# ILPA RESPONSE TO THE MINISTRY OF JUSTICE CONSULTATION ON PROPOSAL TO EXPEDITE APPEALS BY IMMIGRATION DETAINEES

## Introduction

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

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.

Although ostensibly the consultation comes from the Ministry of Justice, it bears a considerable resemblance to the representations which the Home Office made to the Tribunal Procedure Committee. The consultation paper suggests (paragraph 16) that the Ministry of Justice was involved in these discussions but we do not know to what extent and we are aware that the letter of Mr Justice Langstaff was addressed solely to the Home Office and not to the Home Office and the Ministry.

Question nine *in esse* asks "Should the government arrogate to itself the role of the independent Tribunal Procedure Committee" and, given this, it is difficult to regard the consultation as anything other than a thinly veiled threat to the Committee. We urge the Government to respect the Committee's independence and, indeed, its expertise. We recall, as did Mr Justice Langstaff in his letter, s 22(e) of the Tribunals, Courts and Enforcement Act 2007 which confers on members of the tribunal, the tribunal judiciary, the statutory obligation of ensuring that proceedings are handled quickly and efficiently.

# Response to questions

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

1. No.

We agree with the conclusion of the Tribunal Procedure Committee as set out in the letter of Mr Justice Langstaff of 12 February 2016, copied to ILPA, that it is far from certain that the principal rules[1] are failing to deliver and will continue to do so. No new evidence is proffered in the consultation to shake that conclusion.

The evidence identified by the Tribunal Procedure Committee as lacking in the letter of 12 February 2016 of Mr Justice Langstaff ,communicating the Committee's decision, has not been provided in the current consultation and in those circumstances we are surprised that the consultation has been published. Mr Justice Langstaff wrote

> *The Home Office view is that the Principal rules 'have demonstrably failed to deliver, despite detained appeals having been prioritised.' While the T[ribunal] P[rocedure] C[ommittee] understands the Home Office's desire to deal with cases as quickly as possible, it does not think that there is the evidence from which this conclusion can properly be drawn….procedures already exist within the Principal Rules which can be used to expedite cases. There is nothing to prevent the Home Office (or any other party) applying to the Tribunal to shorten deadlines or list hearings more quickly.*
>
> *The Home Office notes that, without amended rules, there is no 'assurance of success' in achieving expedited consideration of appeals. If this concern arises from the use of court room and judicial resource allocated to cases involving those in detention, listing is a judicial function and the appropriate way of resolving it (short of providing greater resource) would seem to be by exploring with the Chamber President any possible alternative approaches….If it is, rather, the way in which judges are exercising their discretion within the rules the T[ribunal] P[rocedure] C[ommittee] prefers to assume that the judges are acting properly as members of an independent judiciary. The decision to hold the 2014 Fast Track Rules unlawful was in part reached because the then rules fettered the discretion to do justice in individual cases to too great an extent.*

The Ministry of Justice should be alive to the responsibility of the Lord Chancellor to uphold the independence of the judiciary under s 3 of the Constitutional Reform Act 2005.

***Fairness***

In his 12 February 2016, Mr Justice Langstaff reminded the Home Office that "We cannot make rules that we believe to be unlawful." Nor should the government.

[1] The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI (2016/2604 (L 31)).

The material presented in the *Detention Action*[2] and the *R(JM) et ors*[3] and *IK et ors*[4] cases, the judgments in those cases, and the correspondence pertaining to the Tribunal Procedure Committee's investigation of the question of whether rules should be made for an accelerated procedure catalogue the reasons why this is not in the interests of justice, and is not just, to have separate rules and accelerated procedures for a cohort of cases of detained persons. The decision on how best to balance speed and fairness is one properly made by the tribunal judge in charge of the case. The principal rules allow for this.

The fast track rules were found by the court of appeal to be "systemically unfair and unjust"[5]. The Home Office response was to propose to the Tribunal Procedure Committee making rules for a cohort of cases that were 'unnecessarily late, opportunistic, abusive or highly likely to fail'. Those criteria having been rejected by the Committee as both 'hit and miss' and highly prejudicial, the Ministry of Justice appears to have abandoned the project of finding fair selection criteria that would not put individual cases at risk of injustice. But it is no answer to the inability to identify fair selection criteria that would not put individual cases at risk of injustice to include all cases in the proposed new fast track.

See our response to question three on 'benefit' and our comments on the impact assessment. The issues in these cases are whether a person is sent back to face persecution, or separated from their family and home. A fair determination of their case is the priority and a fair hearing and just outcome the greatest benefit to any person, whether detained or not.

***A premature response***

ILPA invited the Tribunal Procedure Committee to see if the Home Office to set up a new detained fast track and then to take a view on the desirability of rules and the content of any rules considered desirable, in the light of examination of the cohort of cases being selected for that process and their outcome. We commend this approach to the Ministry of Justice. Such an approach, we argued, would ensure that rules were made on the basis of fact rather than aspiration. It was our contention that the Home Office would not be able to devise a detained initial stage which would produce justice in individual cases and that it would therefore be unable to satisfy the Committee. We recognised that a detained initial stage without a fast track appeal would not secure the Home Office's primary objective of end to end detention but anticipated that if it could, it would be willing to a procedure with a detained initial stage only for a while, to demonstrate the strength of its conviction that its procedure would be able to operate as it intended. That the Home Office has not devised a detained initial accelerated procedure leads us to conclude that it too doubts whether its procedure could be fair and deliver justice in individual cases.

***Legal aid***

It is stated in the impact assessment that "We do not currently have data to confidently monetise the costs to the Legal Aid Agency". It is stated at paragraph 48 that 'Option 1 [the proposal on which we are commenting] would not widen the scope of civil legal aid". It appears

[2] *R (Detention Action) v SSHD* ((2014] EWHC 2245 (Admin)) ; *R(Detention Action) v SSHD* [2014] EWCA Civ 1270 ; R(Detention Action v SSHD) [2014] EWCA Civ 1634; *R(Detention Action v First-Tier Tribunal) (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689; *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.
[3] *R(IM) et ors* (CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015).
[4] *IK, Y, PU et ors* (CO 678/2015; 747/2015.
[5] *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

to be assumed that legal aid for immigration, as opposed to asylum, cases in the proposed new fast track be obtained through applications for exceptional case funding. [6]

There is no legal aid for immigration cases, subject to limited exceptions for trafficked persons, survivors of domestic violence[7]. We recall the comments of Ouseley J in *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) (09 July 2014) as to the central role of legal representatives in the light of which we consider that discussions on legal aid must necessarily pre-date discussions on whether or not immigration cases could be made subject to accelerated procedures.

Applications for exceptional case funding, which involve considerable work by lawyers, are not remunerated unless the application succeeds. It cannot be assumed that lawyers would make these applications, unfunded and at risk. They cannot be forced to do so and no system can be predicated on the assumption that they will do so. This is evidenced by the volume of exceptional case funding applications, only some 174 in the period January to March 2016; 72 per month nationwide in immigration in the period April to June 2016. Nor is it evident that the Legal Aid Agency could cope with a large rise in the number of applications, given the amount of time it spends on each one. The Ministry of Justice will have better access to the statistics on this than does ILPA.

Nothing in the proposed timetables reflects that it can take the Legal Aid Agency a very long time to decide applications for exceptional case funding and that more than one application may need to be made in the course of the case because the Legal Aid Agency grants the minimum it considers necessary at the stage the case has reached and repeat applications must be made to secure further funding.

If applications are made in all cases and the majority are successful, then determining them individually rather than bringing them within the scope of legal aid is a drain on the limited resources of the Legal Aid Agency, whose expenditure is already unduly skewed toward bureaucracy rather than funding cases. If applications are made in few cases or many are unsuccessful then significant numbers of persons in the proposed new fast track will go unrepresented. No attempt has been made to quantify how many applications will be made.[8]

That persons are detained under Immigration Act powers is generally an indication that they do not have leave to be in the UK and that therefore they are entitled neither to work and earn money nor to public funds. This is acknowledged in the impact assessment at paragraph 51. They cannot pay for representation so if there is no legal aid they will be unrepresented. ILPA has written at length on the need for legal aid for immigration appeals and has drawn particular attention to the plight of detainees and prisoners.[9] Legal Aid covers disbursements, including the £800 appeal fee, interpreters and expert reports, as well as legal fees.

