Alison Harvey
Legal Director
Immigration Law Practitioners' Association

Recent challenges to accelerated procedures involving detention in the UK

In *Saadi v UK* (2008) 47 EHRR 17 the European Court of Human Rights ruled that detention for administrative convenience, for the processing of applications for asylum, as carried out in the UK's detention centre at Oakington at that time did not violate Article 5(1) of the European Convention on Human Rights. It was a controversial judgment and there is a powerful joint dissenting opinion, but the European Court of Human Rights had reached the same conclusion as the UK House of Lords in *Saadi & Ors, R (on the application of) v Secretary of State for the Home Department* [2002] UKHL 41 (31 October 2002).

Those judgments concern a particular accelerated procedure. Since they were given, accelerated procedures in the UK have changed. They have become much faster but the overall period for which persons are detained has increased. The Oakington Fast-track involved the detention of single men for seven days. At is inception, only certain nationalities (normally those where the overall chances of success were deemed low) were considered suitable for the detained fast-track. After a decision, persons were normally released from detention, either with a grant of leave or to pursue their appeals.

In 2002 a Detained Non-Suspensive Appeals procedure was introduced, whereby those whose claims for asylum were deemed unfounded were denied an in-country right of appeal. Challenges were by way of judicial review. Then, in 2003, what became the modern "detained fast-track" was introduced in Harmondsworth detention centre. The procedure was more accelerated, but detention was for longer; this time the appeal was also accelerated and the person remained in detention while the appeal was heard. In theory, any case could be included in this fast-track; there was no limit based on nationality. The same system has been operated at other centres since, including Yarls' Wood, where women are held.

In *The Refugee Legal Centre, R (on the application of) v Secretary of State for the Home Department* [2005] WLR 2219, [2004] EWCA Civ 1481 (12 November 2004) a challenge to the 2003 procedure was brought. It was argued that this carried an unacceptable risk of unfairness: that the system was unfair and therefore unlawful. This was rejected on the grounds that sufficient provision was made for flexibility for the risks of unfairness, which undoubtedly existed, to be addressed in the cases in which they arose.

Reliance on accelerated procedures increased in the UK. In 2011 the non-governmental organisation Detention Action published a report *Fast-track to despair: the unnecessary detention of asylum-seekers* which contains a very detailed, very critical, portrait of the system as it operated at that time and gathers the available statistics and policy documents.

Detention Action moved to challenge the Detained-Fast Track, seeking permission for judicial review. Success in an individual challenge to being included in the Detained Fast-track would see an individual released; to challenge the system as a whole a public interest challenge was necessary. Detention Action instructed Sonal Ghelani, who had been the solicitor in *Saadi v UK*. It put its case in the terms in which the *Refugee Legal Centre* case had been put: that the system carried an unacceptable risk of unfairness.

The sequence of the litigation is complex and, in this highly politicised environment, it is important to stick close to the text of the, sometimes difficult, judgments.

In the initial challenge there was a substantive judgment in *R (Detention Action) v SSHD* (([2014] EWHC 2245 (Admin)) and a separate judgment on relief ([2014] EWHC 2525 (Admin). Detention Action appealed the decision on relief and also the judge's decision to refuse to rule on the lawfulness of detention during the period after the Secretary of State's decision refusing asylum and pending appeal to the Court of Appeal which gave judgment on the question of relief in R (Detention Action) v SS*HD* [2014] EWCA Civ 1270 and on the appeals point in *R(Detention Action v SSHD)* [2014] EWCA Civ 1634. The Secretary of State did not appeal.

Ouseley J at first instance said at paragraph 2 of the relief judgment

> I am satisfied that declaratory relief is necessary, and that this relief should refer to what is unlawful in the operation of the Detained Fast Track. A wider declaration that the operation of the DFT was unlawful would not properly reflect the more limited basis of the judgment.

