association of visitors to immigration detainees

Response to Ministry of Justice consultation on proposals to expedite appeals by immigration detainees
22nd November 2016

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

No, we don't agree. The objective of this proposal is purportedly to reduce the time spent in detention – without compromising access to justice. It is not clear that a maximum time period for determination of asylum appeals in detention is necessary to achieve this; a 'fast track' process may in fact hinder access to justice.

The timeframe for cases is currently decided by Immigration Judges on a case by case basis, as per the Principle Rules. It is their decision on how best to balance speed and fairness in setting deadlines. Imposing a timeframe through the introduction of separate rules for detained cases, would remove this flexibility and potentially run counter to justice by removing the discretion of the judge to decide on a case by case basis what is a just and fair approach to the timeframe required to determine an individual appeal. Asylum cases are complex and difficult and effective representation is hindered for those in detention who face far greater barriers to justice as a result of the Legal Aid system.

Further, there is no evidence to suggest that the unnecessary delays in the appeals process, which prolong detention, are due to a failing in the principle rules. Rather, the principle rules give judges discretion and flexibility to determine appropriate timeframes, and detained cases are already prioritised. It is therefore not clear why an additional set of rules are necessary.

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

No, we don't think an expedited appeals process should be put in place at all. The fixing of a timetable for appeals does not allow flexibility to consider the circumstances of the individual case. All cases should be dealt with in a timely manner, and detention should be for the shortest possible time, and as a last resort. This should be achieved not through fixed time limits but through the implementation of proper case management processes.

We are concerned that process does not include any screening to identify vulnerable people, one of the key failings of the previous 'Detained Fast Track'. The new 'Adults at Risk' policy, which came into force on 12th September, aims to reduce the numbers of vulnerable people detained, but it makes clear that many vulnerable people will still be detained if it is felt that the immigration control objectives outweigh their level of risk. It is not clear yet how this balancing of factors will be implemented, or indeed whether the new policy will achieve its objective of reducing the number of vulnerable people detained. The policy has already faced considerable criticism from specialist NGOs. Further, as of the 21st November 2016, permission has been granted for judicial review in nine claims whose focus is the adoption, within the new policy, of a more restrictive definition of torture.

We would therefore have serious concerns were the new 'Adults at Risk' policy be relied upon as a screening mechanism for any new expedited process. The Home Office consistently failed to identify cases of vulnerable people unsuitable for the old 'detained fast track' process, the absence of screening to identify vulnerable people who would be unsuitable for an accelerated procedure is a major concern. Further, the new 'Adults at Risk' policy only applies to those in IRCs, pre departure accommodation and short term holding facilities, and not to those in prisons.

The inclusion of those detained in prisons is also extremely problematic and may prove unmanageable. It is well documented[1] that immigration detainees in prisons face even greater barriers to justice; they are often isolated and with little access to the social supports and NGO/specialist supports available to those in IRCs. Worse, they are often without any legal representation, or access to immigration advice on legal aid. Not all prisons have Foreign National Prisoner Officers, and while statistics are produced on the numbers of immigration detainees in prisons, there is no publicly available information on where prison detainees are held. They are therefore extremely cut off from the processes through which any appeals decision could be made. The Home Office consistently issues deportation orders at the end of a sentence, rather than at an appropriate and timely point during the sentence. This has been highlighted by the Independent Chief Inspector of UK Borders and Immigration. Further, appellants in prison face greater challenges to making an appeal within any reasonable timeframe, let alone an expedited process: they cannot make or receive phone calls, they do not have access to the internet, and there is no provision for a 'Detention Duty Advice scheme' (rota of legal aid solicitors) in prisons. The HM Chief Inspector of Prisons (2015) reported on various concerns in relation to the legal advice provisions available to immigration detainees in prisons, concluding that restrictions on communication from prison 'impacts on access to justice'. To introduce a five day deadline on an appellant in prison is therefore unjust.

3. **Do you have any other proposals for alternative criteria to select groups who would benefit from an expedited appeals process?**

No. As outlined above we believe that timeframes should be set by judges on a case by case basis. It is unclear that there is any benefit to an expedited appeals process for any group, and in any case, the principal rules already give scope for individualised timeframes for determination, which should allow for timely processes that are also fair.

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

As outlined above timeframes should be set on a case by case basis and not for administrative convenience. Introducing a timeframe undermines access to justice.

This question is a leading question, in that it presupposes one agrees with the principle of time limits.