Where legal aid is available other than on an exceptional basis, as in asylum cases, a publicly-funded representative must decide whether the claim justifies continued funding within the

[6] Impact assessment paragraph 49.
[7] See *R (Gudanaviciene and Others) v The Director of Legal Aid Casework and The Lord Chancellor* [2014] EWCA Civ 1622, 15 December 2014
[8] Impact assessment paragraph 48.
[9] See http://www.ilpa.org.uk/pages/briefings.html , for example ILPA's evidence to National Audit Office on legal aid, 21 July 2014; ILPA briefing for House of Lords debate *Effect of cuts in legal aid funding on the justice system in England and Wales,* 11 July 2013.

period allowed for lodging an appeal after the receipt of a refusal from the Home Office. Representatives differ in the way in which they apply the test for further funding. Legal aid is to be granted where the prospects of success are uncertain.[10] The prospects of success must be borderline, uncertain or good for legal aid to be granted.

A significant number of persons, including persons subsequently found to be survivors of torture, were dropped by their legal representatives after the Home Office decision and before an appeal in the detained fast track appeal because of the assessment of their prospects of success. If their representative in the detained fast-track refused public funding, would-be appellants were only able to approach other firms with an exclusive contract to represent individuals in the detained Fast-track in the particular immigration removal centre in which they were held. They did not have the option of instructing representatives with particular expertise, even supposing that they were able to find them. In practice, once funding has been refused an individual finds it difficult to find another representative and is likely to have to represent him/herself at any appeal.

Successful judicial review challenges to detention and/or inclusion in accelerated procedures have the potential to provide evidence of flaws in the process but there were many cases in the detained fast-track where the grounds for a challenge appeared to exist, but no challenge was brought. There are a range of reasons why judicial reviews were not brought to try to secure release from the detained fast track. Securing the clients release on production of a letter from Freedom from Torture or the Helen Bamber Foundation was one reason why proceedings did not reach judicial review. A lawyer may still have been collating the evidence for a judicial review to challenge suitability when the appeal hearing came on. There may have bene an indication of, for example, mental health problems but a need to obtain more evidence. Another reason was that legal aid lawyers judged that the case did not meet the merits test for a judicial review, particularly where the client's credibility has been impugned. In some cases it may be questioned whether this accurately applied criteria that allow funding to be granted where the merits are "uncertain."

Some barristers who suggested judicial review to instructing solicitors representing clients privately in the fast track have been told that this was too expensive and that the client had the alternatives of trying to win at appeal or making a fresh claim. This may reflect a failure to inform the client that legal aid is available for judicial review (Legal Aid, Sentencing and Punishment of Offenders Act 2014, Schedule 1 Part 1, paragraph 19), or the client's decision that they do not want to change to a representative with a legal aid contract. Or it may reflect application of the rules on restrictions on judicial review in immigration cases, whether correctly or incorrectly. These exceptions bar legal aid for judicial review in 'an issue relating to immigration' in two circumstances. Firstly, where: the same issue, or substantially the same issue, was the subject of a previous judicial review or an appeal to a court or tribunal; that court or tribunal found against the would-be claimant; and less than a year has elapsed since the day of that previous determination (Legal, Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1 Pt 1 para 19(5)). This can affect cases where the case for release turns on a matter adjudicated upon in the appeal, but it is difficult to comprehend how it could apply in cases where there is sufficient evidence to bring a fresh claim.

[10] Regulation 60(3)(b)of the *Civil Legal Aid (Merits Criteria) Regulations 2013* (SI 2013/104) as amended.

In many firms, the same staff were providing representation in the detained fast track as were commencing the pre-action protocol for a judicial review and having conduct of the judicial review. Pressure of time may thus explain why judicial reviews were not brought.

The clock is ticking when a representative is trying to bring a case in accelerated procedures. It is necessary to give notice and send a letter before action, but procedures often do not halt when this is done. The Home Office, having received notice of commencing judicial review tended to wait until the point at which the lawyers have obtained legal aid and lodged proceedings, and then cave in, rather than take any action before that point. Not only is this frustrating, it means that no precedents are set. ILPA has very long complained that when the Home Office concedes one case for a particular reason, it nonetheless fights the same point on subsequent cases.[11]

If the judicial review is conceded post issue of proceedings and prior to the permission hearing then payment is at risk and is at the discretion of the Legal Aid Agency. This consideration weighs with lawyers already under pressure of time. This is not to defend failures to challenge continued detention by judicial review where this is in the best interests of the client, but to record that it is one of the explanations in practice.

Persons in the detained fast track ended up unrepresented in various ways. First, when asked by the Home Office whether they wanted a representative from those contracted to provide representation within the fast track some said no. In some cases this happened because the person was under the impression that the representative would be part of the Home Office, rather than independent. In other cases the person had a representative on the record but was unaware that either that person could not provide representation within the fast track because s/he did not hold an exclusive contract and had not done the requisite amount of work on the case to be allowed to retain it. ILPA urged the Legal Aid Agency to abandon exclusive contracting and to allow all those prepared to represent clients in the detained fast track to do so.

In other cases people said no to legal aid because they had instructed a representative acting privately. They then learned that they could not afford the fees to have that person represent them in the fast track. Given the location of immigration removal centres and the speed of the procedure, private representation can be extremely costly. Private representatives whom the client would be willing to pay have often struggled, particularly when they working within small firms and having to meet deadlines for other clients, to rearrange diaries to accommodate accelerated procedures. Those representing on legal aid but without exclusive contracts, for example for an existing client for whom they had done more than five hours work prior to entry into detention, reported difficulties in freeing up staff at short notice.

One Cameroonian LGBT asylum seeker explained to his subsequent representative how he was given a card with the name of one of the exclusive contractors on it and told that this would be his lawyer. He expected them to get in touch with him, but did not hear from them. He attempted to phone them but could not make himself understood and the credit ran out on his 'phone. By the time he got to the day of his asylum interview he was thoroughly frightened. He did manage to speak with another exclusive contractor on the day of his interview, who arrived

[11] See Alison Harvey's paper on the Rule of Law for the Home Office National Asylum Stakeholder Forum Strategic Engagement Group of September 2015.

part-way through the interview and from then on had conduct of the case while it was in the fast-track.

There were problems with persons accessing a representative with an exclusive contract if their private representative dropped them. These were raised in the meetings with the Home Office following the Detention Action judgment. There was a lack of clarity about how such persons got a representative from among the exclusive contractors. The Home Office stated in the meetings that if a person wanted a representative from among the exclusive contractors then an interview would be delayed to allow them to obtain one, but it was unclear that individuals knew this and unclear what mechanism was supposed to operate post interview. It was unclear whether applicants were allocated a representative from among the exclusive contracts in practice.

If one exclusive contractor declined to represent a detainee at the appeal stage because they assessed that the detainee failed the merits test then while another exclusive contractor could pick up the case at a surgery, if the person was appealing against the refusal of legal aid[12]) then the other exclusive contractor approached could take the case until the Legal Aid Agency has processed the appeal against refusal of funding and agreed that the case was eligible for controlled legal representation.

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

2. No.

We do not consider that an expedited process, in the sense of a process with a fixed timetable, should be put in place at all. All cases should be dealt with in a timely manner and such expedition as can be achieved given the circumstances of the individual case. See our response to question 1 and the reasoning of Mr Justice Langstaff quoted therein.
It is Home Office policy that detention should be used as a last resort and for the shortest possible time. This is repeated as government policy in paragraph 22 of the consultation paper. Cases should be dealt with in a timely manner both within and outside detention. The way to achieve this is not to have fixed time limits but to put in place procedures to manage the individual case.