He further held that unlawfulness to have existed as of 9 July 2014, when judgment was given. This refers back to his finding in the substantive matter

> 219. The DFT policy is not unlawful in its terms. It does not contradict the provisions of statute or Directive, nor is it in breach of the ECHR. The inclusion of the appeal process in the DFT is lawful. The overall test in relation to a quick but fair decision is lawful. I do not accept the arguments that particular claims should of themselves be excluded. The period of detention overall is not unlawful in general. I do not consider that there is discrimination against women applicants in the process.
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> 220. … the various shortcomings which I have identified do not show the process to carry an unacceptable risk of unfairness, save in one respect.
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> 221. I am satisfied that the shortcomings at various stages require the early instruction of lawyers to advise and prepare the claim, and to seek referrals for those who may need them, with sufficient time before the substantive interview. This is the crucial failing in the process as operated. I have concluded that it is sufficiently significant that the DFT as operated carries with it too high a risk of unfair determinations for those who may be vulnerable applicants.

The shortcomings identified included that the process by which cases were screened to determine whether they could be included in the fast track could not be relied upon to identify those, such as survivors of torture and the trafficked, whom the Home Office deemed should not have their cases processed in the detained fast track and nor were such persons being identified at a later stage.

In particular Ouseley J suggested that the risks of unfairness in the detained fast-track might be mitigated by the earlier instruction of lawyers, giving them four days to prepare the case before interview. It subsequently emerged in meetings convened by the Home Office that there was disagreement about the way in which this was intended to mitigate the unfairness. The Home Office viewed the four clear days as allowing the lawyer adequately to prepare the

case which would then pass through the fast track with all risk of unfairness removed. A detailed reading of the judgment, however, makes clear that the four days were viewed as an opportunity for a legal representative to get a client out of the detained fast-track, whether by starting a judicial review or, as provided for in Home Office guidance, securing agreement from Freedom From Torture or from The Helen Bamber Foundation to examine the case.

The Home Office met regularly with legal representatives, representatives of Detention Action, the Immigration Law Practitioners' Association and the Foundations, to try to ensure that it was giving lawyers four clear days and that these were not eaten away at by logistical difficulties of getting an appointment to see a detained client. The meetings also discussed actions to be taken to address the shortcomings in the process identified by Ouseley J.

At its appeal to the Court of Appeal, Detention Action lost on relief but won before a differently constituted court on Ouseley J's refusal to rule on whether the criterion for inclusion in the detained fast-track: that the appeal can be processed quickly, applied post initial refusal. On that point, the Court of Appeal held that while the application of the quick processing criteria to the question of whether a person could be detained pending appeal is not objectionable in principle and does not breach the Home Office's guidance, it does not satisfy the requirements of clarity and transparency because the Home Office had not signalled a policy change from requiring its general detention criteria to be met, as it had done at the outset (a matter evidenced by the Immigration Law Practitioners' Association's *The Detained Fast-track process: a best practice guide,* published in 2008), to applying the detained fast-track "quick processing criteria" at the appeal stage.

Detention Action then challenged the appellate stage of the process from a different angle, attacking the legality of the procedure rules governing the hearing of fast-track appeals, contained in a schedule to The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604). In *R(Detention Action v First-Tier Tribunal) (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin) (12 June 2015), Nicol J held that the fast-track procedure rules were *ultra vires* the powers of the Tribunal Procedure Committee, which has the power to make procedural rules ensuring that justice be done and that the tribunal system is fair. By "allowing one party to the appeal to put the other at serious procedural disadvantage without sufficient judicial supervision", the rules were not securing these objectives and the Committee was acting outwith its powers. Nicol J granted a stay on the effect of his judgment, but Detention Action appealed this to the Court of Appeal and, perhaps unsurprisingly given that *vires* was at issue, lifted the stay on 26 June 2015.

Meanwhile, in the High Court, linked cases challenged the Home Office's decision not to release people from the detained fast-track on the strength of a letter from the Helen Bamber Foundation because, as a result of the Foundation's finding itself booked up until 2017, those letters no longer provided an appointment date but just indicated that the case met its criteria for an appointment. The cases were divided into two, *R(JM) et ors* (CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015) raising generic issues and *IK, Y, PU et ors* (CO 678/2015; 747/2015 and 814/2015) raising specific questions of trafficking and equality legislation. The Immigration Law Practitioners' Association intervened in the generic cases, the Poppy Project, based at Eaves Housing for Women, which works with trafficked persons, intervened in the trafficking and equality cases. The hearing was due to start on Tuesday 30 June but the Home Office failed to file a skeleton and, at the eleventh hour, expressed a willingness to agree a consent order.

