

LIBERTY

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**Liberty's response to the Tribunal Procedure Committee's
Consultation on Tribunal Procedure (First-tier Tribunal)
(Immigration and Asylum Chamber) Rules 2014 and
Tribunal Procedure (Upper Tribunal) Rules 2008 in relation
to detained appellants**

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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Question 1: Do you think there should be specific rules setting down time limits in cases where an appellant is detained in an Immigration Removal Centre that differ from those in the Principal Rules?

Question 2: How long is it reasonable to expect most appellants detained in an Immigration Removal Centre to be able to:

- a) Lodge a notice of appeal after receiving a decision?***
- b) Prepare for a hearing after lodging a notice of appeal?***
- c) Request permission to appeal after receiving a judgment?***

Renew a request to appeal to the UT after permission is refused by the FTT?

Question 3: How long is it reasonable to expect the respondent to be able to:

- a) Provide the relevant documents after receiving the notice of appeal?***
- b) Request permission to appeal after receiving a judgment?***

Renew a request to appeal to the UT after permission is refused by the FTT?

Question 4: Should the rules impose time limits on judges dealing with appeals where a party is detained? In particular, should the rules require that:

- a) Judges produce a decision within a specified timeframe; if so, what should that timeframe be?***
- b) FT Judges produce a decision on an application for permission to appeal within a specified timeframe; if so what should that timeframe be?***

UT Judges produce a decision on an application for permission to appeal within a specified timeframe; if so what should that timeframe be?

Introduction

1. Liberty welcomes the opportunity to feed into the Tribunal Procedure Committee (TPC) consultation on the reintroduction of a 'detained fast track.' Liberty responded to the Ministry of Justice's (MoJ) consultation on the same issue in November 2016 and has for many years worked in coalition with other detention organisations to support the rights and welfare of those held in immigration removal centres (IRCs).

2. Liberty does not believe that there should be specific rules setting down time limits where an appellant is detained in an IRC separate to those of the Principle Rules. Liberty, once again, would urge the Government to abandon its commitment to a discredited detained fast track procedure. Instead, a focus on engagement with individuals in the

community and a thorough process of case management should be prioritised over resurrecting a process which the Court of Appeal found to be ‘structurally unfair and unjust’.¹

3. Liberty welcomes recent Home Office announcements on the introduction of pilots examining alternatives to detention.² Alternative approaches have been shown to produce considerable savings and offer a chance for the Government to pursue its policy objectives of reducing the time people spend in detention; securing compliance with decisions; and reducing the absconding rate. Critically, in Liberty’s view, they also offer the opportunity to uphold the basic rights of individuals.

Tinkering with an ‘unfair’ system

4. There was little difference between the proposed new fast track system that the MoJ set out in 2016 and its discredited predecessor. Two of the main differences were longer time-scales and the introduction of a routine ‘paper review’ by judges prior to appeal. Since the 2016 consultation, the Home Office and the MoJ have agreed that it would not be ‘operationally practical’ to include foreign individuals who have served a criminal sentence held in prison within any fast track rules.³ Our previous 2016 consultation response outlined the extreme difficulties and access to justice problems that a fast track system would create for those held in prisons. It is therefore worrying that the Government has also noted their desire to overcome operational issues going forward. As such we echo our comments from the 2016 MoJ consultation:

*‘Liberty believes that the present proposals simply repackage, in some respects exacerbating, unjust and unlawful features of the old regime. In doing so they demonstrate a lack of respect for the judgment of the Court of Appeal in the Detention Action case and invite a finding that any new fast track system is manifestly unfair and, therefore, unlawful’.*⁴

5. The proposed timescales of a new extradited system from the MoJ of between 25 to 28 days would lead to tangible unfairness in many cases. The very existence of an expedited system for a category of appellants would exert a powerful influence on judges and distort the operation of vital judicial discretion in individual cases. The safeguards

¹ R (Detention Action) v First-tier Tribunal and others, paragraph 45, [2015] EWHC 1689 (Admin)

² HC Deb 24 July 2018, vol 645, col 908

³ Consultation on Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to detained appellants, paragraph 17

⁴ Liberty’s response to the Ministry of Justice’s consultation on proposals to expedite appeals by immigration detainees, paragraph 5

suggested are simply not strong enough to counteract the critiques of the original system. We will focus on safeguards in our answer to questions 5 and 6.