We express particular concerns about those detained in prison service establishments. It is much more difficult to communicate with them and they are more limited in what they can do to progress their Many of those detained in prison service establishments do not currently have a good (or any) legal representative, or access to immigration advice on legal aid. The Legal Aid Agency will pay one and a half hours travel time to a prison unless a specific exemption applies. These cases are not financially attractive to lawyers. Some have family friends, or access to debt that allow them to pay for legal representation, which may or may not be of good quality. Others are very much alone, and their lives are chaotic, they are unable to access representation. The Detention Advisory Service which used to assist those detained in prisons, has closed down. Funding it receives from prisons was cut because of cuts to funding to prisons. Not all prisons have Foreign National Prisoner Officers and where these exist this may

[12] On Legal Aid Agency form CW4 which representatives refusing legal aid on merits are under an obligation to bring to their client's attention and to help them complete.

be just one responsibility among very many a person holds. Prisons make scant use of interpreting services at their disposal because of cost.

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

3. This leading question is not applicable given our responses to the questions which precede it.

As per our responses to the questions above we do not consider that a separated accelerated procedure should exist or that it would deliver benefit to those within it over and above that which can be delivered under the principal rules.

All cases should be dealt with in a timely manner in the light of the individual circumstances of the case. The word 'benefit' is not well deployed in the question. Appellants benefit where they enjoy a fair appeal and a chance to put their case. The courts have found that accelerated procedures in detention attempted to date have not provided the opportunity for such a fair appeal.[13]

Insofar as the alleged 'benefit' is that a person spend less time in detention, it is stated in paragraph 25 of the Impact Assessment that at the moment many persons are released before their appeal is determined and that it is expected that a substantially fast appeal process would justify detention until their appeal is determined, i.e. that the changes would result in persons being detained for longer, not for less time.

It is also stated that the beds freed up where a person is removed could be used to detain others, thus, contrary to settled government policy as set out in our comments on the impact assessment, increasing not reducing the total number of persons detained. Counting not to be detained as a benefit, the proposals in the consultation could produce an overall 'cost' in this regard.

The impact assessment goes on to state "it is not clear how the expedited process could affect mean detention time for IRC detained appellants". See further paragraph 51 of the Impact assessment.

Similarly for the total numbers detained and the total number of appeals from detention. To talk of benefit in these circumstances is, at the very least, premature. The statement at paragraph 50 of the impact assessment that a short fixed timescale for appeal will have a positive effect on mental preparation for settlement or return fails to consider the impact on mental preparation or mental health of knowing that you have not had an opportunity to put your best case forward or of an unfair decision.

[13] *R(Detention Action) v SSHD* [2014] EWHC 2245 (Admin)) ; *R (Detention Action) v SSHD* [2014] EWCA Civ 1270 ; *R(Detention Action v SSHD* [2014] EWCA Civ 1634; *R(Detention Action v First-Tier Tribunal) (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689; *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.; *R(IM) et ors* (CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015); *IK, Y, PU et ors* (CO 678/2015; 747/2015

We know of no evidence that persons in immigration detention would trade a fair hearing for a shorter period in detention and are aware of many statements by such persons to the contrary. The overall time a person spends in detention is not a function of the speed with which their application and appeal is determined. In paragraph 32 of the consultation paper the Home Office observes that it is not including time limits for the stage before the Upper Tribunal and, given our opposition to time limits we agree with this. But cases can take a year or more to be heard by the Upper Tribunal and not only appellants, but also the Home Office, may appeal if it loses.

***The original Home Office proposals: late or opportunistic, abusive or weak claims***

We set out here for completeness that we do not agree with the proposals, which we are pleased to see appear to have dropped, set out in paragraph 3 of the *Proposals for New Fast Track Appeal Procedure Rules* sent to the Tribunal Procedure Committee under cover of Mr Rob Jones' letter of 17 November 2015. There it was proposed that the criteria' "broadly speaking' would relate to

- Late or opportunistic claims
- Abusive claims
- Weak claims
- Claims where the claimant has acted dishonestly or in bad faith.

We do not consider that screening or enforcement interviews on the information the Home Office holds on a person at the point of their being detained allow the Home Office to apply its own policies on who should and should not be detained or to apply such criteria as those suggested. See further our response to question five below.

There was frequent confusion about the basis for a case being included in the Detained Fast-track in the past, with politicians, Home Office employees and others stating that the scheme is a method for resolving unmeritorious claims,[14] rather than that it is in place to make speedy decisions on cases that can be decided quickly. There has consistently been a common perception in UK Visas and Immigration and its predecessors that all cases in the Detained Fast-track are weak cases .[15]

As Mr Justice Langstaff highlighted in his letter of 12 February 2016 any criterion based on the merits of the case increase the risk of real or perceived prejudice against applications. This could increase prejudice both within the decision-making process and in the treatment of persons in detention, where there are already very grave concerns[16]. The timing of a claim is not a reliable indicator of the weakness of a case. For example, a person with a well-founded fear of persecution, fearing, rightly or wrongly, a rapid decision in an unfair procedure and

[14] At the National Asylum Stakeholder Forum on 9 February 2012, the then Chief Executive of the UK Border Agency, Mr Whiteman stated that the criterion for selection of claims into the Detained Fast-track is that they are clearly unfounded. This error has been made by other senior officials at previous meetings of the National Asylum Stakeholder Forum, as was identified in a research paper published by Stonewall in 2010.

[15] Paragraph 2.2 of the Detained Fast Track Processes policy document. See also *Detention Action* [2014] EWHC 2245 (Admin) at paragraphs 62 and 88.

[16] See ILPA's submission to the Shaw Review: Revie*w of the welfare in detention of vulnerable persons, ILPA submission*, 2 June 2015 at http://www.ilpa.org.uk/resources.php/31052/review-of-the-welfare-in-detention-of-vulnerable-persons-ilpa-submission-2-june-2015 and *ILPA submission to All Party Parliamentary Group on Refugees and on Migration: enquiry into immigration detention in the UK* – October 2014 at http://www.ilpa.org.uk/resource/30224/ilpa-submission-to-all-party-parliamentary-group-on-detention-enquiry-into-immigration-detention-in-

speedy return, may prefer to go underground and hide than ask the authorities for protection. When apprehended they claim asylum. Whether a claim is weak, strong or abusive may not be identified. What matters in a claim for asylum is future risk of persecution.

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

4. This leading question is not applicable given our answers to the questions which precede it.

We consider that timescales should be set with regard to the circumstances of the individual case and that fixed timescales, whether overall or for particular stages, are not conducive to the just disposal of cases.

See our response to question five below re the work that a legal representative is required to do.

**Question Five. Do you think 25 working days is sufficient time to dispose of an appeal in the First-tier Tribunal, and a further 20 working days sufficient time to determine whether an appellant has permission to appeal to the Upper Tribunal?**

**If not, do you have a view on how long should be allowed for an appeal to be determined in the First-tier Tribunal and/or to determine whether an appellant has permission to appeal to the Upper Tribunal?**

**Please give reasons for your answer**

5. This question does not admit of a yes/no answer.

The consultation paper prejudges the answer to the question: it states the government's view that it is in the interests of all parties that there be a set time frame. At the risk, therefore, of wasting our time, we venture to disagree.

Twenty-five days may be sufficient in a particular case and insufficient in another. There will be very many cases in which 25 days will not permit the proper preparation of cases. That 25 days strikes the balance between speed and fairness is asserted but not evidenced in paragraph 34 the consultation paper. Similarly it is asserted in paragraph 35 that it helps all parties to plan prepare and submit their case. This is not evidenced and it is not correct. We set out why below.

***The Home Office personal information form pilot***

The Home Office is currently piloting the use of "personal information forms" that collect information about a claim for asylum prior to the substantive interview, recognizing that it is very difficult to carry out a satisfactory asylum interview "cold," with no prior knowledge of what the case is about. The feedback from these pilots from Home Office staff is overwhelming positive. ILPA supports the opportunity to submit evidence about a case, be it an asylum or an immigration case, in advance of an interview.

