Asylum and Immigration Tribunal - Fast Track procedure Rules

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Dear Magali Provensal,

Asylum and Immigration Tribunal – Fast Track procedure Rules

I write in response to the Department for Constitutional Affairs consultation paper on the above.

You will be familiar with the work and the professional standing of the Immigration Law Practitioners Association (ILPA). It was established in 1984, and is dedicated to encouraging high standards in the practice of Immigration law. We have a current membership of 1,225, comprising barristers, solicitors and other practitioners regulated by other professional bodies. We have members who work in private practice and in the not for profit sector, and who engage in all areas of immigration law, commercial and publicly funded. Many undertake publicly funded appeal work. A significant number take part in the LSC funded duty solicitor scheme for Harmondsworth and have experience of working within the fast track system. It is from this perspective and background of experience that this submission is made on behalf of our members and their clients who are subjected to the fast track procedure.

General comments

ILPA continues to be opposed in principle to the fast track system. This is because an application for asylum cannot be justly determined within 2 days and a subsequent appeal against refusal determined within 5 days of the decision. It is impossible to adequately prepare representations in support of an asylum claim when a legal representative meets their client in the morning, they are then interviewed by the Home Office in the afternoon and then a decision is served the following day. Similarly, it is not possible to adequately prepare for an appeal hearing (including preparation of witness statements, skeleton arguments, chronologies and bundles of relevant evidence) within the three

days allowed before an appeal bundle must be lodged with the IAA.

Historically, many of our members refused to sign up for the duty solicitor scheme believing it to be a demonstration of tacit support for an unfair system. However, since the Court of Appeal in the case of the **Refugee Legal Centre v Secretary of State for the Home Department** held that the system was not inherently unfair a growing number of our members have joined the duty solicitor scheme to ensure that wherever possible cases that are not suitable for the fast track system can be identified and decisions to keep the cases within the fast track system challenged.

Whilst the Court of Appeal found that the fast track system is not of itself *inherently* unfair and therefore unlawful it expressed some views which ILPA would concur with. We would agree in part with Lord Justice Sedley when he remarked that "the choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-around of asylum applications. *But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency*".

ILPA has two major concerns about the draft fast track procedure rules:

(i) The Secretary of State for the Home Department claimed before the Court of Appeal that the fast track scheme is considered only suitable for straight forward cases that can be determined quickly. The Secretary of State claims to exercise "flexibility" and removes cases from the system which turn out to be "particularly complex" or to require expert evidence or where the Appellants have medical problems (see paragraph 12 of the Judgement). Counsel for the Secretary of State described this readiness to be flexible as "deeply ingrained" but the Court of Appeal did not consider this to be good enough. The Court was of the view that a written flexibility policy to which officials and representatives alike can work was required. The Secretary of State undertook to publish such a written flexibility policy but to date it has not been published.

Given this commitment to flexibility from the Secretary of State and his assurance that only the most straight forward cases should remain in the fast track system, we believe the Fast Track Procedure Rules should reflect and reinforce this. They should *require* an Adjudicator to transfer from the system those cases where there is the merest possibility that an appeal cannot be justly determined unless it is transferred out of the fast track procedure. Paragraph 31 (1)(b) of the draft fast track procedure rules provides that the new Tribunal *may* transfer a case out of the fast track procedure if it is satisfied that there are exceptional circumstances which mean that the appeal cannot otherwise be justly determined. ILPA strongly believes that *may* should be *must* and that *exceptional circumstances* should be mere *circumstances*.

Similarly, paragraph 31(1)(c) provides that the Tribunal *may* transfer the case out of the fast track procedure where the Respondent to the appeal has failed to comply with the provision of the Rules (or a direction) and where the Tribunal is satisfied that the Appellant *would* be *prejudiced* by that failure if the appeal was not transferred out of the fast track procedure. ILPA strongly believes that if there are circumstances where

the Tribunal is satisfied that an Appellant *would be prejudiced* then the Tribunal *must* transfer the case out of the fast track procedure.

(ii) ILPA believes that it is *essential* for all decisions taken by the Tribunal to continue to be served both on the Appellant and on the representative. Given the very tight time limits it is essential that representatives receive decisions and notices at the same time as they are served on the Respondent so that consideration of these and the required work for the next stage can start as soon as possible. It is therefore with concern that ILPA notes that the draft rules do not contain the requirement at paragraph 8(3)(b) of the current rules which requires the Appellate Authority to serve the Adjudicator's written determination of the appeal on the Appellant and "any representative acting for a party". Under paragraph 14(3)(a) and Rule 19(2)(a) of the new Procedure Rules the responsibility for serving the Determination of the Tribunal and any decision in respect to reconsideration has been transferred from the IAA to the Home Office. There is no longer any requirement to serve the determination on the representative. The only requirement is to serve it on the Appellant. We have serious doubts as to whether the Appellants will be given access to fax facilities to fax these determinations and decisions on to their representatives or, even if they are provided with these facilities, whether they will understand the need to do so. There should remain a requirement in the Procedure Rules that all determinations or decisions be served both on the Appellant *and* on any representative recorded as acting.