[1] See, for example, BID (2014) Denial of Justice: the hidden use of prisons for immigration detention

5. **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**

No. Again, the question can only be answered by the Tribunal on a case by case basis. 25 working days may be enough time for one particular case, but another may require significantly more or less. Imposing a time frame presupposes that each case is either as straightforward or as complex as the next and is not dictated by individual circumstance.

6. **Do you think that 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.**

Case management reviews should be in person in all cases. They are likely to involve complex issues of great weight, and therefore as a principle of justice all case management reviews should be oral, unless there is an agreement by both parties to resort to a paper review.

7. **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?**

We agree that judges should have the discretion to set a timeframe for the appeal hearing. We are not aware of any evidence that this has failed, and so it is unclear what purpose the expedited deadline serves.

8. **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 Appeals Chamber of the First Tier Tribunal? Please give reasons for your answer.**

We do not agree that appellants in detention or prison should be subject to a new expedited appeals process. We also disagree that appellants should be required to pay a fee. Appellants in prison or detention are incarcerated for administrative convenience; this deprivation of liberty by definition makes any preparation of the evidence and information required for appeal more difficult. The tight timescales involved will also increase the pressure for them and make the burden of proof for any exemption unrealistic. No one should be denied access to justice because they cannot afford to pay.

9. **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. Setting Tribunal Procedure rules is a judicial function, carried out by the independent Tribunal Procedure Committee. Setting the timescales involved is part of this process, and in order to safeguard the independence of the judiciary it is inappropriate for the Government – which is a party to these appeals – to impose timeframes.

10. **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 wish to highlight the following in relation to the Impact Assessment:

- It is assumed in the IA that an expedited timeframe is in the interests of appellants. However, the High Court and Court of Appeal found, in the Detention Action litigation, that short timescales can render expedited processes unlawfully unfair. Research by the NGO Detention Action (2015) indicates that people in detention prefer to have more time to make asylum appeals – even if this means they spend longer in detention. It is well documented that engagement with immigration control is more likely if the person feels that their case has been decided in a fair procedure. Evidence that suggests that appellants would prefer a less fair, but speedier process is not outlined in the IA.
- The IA refers to the mental health of a person in detention in relation to the 'short, fixed' time frame being likely to have a positive impact. There is no evidence to substantiate this, and Detention Action's research above suggests this may not be the case. Indeed, the enforced short timeframe would appear more likely to add to the stress and confusion of being detained and therefore have a detrimental effect on someone's mental health.
- The IA also repeats the assumption that it is the appeals process which is the cause of prolonged detention. However, long term detention is also caused by delays in securing travel documentation, or because they are stateless, or considerable periods are spent in detention before and after appeal. A reduction in the time spent in detention could be achieved in a myriad of ways, yet none of these have been considered in the proposal.
- At paragraph 18, it outlines that people waited a mean of 61 days waiting for their appeals to be heard and 102 days detained overall. We are not told why these lengthy periods occurred.

11. 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.

An equality impact assessment should be carried out, given the substantive nature of the changes proposed.

We would refer to the cases *R(JM) et ors* and the 'trafficking and equality' cases *IK, Y, PU et ors* which provide evidence of the equalities impacts of the previous DFT process in relation to vulnerable groups. The previous detained fast track was found to operate with an unacceptable risk of unfairness in relation to people at risk. These cases also provide information on the equalities impacts for those with protected characteristics of disability, sexual orientation and gender reassignment. Equalities impacts on individuals with other protected characteristics would have to be carried out. We would also highlight the findings in the *Shaw Review into the Welfare in Detention of Vulnerable People* which provides ample evidence of the risk of harm in detention of a range of different groups including those with mental health needs, lesbian gay or transgender people in detention, or people who have been trafficked. A recent report by Stonewall and UKLGIG (2016) *No Safe Refuge: Experiences of LGBT asylum seekers in detention* also contains evidence of

the harassment and victimisation faced by LGBT persons in detention. For some appellants, their sexual orientation or gender identity may be the grounds for their asylum claim. These are incredibly complex cases with evidential requirements very high, and therefore they are extremely likely to be disadvantaged by an accelerated procedure.

12. 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.

We refer you to the research by NGO Bail for Immigration Detainees (BID) which details the effects on children of a family member being detained[2].

For appellants in prison, Article 8 grounds feature in many deportation appeals. An expedited timeframe would place unrealistic timeframes for these cases, which often rely on witness statements, a logistic and financial burden on family members that they may not be able to meet.

[2] BID (2013) Fractured Childhoods: the separation of families by Immigration Detention