It was not usual for representatives, whether exclusive contract holders or not, to prepare a statement prior to interview in the detained fast track. Preparation of such statements gives a client chance to order their thoughts and for the representative to set these down in an organised way and also to ensure that all relevant matters, are covered. It is necessary to take the statement, draft it up, go through it with the client, asking additional questions that have occurred to the representative while drafting and correcting misunderstandings and check the amended draft with the client. Sometimes this means going through several versions. There is a high risk if this process is truncated or rushed of producing a statement that leads to allegations of inconsistency or of omissions and thus if there is inadequate time for the preparation of a statement one is unlikely to be prepared at all.

***Unfairness and injustice***

We set out below tasks to be accomplished in a detained case. This list is indicative only

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| Consider the screening interview record and any other documents provided by the Home Office |
| (Book an interpreter ) and get in touch the client to explain your role and to assess financial means and complete Legal Help form over the phone |
| If necessary communicate via fax with the client requesting that they call the law firm office and requesting a signed form of authority. |
| If necessary get in touch with the detention centre or prison directly – some detention centres or prisons will refuse to get in touch with client unless you provide a signed form of authority, others (such as Yarl's Wood) will go and get the client and put them on the phone. |
| Further steps to be taken to assess client's means: get in touch with the client's bank for bank statements; contact family/friends/organisations that have been providing support to get proof of means; contact the client's partner for their proof of means and bank statements. |
| Fax the client a copy of the Legal Help to be signed |
| Evidence of means permitting, open the client file |
| Go on record as acting for the client with the Home Office |
| Make a subject access request to the Home Office and/or request particular documents from it e.g. previous visa applications . |
| If relevant request files from previous representatives (these generally take 7-14 days to be received). |
| Request medical file from Healthcare at the detention centre |
| If applicable request medical file from previous GPs |
| Book an appointment to see the client (and interpreter). |
| If applicable, further chasing of proof of means. |
| Attend the client at detention centre/prison to take initial instructions – explain your role, explain the process; establish outline of case; go through any screening/enforcement interview; establish |

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| any reason client is not suitable for the procedure or that further time is needed; advise client to request a Rule 35 report if needed. |
| Send a client care letter |
| If appropriate make representations to the Home Office on any issues arising out of screening /enforcement interview |
| Make any necessary referrals e.g. to relevant first responder in the National Referral Mechanism. |
| If appropriate, make representations to the Home Office setting out why your client not suitable for detained fast track and or/further time is needed and apply for temporary admission |
| If appropriate make representations to healthcare in the detention centre setting out any mental health problems your client may have and; request that a Rule 35 report to be carried out. |
| Consider Home Office country of origin reports; Consider other country of origin information; consider relevant case-law and country guidance; consider whether your client would benefit from an expert report. |
| Consider any documents you may have received from Home Office or client e.g. entry clearance applications or original documents from client. Identify anything of significance you may wish to request from the Home Office. |
| Apply for funding for country of origin/medical expert reports; check availability of experts; researching appropriate experts (e.g. on Electronic Immigration Network/discussing with colleagues) getting in touch with experts with brief case summary, waiting for response; ascertaining three alternative quotes as required by Legal Aid Agency; considering quotes |
| Apply for funding for translations; obtain alternate quotes ; checking availability and timeframe of translator, and consider quotes |
| Apply for funding for further work on file and interpreter and travel disbursements |
| Contact any witnesses and start taking their statements |
| Attend the client at the detention centre/prison to take further more detailed instructions and prepare the client for the asylum interview |
| Chase the Legal Aid Agency for a response to funding request. Further correspondence with Legal Aid Agency if funding is refused. |
| Consider starting Judicial Review proceedings depending on the Home Office response to request release from detention and/or allow extra time and the reasons for refusal |
| Get in touch with other experts to see if a medical assessment/country expert report can be prepared pro-bono if the event funding is not available or is refused |
| Chase the Home Office and the detention centre for response to Subject Access Request; chase request for medical files and other requests for documents |
| National Referral Mechanism follow up steps if necessary e.g. – if you have asked Home Office to refer, you would need to chase them, see if they have made referral yet. If you have contacted another 1st responder you would be making them an apportionment at detention centre |

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| Make further representations to the Home Office on suitability of detention depending on progress with funding for experts/translations/witnesses/National Referral Mechanism appointments with 1st responders etc.. |
| Begin drafting post-interview representations |
| If received, consider the medical file |
| Attend the client before the interview where possible |
| Attend the interview |
| Make oral representations that client is unsuitable for the process/ further time is needed |
| Attend the client post interview. |
| Attend client over phone to take instructions on interview records and finish drafting representations and collating evidence |
| Consider Home Office refusal letter |
| (Book an interpreter) and speak with client over the phone to update and advise on refusal |
| Book an appointment (and interpreter) to see the client |
| Attend client – go through refusal decision |
| If applicable complete a CW4 withdrawing legal representation as case is without merit ; Write to client informing them |
| Open new file for client; complete Controlled Legal Representation form; Consider merit to granting CLR. Again may be issues with financial evidence |
| Write to client explaining that will be representing at the appeal |
| Lodge appeal /submit an administrative review |
| Make a temporary admission request setting out further evidence needed and timescales |
| Continue to get in touch with any witnesses |
| Draft the client's statement responding to the Home Office refusal letter and setting out their case |
| Make further requests for funding for medical/country expert report if funding not granted |
| Write to the Court to request an adjournment and/or for case to be taken out of the procedure |
| Instruct an expert if received funding and have been given an adjournment (book a room if necessary) – often limited availability |
| If funding for expert reports confirmed but no adjournment has been granted, contact experts to request preliminary reports |

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| Check counsel's availability |
| Brief counsel |
| Inform client of hearing date and book an interpreter |
| Attend the client to finalise statement |
| Continue to prepare client's case by gathering evidence; further drafting witness statement; contacting any witnesses; considering any relevant documents and/or translations |
| Consider (preliminary) reports from experts |
| If applicable respond to refusal of adjournment |
| Checking counsel's availability to draft grounds. |
| Draft a Pre-Action Protocol letter and getting opinion from counsel on content of pre action protocol and merits of judicial review |
| Consider response from the Home Office |
| Send further pre action letter and/or a response to the Home Office |
| Consider merits of application and risks. |
| Make an application to the Legal Aid Agency for emergency funding certificate |
| Chase Legal Aid Agency for response to application for emergency funding certificate |
| Counsel to draft grounds. |
| If funding is confirmed: write to the client to update them; instruct counsel; prepare bundle for request for permission to Judicial review |
| App1, Means 1 to be sent to Legal Aid Agency within five days of emergency cert being issued |

Problems in particular cases that risk resulting in the procedure being unjust include the following:

***Screening in asylum cases***

Screening in asylum cases is ineffective and cannot exclude those whom it is the Home Office policy not to detain and complex cases from detained accelerated procedures. In asylum cases screening occurs at the outset of the asylum process and often before the individual has received any substantive legal advice. Home Office policy states that an individual's immigration history will be taken into account when considering their credibility and specifically provides that a delay in making a claim for asylum can undermine credibility if there is no explanation for the timing of the claim.[17] There is therefore a reason for the individual to claim asylum as soon as possible. Many of those seeking asylum will not have a legal representative at this stage.

[17] Page 16 of the UK Border Agency policy document: Considering asylum claims and assessing credibility.

Home Office policies of dispersal are one reason for this: many persons only obtain a representative after dispersal, which comes after they have claimed asylum. Even where a person does secure a representative, there is frequently almost no opportunity for case preparation prior to screening.

In addition legal representatives are not normally present at screening. The Legal Aid Agency will only fund their presence in the case of separated children or in exceptional circumstances. This means it is most unlikely that a legal representative will be present to explain, or to assist the applicant to explain, that their case is complex or otherwise incapable of being dealt with in a fast track accelerated procedure.

ILPA has no quarrel with the approach of gathering minimal information at screening. The asylum claimant may be newly arrived, confused and distressed. They may be fearful of the officials interviewing them. The initial encounter may take place in a semi-public place. The interview is not recorded or a full note taken. Interpretation may not be as sophisticated as where a person speaking a particular dialect has been sourced for a full asylum interview.