With those general comments in mind we turn to answering the specific questions set out in the consultation paper.

1. Do you agree that the new Fast Track Rules clearly define what a fast track appeal is?

Yes

2. Do you agree with the proposals for Rules on determining appeals without a hearing to apply to initial fast track appeal hearings as well as reconsideration?

No. Given the speed of the fast track system, the vulnerability of the Appellants, the difficulties in communicating between the Appellants and the representatives and the importance of these cases being given the most anxious scrutiny, we see no circumstance whatsoever for an appeal to be determined without a hearing. ILPA would be particularly concerned about those un-represented appellants (including those where a representative has refused to grant controlled legal representation for an appeal). No determination of their applications to remain under either the Refugee Convention or the Human Rights Convention should be permitted without the Appellant being present before an Adjudicator with access to an independent interpreter to enable them to draw attention to the Adjudicator any matters relating to their case or its conduct prior to the making of a determination. The safeguard of an oral hearing must remain in all fast track cases.

3. Do you agree that giving the Home Office responsibility for service

of decisions can help the fast track process?

No. We believe responsibility for serving determinations and decisions should remain with the Immigration Appellate Authority who should continue, as the case is now, to serve determinations and decisions on both the Appellant and the representative. Whilst the change may be considered suitable for the Principle Rules we do not believe it is suitable for the Fast Track Procedure Rules given the tight deadlines. We are concerned, for example, that the Tribunal may serve the Home Office with the determination of the Adjudicator at 9am in the morning but that this Determination will not be served on the Appellant in detention until much later in the day. Since there is no requirement in the Procedure Rules for the determination to be served on the representative, it is possible that the Appellant may not gain access to the required facilities to make contact with the representative and forward the decision on to them until the next day. Given that time limits are so restricted the loss of any time is critical. It is essential for both fairness and the practical working of the fast track scheme that the IAA continue to serve all decisions contemporaneously on both the Home Office and the Appellant's representative.

If responsibility for service of the decisions is to be transferred to the Home Office then Rules 14(3)(a) and 19(2)(a) should be amended so that service of the Determination or notice of decision must be served not only on the Appellant but also on "any representative acting for a party" as provided for in the current rules.

4. Are you satisfied with the procedures in the new Fast Track Rules for the "filter provision".

No. The time limits are simply too tight and unworkable. The work that needs to be done by the representative is the equivalent of currently preparing grounds for an application to the High Court for statutory review. The current time limit available for doing this work is 10 working days. This stage of the proceedings is the most legally complex for a representative requiring the identification of errors of law by an Adjudicator and it is the stage that is most likely to require the use of Counsel. Extra time therefore needs to be built into the scheme to enable the instruction of Counsel and the proper consideration of the papers by Counsel. At the very least 5 working days should be allowed for applying for review.

For the same reasons as set out above, we would oppose the transfer of the responsibility for serving the decision to the Home Office. It seems perverse for a rule to be introduced enabling the AIT to serve the decision on the Appellant itself if the Home Office fails to notify the IAT that service has taken place within one business day – surely it is better if the IAT simply serves the decision direct on the Appellant and the representative in the first place.

5. Are you satisfied with the procedures for the reconsideration stage?

No. Where reconsideration has been ordered an error of law has been

identified and it is considered that there are real prospects that the appeal may be allowed on reconsideration. In these circumstances, allowing only one day for preparation followed by the day of the hearing itself is simply unacceptable. The requirement that the parties to the appeal will be notified of the hearing date by noon on the business day before the hearing at the latest is equally unacceptable. Representatives need at the very least two full working days notice of the hearing. There will be no time to prepare the documents to be required to be considered by the Tribunal for the hearing. No allowance appears to be made for the time that the representative may require to arrange a legal visit with the Appellant, take their instructions on any matters arising and to advise them.

6. Do you agree that the Tribunal should not have discretion where all parties consent to transferring an appeal out of the fast track?

We agree with the proposal that the Tribunal must transfer a case out of the fast track procedure if all the parties consent. We would go further. For the reasons set out above, we would redraft the proposed rules so that the word *may* in Rule 31(1)(b) and (c) be replaced with *must*. This would not only provide consistency with Rule 31(1)(a) but would also be the right thing to do to ensure that all those cases where there is a possibility of justice being denied are transferred out of the fast track procedure. ILPA further believes that the word “exceptional” should be removed from 31(1)(b) for the reasons set out above.

7. Do you agree that the transitional provisions cover the relevant issues?

Yes.

Yours faithfully,

Rick Scannell

Chair of ILPA