Then on 2 July 2015, the Minister for Immigration and Security, the Rt Hon James Brokenshire MP, announced in the UK parliament, the suspension of the detained fast-track. While reiterating the Government's commitment to the detained fast-track, he stated that 'Risks surrounding the safeguards within the system for particularly vulnerable applicants have… been identified to the extent that we cannot be certain of the level of risk of unfairness to certain vulnerable applicants who may enter DFT.' The Minister stated that 'every individual who was detained under the DFT policy and remains detained will have their detention urgently reviewed at senior level'. He indicated that a suspension might be short.

Consent orders were agreed in the generic and, subsequently, in the trafficking and equality cases. Blake J indicated that he did not consider that general relief was a matter for his order.

The Secretary of State indicated that she would restart removals, but that everyone in detention who had had a fast-track asylum decision/appeal would be informed of the litigation and given four days to take legal advice and decide whether to make any further representations. The Home Office issued interim guidance.

Meanwhile the Lord Chancellor appealed Detention Action's victory on the question of the appellate stage. In *The Lord Chancellor v Detention Action (Secretary of State for the Home Department an interested party)* [2015] EWCA Civ 840 the Court of Appeal upheld the judgment of Nicol J. It held, at paragraph 45 of the judgment, that "the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases…The system is therefore structurally unfair and unjust". It was no answer to say that a person could argue for their removal from the fast track. First, a case had to be made as to why and the time limits were insufficient to make it. Also, this would put him/her in the invidious position of having to point out the current weaknesses in his/her case, while knowing that it might still go ahead. Finally it was recognised that the provision to remove a case from the fast track was liable to be regarded as an exception.

The gravity of this finding cannot be overstated. A committee especially appointed for the purpose has made rules, sanctioned by the Lord Chancellor and day after day tribunal judges have heard cases and lawyers have appeared before them, in a process structurally unfair and unjust. If nothing else the judgment is a call to eternal vigilance.

On 3 August 2015 the Lord Chancellor was refused permission by the Court of Appeal to appeal to the Supreme Court, but he may renew this application to the Supreme Court.

Current processing of claims in detention is being scrutinised closely to verify whether the Home Office is indeed applying the general detention criteria or whether an unlawful "detained slow track" is developing. This is relevant to whether those lawyers with exclusive contracts to provide legal advice and representation to those detained consider their position to be tenable. At the same time there is concern that while the detained fast track only operated in certain centres, those still in detention who have been through an unfair process and wish to make fresh claims, are scattered in different centres where the same provision for representation in a substantive asylum case has not been made.

The Home Office has not provided special notifications to those who have been released from detention whose claims for asylum were determined in a process now determined to be unfair. Following applications for permission for judicial review, a charter flight to Pakistan was cancelled. More generally, challenges range from those that are limited to pointing out

that the person facing removal has been subject to an unfair procedure to those highlighting specific features of the individual's case that contribute to such unfairness.

As to the future, Ouseley J said in the July 2014 *Detention Action* judgment:

> At each stage, however, it has been the prospective use of lawyers, independent, giving advice, taking instructions having gained the client's confidence, which has seemed to me to be the crucial safeguard, the crucial ingredient for a fair hearing, whilst maintaining the speed of the process, but which can protect against failings elsewhere, and avoid an unacceptably high risk of an unfair process.'

Without lawyers, it appears, the detained fast-track cannot function. Lawyers, tribunal judges and the Tribunal Procedure Committee will all be considering carefully whether the Home Office is able to devise a lawful process. The Tribunal Procedure Committee has allowed the Lord Chancellor to conduct the litigation, but they present rules to him for his approval and thus the view they take of the lawfulness of any proposals will be relevant.