6. Liberty believes that any deadlines imposed by a new expedited system would curtail the ability of judges to make case-by-case decisions in the necessary time required to ensure a fair hearing. The Court of Appeal in the *Detention Action* case concluded that it was 'likely' that judges will consider any time limits to be the default position, [as] the expectation must be that the time limits will usually be applied. Otherwise the object of the time limit would be defeated'.⁵ We are concerned that new rules with rigid timeframes would likewise be seen as the default. This is particularly concerning given the current average length of time it takes for an appeal to be resolved exceeds the 28 day maximum currently being suggested by the MoJ.

7. In 2017/18 it took an average of 4.5 weeks following the receipt of an appeal to reach a substantive hearing in the Immigration and Asylum Chamber (IAC). It took an average of 9.3 weeks from receipt of an appeal for the IAC to issue a judgment disposing of the case.⁶ Liberty is unaware of any concerns raised by civil society that the Principal Rules create unfairness in and of themselves. Liberty is also not aware of any Home Office concerns that the Tribunal is creating unnecessary delays or enabling appellants to hold up the process. If this is the case, the Home Office should present evidence to this effect. The TPC is right to identify a clear tension between speed and the fairness of the process. Yet, as the *Detention Action* ruling emphasised 'speed and efficiency must not trump justice and fairness'.⁷ The Principal Rules do not prevent cases from being disposed of quickly where this can happen without the fairness of the process being infringed upon.

8. It is important to reiterate that legal representatives of people held in detention face far greater obstacles in accessing their clients than in non-detained cases. In the *Detention Action* case, the Court of Appeal found that: "*The combination of a highly expedited timetable and the fact that the appellant is in detention makes [the task of producing corroborative evidence] very difficult*".⁸ The Court further listed, as a central flaw in the system, "*the problems faced by legal representatives of obtaining instructions from individuals who are in detention*".⁹ Despite the suggested longer time frame any expedited

⁵ *Detention Action* judgment, paragraph 44

⁶ Consultation on Tribunal Procedure, paragraph 36

⁷ *Detention Action* judgment, paragraph 49

⁸ *Detention Action* judgment, paragraph 19

⁹ *Detention Action* judgment, paragraph 37

procedure would raise the same concerns because it erodes the judicial flexibility contained within the Principal Rules.

9. In addition, the TPC is right to consider the recent Supreme Court case, *R (UNISON) v Lord Chancellor*¹⁰, which held that any procedural regime must not create a real risk of creating barriers to effective access to justice.¹¹ That case also made clear that any intrusion on the right to access to justice must not be greater than is justified by the objectives it intended to serve. It is also important to point out that while the Home Office may balance immigration control objectives against the right to liberty and risk of harm to individuals, this is not the case when it comes to the right to fair asylum process and non-refoulement. Liberty believe that a fast track system in line with the MoJ's most recent proposals would leave the TPC unable to dispense their duty to create rules which ensure that justice is accessible and fair.

Question 5: If specific rules were made in relation to cases where an appellant is detained, should they also provide for a case management review in all cases? Should such a case management review involve a hearing?

10. The Government acknowledges that within an expedited process there is a 'risk of appellants being disadvantaged'.¹² However, they also believe that this can be mitigated with sufficient safeguards. One of those safeguards is a case management review of all cases. In short the safeguards suggested are not strong enough to counter the disadvantage caused, and not enough thought has been given on how to stop vulnerable people entering an expedited process in the first place.