Home Office policy required that the decision to place a case in the detained fast-track was made by the Asylum Intake Unit on the basis of information provided by, and consultation with, the Asylum Screening Unit. Information provided by Home Office staff to ILPA in workshops and "stakeholder" meetings evidenced a lack of precision as to the way in which decisions were made.[18] There was no requirement to communicate the reasons for the decision to assign a case to the detained fast-track to a legal representative. This made it difficult for a representative to know why the case has been allocated to the detained fast-track and to challenge this.

The consequence of the problems with screening was that the process did not screen out cases which did not fit the Home Office's criteria for the detained fast-track or indeed for detention. UNHCR stated:

> *UNHCR considers that the screening of asylum applicants and procedures for the flexibility and removal of unsuitable cases from the detained fast track are often not operating effectively to identify complex claims and vulnerable applicants. As a result, UNHCR is concerned that inappropriate cases are being routed to and remaining within the detained fast track.*[19]

Problems with the Rule 35 procedure that is supposed to identify evidence of torture, physical or mental health problems once a person is detained are well-documented, including by Stephen Shaw in his report

That the detained fast-track was flawed, is evidenced by the cases in which a fresh claim for protection was made very shortly after the conclusion of the detained Fast-track. Some were based upon evidence that was sought while the case was in the fast track but not obtained in the timescales it took the procedure to run its course. There is no guarantee that individuals whose cases have been dealt with in a fast track will have sufficient time or access to advice to be able to submit a fresh claim. Of 58 detainees seen by the charity Medical Justice prior to the

[18] See ILPA's letter to Mr Kirk of 29 February 2008.
[19] See UNHCR Quality Initiative Fifth Report.

*JM* litigation[20], 26 were refused through the fast track process but later released pending determination of a fresh claim.

In the former detained fast track, once a fast track case was allocated to a duty representative, they

***Immigration cases***

In immigration cases it may be necessary to collate a large body of evidence of family and community ties, as well as medical evidence, evidence on the risk of re-offending in cases where the person has previously been convicted of a crime etc.

The asylum screening procedure is intended to identify the reasons why a person should not be detained or can be detained. In contrast enforcement interviews do not focus on this. There is no legal aid for immigration and all the problems described above are therefore at least if not more likely to occur in immigration cases. Where a criminal law solicitor is present at an interview, which is far from always the case, they may have little or no experience of immigration cases. Immigration cases may involve sensitive matters such as domestic violence or trafficking and other exploitation that a person may be fearful to discuss.

***Communication difficulties***

A screening or enforcement interview may include a contact number for an individual but often the individual's mobile phone is taken from them once they enter detention because they are not allowed smart phones with access to the internet or a camera. Upon arrival at the detention centre they are then provided with a new mobile phone. Detention centre staff say that they cannot provide the person's mobile number to a representative without a signed form of authority as this would breach data protection regulations. Home Office teams generally only have recorded on their systems the number stated in the screening interview. It can be very difficult to get through on the detention centre number, with representatives having to make many calls before getting through. In detention centres, there are problems with poor reception on the mobiles handed out. Detention centres are very noisy and this is a problem when trying to take instructions over the telephone; there does not seem to be a quiet, or private, area in which clients can go to talk to a legal representative in confidence. Delays in a legal representative getting in touch with clients have a deleterious effect on efforts to build a relationship of trust and confidence. The lack of privacy in detention also means that their willingness to discuss their case in detail is compromised.

Representatives have to send faxes to the detention centres asking that the detained person get in touch with them directly. Those who do not read English may receive the fax but cannot understand what it says and so may not get in touch with their lawyer.

Mobile phones are not permitted in prison service establishments. It is much more difficult to communicate with a client in prison.

Time is of the essence in accelerated procedures but arranging legal visits can take time and then the visit may be time limited and then there may be insufficient time to complete the interview. Work as a result of the *Detention Action* judgment resulted in progress in detention

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centres, including the allocation of dedicated rooms to those with exclusive contracts, although ILPA and others continued to complain that the Home Office should not be taking into a detention centre more cases than it has the capacity to manage there and that includes more cases than it can furnish interview rooms for, for representatives.

Other than for those with exclusive contracts, rooms in the detained fast-track were made available for a limit of two hours at any one time although it was be possible, depending on room availability, to book a two-hour session in the morning and a second one in the afternoon or evening. A representative seeing a client for a morning and afternoon session would not usually have the time to return to their office/ place of work in-between a morning and afternoon or evening appointment, because of the location of the detention centres and so they would not be able to progress a client's case in that intervening period: they had no access to the internet for country research (they were not permitted to take in a dongle to get an internet connection) nowhere private outside the interview room to make confidential calls, speak to witnesses, experts or to send faxes etc. A representative working such accelerated procedures is thus faced with "dead time".

The failure to escort clients (or in some cases representatives) to the interview rooms in a timely manner can eat the time allotted for the lawyer/client interview. Security opens to admit representatives at the time for which the first morning or afternoon appointment has been booked so time is lost, particularly for those further behind in the queue. For example at Harmondsworth a representative can wait 30 or even 45 minutes for security to take them into the detention centre. Time lost because of delays in the start time of the interview caused by the detention centre was not added to the interview time at the end.

***Difficulties collating evidence***

Detained persons are ill-placed to gather evidence. In the detained fast-track, requests for further time to gather evidence going to meeting the criteria to be taken out of the fast-track had to be argued for, orally or in some cases in writing. It could take a day or two to get a response to such a request.

After the interview it is necessary to go through the interview with the client, identify any omissions or confusion or concerns raised by the interviewing officer and make representatives and/or amass and collate evidence to address these. Given the accelerated timescales, clients in accelerated procedures were frequently exhausted by the preparation for the interview and the interview itself and found it difficult to focus.

The Legal Aid Agency will not normally authorise payment for an expert report until after a claim has been refused by the Home Office. The rationale is that an expert report may be unnecessary as the Home Office may accept the case. This means that an expert cannot be instructed prior to the decision on the claim, and that the time for identifying, instructing and obtaining a report is limited to the time between service of the decision and the appeal hearing. Obtaining statements, corroborative evidence and documentation, and if necessary translation, within the proposed timescales would be impossible in most cases. [21]

[21] See the discussion in *Detention Action* [2014] EWHC 2245 (Admin) at paragraph 182.

See our comments on legal aid in response to question one. Where a client is represented privately, even if expert evidence is identified as being required, the client may be unable to afford this, with the result that nothing can be submitted.

Conditions in detention militate against a relationship of trust being formed and this can affect the quality of evidence obtained. In accelerated procedures, it is extremely unlikely that persons will develop sufficient trust in their representatives and the process itself to disclose all information relevant to their claim. This problem is compounded by individuals subject to detention often finding it hard to trust representatives allocated by the authority that has detained them or to trust medical staff working at the place of detention.

Cases of persons who have been tortured or trafficked, are survivors of domestic violence or who have mental health problems are often not easy cases to represent in any circumstances: they can be time-consuming, confusing and exhausting. In detention many suffer very poor sleep, intrusive memories of their past experiences, flashbacks and high levels of fearfulness about what is going to happen to them next. They find triggers to recalling past detention experiences everywhere in the detention centre. The challenges are compounded by the logistical problems resulting from detention and the distress of the client, and the effect of both of these and the accelerated timescale upon attempts to build a relationship of trust and confidence with the client.

***Fairness at hearing***

Dr Nick Gill at the University of Exeter is undertook research into immigration appeals. He has shared with ILPA a snapshot of the findings generated through the observation of 240 non-fast track cases, observed between February and August 2014 and 50 fast-track cases, collected between September and December 2014. Benchmarks were created using guidance for judges and immigration judges scored against these. The statistics were analyzed by an independent statistical consultant.

The findings of Dr Gill's research suggest that the speed of the fast track timetable created difficulties for all involved in a hearing. His team found that legal representatives who appeared ill-prepared in 12.5% of cases observed. It found Home Office presenting officers introducing new evidence in their submissions not covered in cross-examination in 8.3% of cases (outside the fast track the figure was 2.6% of cases) and presenting officers who appeared ill-prepared in 5.4% of cases. Presenting officers asked overly complex questions or multiple questions within a question in 37.8% if cases observed. If asking more than two questions, legal represwentat5ives indicated a structure to their examination in chief and sign-posted each group of questions as they were arrived at only 5.6% of the time in the fast track, compared with 29.6% of the time outside it. Over 60% of adjournment requests were granted outside the fast track, compared with just over 30% within the fast-track. No evidence has been provided to suggest that the proposed timescale addresses these difficulties.

