to give evidence in support of age and it may therefore be appropriate for the local authority to be an interested party.

   ii) In another type of case, the local authority could be the respondent but the Tribunal could have refused interim relief, so the young person could remain in adult asylum support accommodation and there may be ongoing NRM processes. In a case of this kind, it may be appropriate to join the Home Secretary as an interested party as they would be directly affected by the FtT's decision on age. There could also be cases where a decision has been taken to treat a young person's claim as inadmissible before their age is disputed and again in this kind of case, it may be appropriate to join the SSHD as an interested party.

   iii) Given the provisions in section 52 NBA in relation to the making of regulations 'specifying scientific methods that may be used for the purposes of age assessments', we expect that there may be cases where one would want to join one of the professional associations in respect of scientific tests where the Tribunal is giving guidance on the approach to scientific methods of assessment.

154. Thus, in relation to §139 of the Consultation document, we think it may be necessary for local authorities to be joined as interested parties beyond just the question of interim relief identified.

155. In relation to the second basis, in §142, we think there is no need to join the Home Secretary as an interested party in all cases where document forgery or examination is in issue. For age assessment judicial reviews at present, there is joint age assessment working guidance[47] between local authorities and the Home Office that allows a local authority to refer a document to the Home Office without a need to join the Home Secretary as an interested party.

[47] Association of Directors of Children's Services (ADCS) and Home Office, 'Age assessment joint working guidance' (June 2015, published 22 May 2015) 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/432724/Age_Assessment_Joint_Working_Guidance__April_2015__Final_agreed_v2_EXT.pdf> accessed 17 January 2023.

156. In relation to the third basis, at §143, it is correct that at present the judicial review process allows either a local authority or the Home Secretary to be joined as an interested party. For example, one of our members has had cases where, for example, the young person remains in adult asylum support accommodation and the Administrative Court has considered that it is appropriate for the Home Secretary to be an interested party. Whilst we understand this may not happen in a significant number of cases, at this stage, given that the new process in the FtT will be novel after over 20 years of age disputes being within the realm of judicial review, we can see reason for preservation of the interested party option in such cases.

Credibility and Tribunal Reasons

Question 23: Do you agree that Rule 29(3A) should be amended as proposed in order to give effect to s8(1A) Asylum and Immigration (Treatment of Claimants etc) Act 2004 and s22 Nationality and Borders Act 2022? If not, why not?

157. We agree with the TPC's view articulated at §151 of the Consultation document that it does not make a significant difference to the requirements on the Tribunal to produce reasons.

158. In relation to the drafting, might it be helpful to clarify the Rule:

> *(3A) Where the decision of the Tribunal disposes of proceedings to which the relevant section applies, the Tribunal must include in its reasons a statement explaining-*
> *(a) whether it considers the appellant has engaged in behaviour to which section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 applies and if so, how it has taken account of the behaviour in making its decision; and/or*
> *(b) whether it considers section 22 of the Nationality and Borders Act 2022 applies and if so, how it has taken account of the provision of late material in making its decision.*

Experts

Question 24: Do you agree that Rule 14 should be amended to harmonise it with similar rules in other Chambers? If not, why not?

159. While we have no objection to harmonisation, we do not agree that Rule 14 should be amended at this time, if it would result in the facilitation of a single joint expert procedure. We recognise that part of the context to this question is that the Government's 'New Plan for Immigration' proposed changes to '[i]ntroduce a new system for creating a panel of pre-approved experts (e.g. medical experts) who report to the court, or require experts to be jointly agreed by parties'.

160. ILPA has various concerns in relation to greater use of single joint experts. Our view is that the issue requires further consideration before any Rule changes that could prompt greater use of

single joint experts are made. Given that 'at present the TPC is not satisfied that a greater use of joint experts requires substantive changes in the existing rules' (per §154 of the Consultation document) and that '[o]n balance the TPC's view is that the F-t Tribunal IAC (and for that matter the SEC) would have the same powers to order parties to jointly appoint a single expert as other Chambers' (per §159), we do not think a sufficient case for change—which rests on the TPC's conclusion at §160 that 'it would be sensible to harmonise the F-t Tribunal IAC Rules with other Chambers that have significant use of experts' and that this will 'avoid any ambiguity as to the F-t Tribunal IAC's power to manage the use of joint experts by case management order'—has been made.

161. One of our members has suggested that *'the idea of joint experts is a solution in search of a problem'* in that '*there is no evidence of any significant difficulty with experts these days – any problems which did exist have been largely dealt with by the encouragement of high standards by the judiciary, criticism of experts who genuinely fail to live up to proper standards (coupled with a reduction in the past tendency of the judiciary to regard experts with suspicion) and clear practice directions for everyone's benefit'.*

162. Our member further noted that '*[t]he other problem with joint experts has been the reluctance of the SSHD to agree to do this in most cases.'* Thus, any new requirement in the Rules to consider this should address such reluctance or it would be pointless. It is difficult to imagine the circumstances in which the Home Secretary would wish to instruct a joint expert in the FtT. Whilst the Tribunal could direct a single joint expert, this could result in a problematic situation where the Home Office was uncooperative in the instruction of the expert.

163. Other ILPA members were concerned about the process for choosing a single joint expert, how long it would take to identify a suitable expert/pool of experts, and the potential for difficulties to arise in reaching agreement between the parties on a particular choice of expert. There were further concerns in relation to the process for setting questions to the joint expert, particularly regarding who sets the questions and the prospect of questions having to be agreed between the parties, as well as in relation to the adequacy of applicable codes of conduct to ensure any Presenting Officers involved in the instruction of a joint expert were required to act ethically. Requiring a joint expert to be used could therefore result in a process that is greatly prolonged.

164. Indeed, one ILPA member who has been involved in judicial review proceedings where a joint expert was used described the experience as protracted and highly contentious. Another member commented that they could think of only one country guidance case in which they have been involved in which the Home Secretary agreed to joint instruction of experts, who had all been called by appellants in a previous country guidance case. Our member noted that '*The process certainly added to the amount of time spent over the expert reports (as the SSHD had numerous written questions for them) and there was a certain amount of dispute between the parties over how joint experts should be handled and how each party was in fact dealing with them'*, while in the next proposed country guidance case in which they were involved, the Home

Secretary refused to instruct joint experts. Our member could not think of any ordinary FtT or UT cases in which the experts have been instructed jointly, and very few in which they thought it was even worth proposing.

165. A significant question also arises as to who would pay for a single joint expert, and the question of funding is especially relevant in relation to legal aid provision. Based on their experience in family cases, one ILPA member was concerned that even where a joint expert had been directed by the Tribunal and agreed, issues may arise in relation to the LAA's willingness to pay for the expert. An issue may arise in relation to whether experts accustomed to being instructed by the Home Office would be willing to be paid legal aid fees.

166. ILPA would welcome a forum for further discussion of the matter of joint experts with the Home Office, MoJ, and any other relevant bodies prior to the change being implemented to the Rules.

Question 25: Do you have any further comments?

167. We would like to reserve the right to provide further comments on the draft Rules, should there be any further clarification of the matters which we have identified to be unclear in the proposals and draft Rules; any additional detail published on the Priority Removal Notice process; and any Regulations laid or safeguards decided for the Accelerated Detained Appeal process.

19 January 2023

Zoe Bantleman
Immigration Law Practitioners' Association