***Other factors: resources***

The time a case takes is also a question of resources, as Mr Langstaff indicated in the extract from his letter cited in our response to question one above. The fewer days individual tribunal judges are sitting the more time they have to write up cases and the fewer permission applications an immigration judge is dealing with the more quickly they will be able to dispose of them. At the moment we see some very long waiting times indeed for listings in both the First-

tier and Upper Tribunal (Immigration and Asylum Chambers) and are aware that questions of resources have been identified as a reason for this. It ill behoves the Ministry of Justice to fail to resource procedures properly and then to try use delays as a justification for re-introducing a fast track.

The management information in paragraphs three and twenty of the consultation paper may reflect resource constraints. The suggestion in paragraph 23 of the consultation paper that resources and staffing could be better managed with a fixed timetable fails to reflect that the procedure is intended to allow for flexibility: for cases to be taken out of the process or given extra time at the case management stage if they cannot be dealt with within the proposed timescale. Certainly can only be achieved at the expense of justice and of a tailored response to the circumstances of the individual case.

Good planning is the way to incorporate the need for a flexible response into the principal rules. This can be done: the Home Office currently askes staff in one location to do work on cases emanating from other parts of the system while the Tribunal makes considerable use of fee-paid part time immigration judges, many of whom are likely to have less work than they desire if the government achieves its aim of fewer in-country appeals, thorough a combination of fewer appeals and fewer of those held in country[22]

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

6. This is a leading question and we do not agree with its premises. We consider that an oral case management review hearing should be timetabled in all cases, and voided only by agreement between the parties.

Given the assumption in the impact assessment that legal aid in immigration cases will come from applications for exceptional case funding we consider it likely, because of the problems with that funding set out in our response to question one above, that in any procedure there could be a significant number of unrepresented appellants who would be wholly unable to deal with a paper case management review.

Many persons will be unable to afford to pay lawyers to represent them whether for a paper or an oral case management review. This lack of ability to pay is one reason for few requests for oral case management review hearings. Even where a case is funded by legal aid, the fixed payment available for attendance at an oral case management review hearing is small and it ill-suited to those attending for just one case rather than a series of reviews heard together.

The default setting in any procedure where there are likely to be unrepresented appellants should be an oral case management review hearing, at both parties are represented, since little can be achieved if the only the tribunal judge and the appellant are present. Unrepresented appellants are unlikely to be able to furnish the material to make a paper case management review successful in managing how the case is to progress.

[22] Amendments effected by s 94B of the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2016 with effect from 1 December 2016. The Immigration Act 2016 (Commencement No. 2 and Transitional Provisions) Regulations 2016 (SI 2016/1037 (C.74)).

Paper case management review hearings are acceptable where this is agreed between the parties.

It is suggested at paragraph 64 of the impact assessment that a case management review hearing will mitigate the risk of onward appeals on the basis that the procedure was too fast for the First tier-tribunal to consider the case fairly. We do not consider that a paper hearing, for which an unrepresented appellant has to apply, has any prospect of mitigating this risk. What a lawyer can do at a case management review hearing will be wholly dependent upon the evidence and information they have been able to amass prior to that hearing. The assumptions are sanguine.

Paragraph 67 of the impact assessment states that no assumptions have been made as to the effect of the reviews on detained appeal volumes.

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

7. No.

We consider that the appropriate criteria for adjournment are those set out in rule 2 of the principal rules, dealing with the overriding objective. Nor are we aware of any evidence that those rules have not served to date.

Paragraph 38 of the consultation paper may suggest ('if it is not ready') that parties could turn up to a case management review hearing and find that the case proceeded directly after an oral case management review. This is impracticable. It is would make it necessary to prepare the case in full and be ready to proceed at this stage. As explained, the viable way to be present at a case management review hearing is to do a number of them all together.

In paragraph 39 of the consultation paper views are invited as to whether rules should specify a fixed timetable after an adjournment in which an appeal should be listed. An adjournment is given because it is required for the just disposal of the case and the reason for the adjournment will determine how long the adjournment needs to be. If a case is adjourned to obtain evidence that will take six weeks to obtain, there is no point in listing it for 15 days hence. The question is rather whether an adjournment beyond a certain period should result in the case's being lifted out of the procedure. No argument is provided in support of the suggestion at the paragraph 38 that it should be possible to adjourn the case for longer than 15 days but nonetheless have it remain in the procedure and this appears to run counter to all the statements in the consultation paper about the 'benefits' to persons from a short period in detention.

See above as to why we consider that there should not be a fixed maximum for the period of any adjournment.

A default paper review will not meet the concerns of the Court of Appeal, particularly where a person is unrepresented. It is not, as it is presented, a compromise, but rather is off point.

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

As indicated above, we do not agree with the proposals for a new expedited appeals procedure in detention.

Were such a procedure to be established, contrary to our representations, then we do not consider appellants should be required to pay a fee.

Appellants are being deprived of their liberty for administrative convenience and the preparation of their appeal is rendered more difficult thereby: they are not free to collate evidence or to see a legal representative. The State having put them in a position where justice is less likely to be done, the State should provide a lawyer to assist them. A lawyer was identified as Ouseley J in the *Detention Action* as an essential safeguard.[23] No one should be denied this because of lack of ability to pay.

To expect tribunal judges to run cases to an accelerated timetable without the assistance of legal representatives is to add to their workload, create conditions in which they will find it difficult to make best use of their case management powers and to impair their ability to do justice in the individual case.

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

No.

See our introductory comments. Rules are made by the independent Tribunal Procedure Committee. This in its turn safeguards the independence of the tribunal judiciary.

We are aware that the government has previously compelled the Tribunal Procedure Committee to exercise its powers, in s 7 of the Immigration Act 2014. The independence of the judiciary has been under attack in recent weeks. The reputation of the Ministry of Justice and the confidence of judges and lawyers in it is very much at stake.

We consider this consultation to be an unwarranted interference with an independent committee, all the more so because the committee has already consulted on and determined this matter. It is open to the Home Office and the Ministry of Justice to convince the Committee that rules are needed and the Committee indicated in the response of Mr Justice Langstaff on 12 February 2016 what it would need to see from the Home Office to lead it to reconsider. This evidence has not been provided. We assume that this is because it does not exist.

[23] *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) (09 July 2014

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

We have read the impact assessment with care. We have detailed our concerns with it *passim* in our responses to the questions above and do not repeat those statements here.
The Ministry of Justice's inviting the Tribunal Procedure Committee to make rules does not determine whether it will do so or, if it does what the content of those rules will be. It is troubling that the impact assessment proceeds on the basis that the independent committee will do what it is told.

We welcome the clear statement in the impact assessment that the Court of Appeal identified that the fast track rules of 2014 were unlawful. We welcome the clear statement at paragraph 7 that accelerating an appeal must not compromise access to fair and effective procedures. It is stated in paragraph 31 that it is assumed that the outcomes from claimants wold be unaffected by the introduction of an expedited appeals process. At paragraph 63 it is assumed that final decisions in appeals would be unaffected because time limits and case management reviews would offer sufficient time to prepare an appeal and the safeguards to allow a case to fall out of the fast track. We disagree for the reasons given in answer to the questions above. We consider these assumptions to be false. It is false for the reasons that the Court of Appeal and high court identified an unacceptable risk of unfairness in the *Detention Action*, *JM* and *IK* cases and for the reasons given in our answers above.

It is stated in paragraph 26 of the impact assessment that more detailed modelling would be required to quantify any changes to length of detention, number of persons detained and numbers of appeals from detention. The Tribunal Procedure Committee indicated in the letter of Mr Justice Langstaff of 12 February 2016 that it would need to see more evidence that the principal rules were not delivering. In the circumstances we should have expected to see more detailed modelling undertaken.

It is stated at paragraph 25 of the impact assessment that detained appeal volumes could increase because as beds became free, more persons could be held. Paragraph 63 records the assumption that the capacity of detention centres would not change. This is contrary to settled government policy:

> *The report recommends that more use should be made of alternatives to detention in the UK, and I entirely agree with that recommendation. Our published policy already reflects the view that detention should be used only as a last resort, and that alternatives should be considered whenever possible. I am considering carefully what further steps may be taken in that regard.*[24]
> *The Government expects these reforms, and broader changes in legislation, policy and operational approaches, to lead to a reduction in the number of those detained, and the duration of detention before removal, in turn improving the welfare of those detained. Immigration Enforcement's Business Plan for 2016/17 will say more about the Government's plans for the future shape and size of the detention estate.*[25]

[24] Rt Hon James Brokenshire MP HC Deb 10 September 2015, col 600.
[25] Immigration Detention: Response to Stephen Shaw's report into the Welfare in Detention of Vulnerable Persons: Written statement - HCWS470, 14 January 2016, per Rt Hon James Brokenshire MP.

See also paragraph 32 and 33, which envisage more persons being detained. See our response to question two.

Paragraph 40 of the impact assessment suggests, by extrapolation from the number of case management review hearings, that it is envisaged that the process would comprise 1,800 detained accelerated appeals per annum. This is not compatible with the government's stated policy to detain fewer persons, for less time.

We are told that the National Offender Management Service may face costs of up to £61,000 for escorting foreign national offender prisoners. At costs of £160 this assumes 381 will be in prison, which accords with the estimate of 380 prisoners. We are then told that not all transfer costs (e.g. moving prisoners to another prison) have been monetised. There seems to be an assumption that a prison near a hearing centre will be suitable for holding persons under Immigration Act powers, who should not be held with convicted persons and who need facilities to see legal representatives and to prepare their case.

We do not understand the comment in paragraph 27 insofar as it is suggested that the swifter determination of an appeal by one prisoner may affect the total number of appeals from prisons unless it is being suggested that a certain number of beds will be kept in prisons, for example near hearing centres. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recommends that foreign national prisoners, if they are not deported at the end of their sentence, be transferred immediately to a facility which can provide conditions of detention and a regime in line with their new status of immigration detainees."[26] The National Offender Management Service has stated

> *The view of the National Offender Management Service (NOMS)/ HM Prison Service, as outlined in Prison Service Instruction 52/2011 Immigration, Repatriation and Removal Services' (2011) is that: "Immigration detainees should only remain or be moved into prison establishments when they present specific risk factors that indicate they pose a serious risk of harm to the public or to the good order of an Immigration Removal Centre, including the safety of staff and other detainees, which cannot be managed within the regime applied in Immigration Removal Centres. This regime derives from Detention Centre Rules and provides greater freedom of movement and less supervision than prisons, as well as access to the internet and mobile telephones*" (para 2.68)[27]

The evidence as to financial impacts appears highly speculative. Lack of clarity about legal aid, with the assumption that this will be dealt with through exceptional cases funding and thus no consideration of how many cases will be funded and how many will not, calls into question the assumptions on which the assessment is based. No evidence is provided at paragraph 70 for suggesting that there would be an increased number of exceptional funding applications for legal aid.

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[26] Council of Europe, (2013), CPT standards, CPT/Inf/E (2002) 1 - Rev. 2013 English', Strasbourg. Available at http://www.cpt.coe.int/en/documents/eng-standards.pdf See also its report on the UK Council of Europe, (2009), 'Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. CPT/Inf (2009) 30 ', Strasbourg. Available at http://www.cpt.coe.int/documents/gbr/2009-30-inf-eng.pdf

[27] See further Bail for Immigration Detainees' *Denial of justice: the hidden use of UK prisons for immigration detention Evidence from BID's outreach, legal & policy teams*, September 2014

As set out in paragraph 23, the timescales have yet to be determined. This renders all estimates of cost approximate.

The assessment is incomplete.

Not knowing the effects of the scheme on the volumes of appeals may, we are told, cause fluctuations in the net benefit but these are not estimated. These are risks to justice, not just monetary costs/benefits.

Risks of cases dropping out at the case management review stage have not been monetised. These too are risks to justice not just monetary costs/benefits.

- Costs of legal aid, already based on flawed assumptions as described above, have not been monetised (paragraph 48).

- Costs of transfers around the detention estate and of transferring persons in detention to hearing centres have not been monetised yet we are told that current costs are some eight million a year (paragraph 35) with an average transfer costing £161. The estimate in paragraph 35 under "Non-monetised costs" is £370,000, not an insignificant figure. This is without counting the costs outlined in paragraph 36 of transporting detainees displaced by appellants.

- Costs of National Offender Management Service Transfers of prisoners to prions near appropriate hearing facilities are not monetised (paragraph 46).

- Costs of case management review hearings are estimated at £270,000 per annum but, as per our response to questions six and seven this is not based on an accurate understanding of how the system of case management review might work.

- Costs of case management reviews to the Home Office do not record legal costs specifically relating to detained appeals. It would be helpful to see Home Office costs related to appeals.

- Estates and administrative costs of calculations for case management review hearings are excluded (paragraph 42). We are unpersuaded that the prospect of up to 1800 such hearings per annum, concentrated in tribunals near detention centres, is such that it would not mandate any change in estate or administ5rative staff numbers.

- Savings anticipated from fewer bail hearings are not monetised (and see our criticisms of the assumption that there will be fewer bail hearings.

- Home Office legal costs are stated to be available (paragraph 56\). No explanation is given as to what unavailable means.

- Costs to public bodies such as the NHS and other government departments are not assessed as this is stated not to be proportionate, but it is not explained how it has been established that the costs are such that the assessment would not be proportionate. It cannot be assumed, as does paragraph 13 bodies such as the NHS providing services in detention would not be affected when their records may be evidence in a case.

- We are told that savings in asylum support payments will be "£50,000 per annum (probably less). No explanation is given of how this figure is calculated, why "probably less" and how much less.

See further below.

The assessment of the costs of option one in paragraph 17 is asserted and not evidenced. The Ministry has failed to demonstrate, as Mr Justice Langstaff invited it to do, that the principal rules cannot be used to do justice. Indeed, the evidence is that it has not tried.

Paragraph 24 and Table 1 make reference to 1,500 persons in detention centres and 400 persons detained under Immigration Act powers in prisons. The effect on these numbers of recent fee increases is not addressed, despite the consultation providing no assurance of fee remission. We are told that a fee exemption for expedited appellants would incur cots of £380,000 per annum. This assumes that some 475 persons not already exempt have their appeals heard in the procedure. No explanation of this is given. This is later described as a saving to appellants but this is not explained. No costs to appellants have been monetised, which makes talk of savings to appellants tendentious. Consider for example the costs to family members of visiting, the loss of opportunities to get support from charitable and other sources which do not exist in the isolation of detention.

Nowhere in the impact assessment is the effect of the amendment of s 94B of the Nationality Immigration and Asylum Act 2002 by the Immigration Act 2016 with effect from 1 December 2016 considered. Indeed it is stated at paragraph 63 that it is assumed that total appeal volume would remain as now. This is a very significant omission and goes to volume and thus to all impacts.

We suggest also that the threat of certification while an appeal is in progress hanging over a detainee would render a detained appellate procedure oppressive. We further point out that s 78 of the Nationality, Immigration and Asylum Act 2002 means that a person cannot be removed while their appeal is pending, therefore use of certificates would render them irremovable, with no immediate prospect of an appeal, and thus eligible for release.

Statements in paragraph 18 about the time persons spend in detention fail to address how far lack of resources contributed to this. It is necessary to look at the stages at which lapses of time occurred to understand this. We are told persons waited 61 days for their appeal to be heard and 102 days in detention overall. Were they waiting for judges to write up? Was lack of resources the cause of the delay? Were they waiting for documentation for removal? Certainty is not produced by a decision which is later challenged when further evidence is obtained.

It is stated that 'time taken to determination for some Foreign National Prisoners can be considerable" but we are not told why. The reasons for this are, we suggest the very reasons that make their cases unsuitable for determination in accelerated procedures, for example the volumes of evidence in 'Nexus' cases.

There is an assumption that it is beneficial not to have persons living with uncertainty, but whether this is worse or better than their living with the certainty that the case has been decided in an unfair procedure is not address.

As to the non-monetised benefit of spending less time in detention:

- Persons may be detained for administrative convenience under the procedures who would otherwise have secured release.
- The costs of the effect of an unfair process must be offset against the benefit of spending less time in detention. .

A sentence such as "Keeping appellants in detention until the end of the appeals process is expected to reduce the prevalence of abscondment" is not English. If it means that fewer persons will abscond, we are not told how many abscond now; how many persons who would otherwise abscond would be detained under the fast track process and how many persons abscond from detention.

Paragraph 9 identifies groups affected. We are told that the impact on "legal service providers" has not been considered in detail. The reasons given for this do not withstand scrutiny. The central role lawyers play in any prospect of a fair system was identified by Ouseley J in *Detention Action*.[28] If the system can only work fairly if they work more hours than they are paid to work, and longer hours than is good for their health, then the system should be judged not to work fairly. For the reasons set out in our answer to question one, the system can only work fairly if they work more hours than they are paid to work, and longer hours than is good for their health. See comments on legal aid above.

Extra time spent in case management review hearings is not offset by a reduction in bail hearings. Under legal aid, bail is separately remunerated. It is wrong to regard a lawyer as having a lump of time that can be spent on case management or on bail. Lawyers have different specialisms and firms recruit according to their workload. The costs of this will depend on the detail of the proposals and the availability of legal aid. The assumption in paragraph 63 that costs of case management review hearings are offset by costs of bail hearings is not we consider supported by the evidence.

Paragraph 71 asserts that the policy is not expected to have any direct monetisable effects on business. This is not true. Law firms are businesses and it will affect them, for example if they are expected to make at risk exceptional funding applications.

We are unpersuaded by the assertion at paragraph 38 that there would be less need to consider release pending a hearing. Matters may come to light during preparation of a case, such as a history of torture, trafficking, sexual violence or mental or physical health problems that militate against detention. Many persons languish in detention because a bail hearing is never made. If they have a legal representative for an appeal, a bail hearing may be made. There is legal aid for bail even where this is not available for the substantive case.

We do not understand the statement at paragraph 53. Insofar as it is suggested that the costs of asylum support equal the costs of detention, we understand this to be false and the costs of detention to higher. Paragraph 54 we find incomprehensible. Could we understand it, we assume that it would be possible to produce a weekly cost of asylum support and to compare this with the weekly costs of detention, at £90 per day for a bed (paragraph 57). This would still not give a complete picture as, where a family is split, a person released would move in with their partner or partner and children in most cases.

[28] *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) (09 July 2014).

As to paragraph 69 on legal aid, it is stated that a new procurement exercise might be required. A new procurement exercise would be required in any event since detention centre legal aid contracts are currently being held over. Immigration removal centre contracts remain governed by the standard civil contract 2010. The stated intention to let new contracts from November 2015 did not happen, in part because of uncertainty about the future of the fast track.[29] There are many questions about the extent to which work since the suspension of the detained fast track does not constitute the same work as previously and ILPA has raised these wit the legal aid agency.

We urge the Ministry of Justice to request of the Home Office statistics on the date of entry into detention and the date of release from detention of those who have been through the detained fast track as well as whether they were removed, granted leave or released without the case being resolved.

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

We observe that no equalities impact assessment has been prepared for the proposals. The government is much better placed that ILPA to collect the data which might allow comments to be made on the effects of the proposals. Instead it has contented itself with a headcount. In the absence of an impact assessment, we refer you to the cases on the detained fast track, in particular the case of *R(JM) et ors* (CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015) and the associated 'trafficking and equality' cases *IK, Y, PU et ors* (CO 678/2015; 747/2015 and 814/2015) and the pleadings and evidence therein. The detained fast operated with an unacceptable risk of unfairness in particular in respect of groups at particular risk. The equalities analyses in the judgments are in point. We are particularly concerned about discrimination against those with disabilities.

It is asserted at paragraph 60 that there is "a clear advantage in having appeals more quickly with more certainty as to timing" and this is used as the justification for indirect discrimination. The "clear advantage" we have disputed above; there is only an advantage if appeals are determined fairly and for the reasons set out above we do not consider that they will be within a fixed timetable. Indirect discrimination will therefore not be justified.

The Home Office has guidance on persons who should not be detained and these include persons with protected characteristics including mental and physical health problems. Persons who should not be detained should not be subject to detained procedures. The *Detention Action, R(JM)* and *R(IK)* litigation, like Stephen Shaw's review, exposed the difficulties for the Home Office in identifying those who meet its criteria not to be detained whether pre entry into accelerated procedures or during them and those difficulties would persist in the proposed procedure. In *R(Hossain & Ors) v Secretary of State for the Home Department* (Rev 1) [2016] EWHC 1331 (Admin) (07 June 2016) Mr Justice Cranston held that the Secretary of State had not 'paid due regard in all aspects to her public sector equality duty in considering asylum claims in detention.' In the cases in *Hossain*, the claimants all had the benefit of legal representation

[29] http://dglegal.co.uk/news/legal-aid-agencys-intentions-tendering-remaining-categories-2010-standard-civil-contra/

and their legal representatives had indeed secured their release from detention. For the reasons given above, the proposed process would encompass immigrations, claimants unable to afford legal representation or to obtain it for free, some of whom would also be unable to pay the appeal fees. To discharge the public sector equality duty, the Home Office must consider the effect on such persons with protected characteristics. We suggest that the results of such consideration will be a conclusion that the process will not deliver justice.

Paragraph 63 asserts that there is no risk of harassment or victimisation if the proposals are implemented. We refer you to the Stonewall/UKLGIG report on LGBT persons in detention for evidence to the contrary.[30] We further refer you to the reports of abuse of women, both sexual and racial, in Yarls' Wood and to Stephen Shaw's report.[31] All the evidence is that the detention of persons does lead to risks of harassment and abuse, including of persons because of a protected characteristic.

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

There is a statutory bar on the detention of families with children save for a short period immediately prior to removal[32] therefore we do not anticipate that families will be detained in these procedures. Families could, however, be split under the proposals. It would be necessary to demonstrate that the decision to detain a member of a family had been taken with due regard to the need to safeguard and promote the welfare of children in accordance with s 55 of the Borders Citizenship and Immigration Act 2009, which takes precedence over any competing provisions of the Immigration Act 2016, governing bail, as set out in s 90 of that Act. Given this protection, we doubt that there will be a case where it is lawful to split a family. In the case of the newly arrived, children will be getting to grips with life in a strange country. This is the time at which the language skills of the family unit are likely to be at their weakest and uncertainty at its highest. Where a family has been living below the radar the point at which they are apprehended is likely to be a particularly unsettling and frightening one for children. Where a family member has served a prison sentence there will already have been a period of separation. There may have been very little contact given the remote location of many prisons and the limited or non-existent funds of families seeking asylum or without lawful to travel. To prolong the separation may damage family relationships, with long term consequences. Thus, in all these circumstances we consider that s 55 militates against detention.

There are also risks to the fair presentation of the case if the family is split. Different family members may be able to contribute different elements of an account. A parent struggling alone with children while their partner is detained may have less opportunity to collate evidence

[30] *No safe refugee: experiences of LGBT asylum seekers in detention,* UKLGIG and Stonewall, October 2016.
[31] Review into the welfare in detention of vulnerable persons: a report to the Home Office by Stephen Shaw, January 2016.
[32] See the Immigration Act 2014 Part 1.

We refer you to the research conducted by Bail for Immigration Detainees into the effects on children of a family member being detained: *Fractured childhoods: the separation of families by immigration detention.*[33]

Adrian Berry
Chair
ILPA
22 November 2016

[33] April 2013. Available at http://www.biduk.org/sites/default/files/FULL%20REPORT%20FRACTURED%20CHILDHOODS%20THE%20SEPARATION%20OF%20FAMILIES%20BY%20IMMIGRATION%20DETENTION.pdf