11. The MoJ outlined a system of a routine paper review of expedited cases as well as judicial discretion to order a case management hearing. One concern with hearings happening mainly on the papers is that a paper review does not allow for the appellant's representative to engage with the Tribunal in the same way as a preparatory hearing attended by all parties. There is evidence from across the legal system which shows the material difference in outcome between paper and oral hearings.¹³ Paper hearings do not provide the same level of scrutiny as an oral hearing and may result in lower discharge rates. Looking at data from social security and immigration cases, it is apparent that individuals who opt for oral appeals experience higher success rates than those whose

¹⁰ [2017] UKSC 51

¹¹ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, paragraph 3

¹² Consultation on Tribunal Procedure, paragraph 9

¹³ R. Thomas, 'Oral and paper tribunal appeals, and the online future', January 2017.

cases are determined on the papers.¹⁴ In social security cases, the data shows that 48 per cent of appeals were allowed, as opposed to 15 per cent of paper appeals. Regarding immigration appeals, 50 per cent of oral appeals were allowed compared to 29 per cent of paper appeals.¹⁵ Paper reviews should not be relied upon as a sufficient safeguard to protect vulnerable people held in detention.

Screening

12. The Government has proposed no new screening process for entry onto a fast track system. With no adequate screening in place, the disadvantage inherent in the system is likely to disproportionately affect vulnerable detainees, such as those with learning difficulties or mental health issues who will find it more difficult to navigate an expedited process. Article 8 family cases involving young children will also be disproportionately affected as these claims require substantial evidence and witness involvement, which will be extremely difficult to secure in the timescales proposed.

13. The Government will point to the adults at risk process which is designed to screen and stop vulnerable people ending up in detention at the initial stage of being detained. However, it is clear from Stephen Shaw's second review into the welfare of those in immigration detention that the adults at risk system is not stopping vulnerable people ending up in detention. Shaw writes that *'it is the case that in my visits to IRCs I found many people whom I felt should not be there'*¹⁶ and that *'every one of the centre managers told me that they had seen no difference in the number of vulnerable detainees (and, in some cases, that the numbers had actually increased).'*¹⁷ Shaw went on to outline the inability of the current system to reliably recognise vulnerability and voiced concerns about the way the adult at risk system was functioning.

14. Given these concerns, it remains immensely worrying that being placed in detention would seemingly make you suitable to be placed on an expedited track. The Home Office proposals fail to distinguish factors that will make individuals unsuitable for detention from those making them unsuitable for a detained accelerated asylum process. The policy guidance focusses on suitability for detention and not suitability for fair determination in an

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons: A follow-up report to the Home Office by Stephen Shaw, pVIII

¹⁷ Ibid

accelerated asylum decision making process.¹⁸ There needs to be consideration of, for example, whether a person's mental health condition affects their ability to participate in an accelerated asylum determination process.

15. If the Home Office does not demonstrate that it has adequately addressed unfairness from the outset of the process, the TPC should not put forward a new expedited system. The courts have made clear that the availability of an appeal is not an adequate remedy against an unfair initial decision making process.¹⁹

Question 6: If specific rules were made in relation to cases where an appellant is detained, should the rules apply a different rule to adjournments than the Principal Rules? In particular, a) should the rules apply a different test when deciding whether a case should be adjourned; and b) should they require that the case be relisted within a particular timescale?

16. The Court of Appeal firmly concluded that the existence of a mechanism for securing short adjournments within the fast track, and the possibility of a transfer out of the fast track, did not remedy the unfairness ingrained in the system. A central reason for this finding was the likelihood that:

*“judges will consider the [Fast Track Rules] time limits to be the default position...the expectation must be that the time limit will usually be applied. Otherwise the object of the [Fast Track Rules] would be defeated”.*²⁰

As such the ability to adjourn or relist a case is not a robust enough safeguard to counter the inherent unfairness present within the system.

Question 7: Should the time spent in detention outside the tribunal process affect any decision on potential fast track rules?

Question 8: Do you have any other comments?

17. The Government argue that one of the reasons an expedited process is needed is to stop individuals being released and then absconding. However, the high rate of release during the appeals process, under the current Principal Rules, indicates that the risk of absconding is not considered to be particularly high. The Home Office has provided no

¹⁸ See Home Office: Adults at risk in immigration detention guidance, 2 July 2018

¹⁹ *(R (Refugee Legal Centre) v SSHD* [[2004] EWCA Civ1481).

²⁰ *Detention Action* judgment, paragraph 44

evidence to the Committee that a substantial proportion of those released do in fact abscond.

18. The Home Office has a range of powers to manage the risk of absconding in the community, including reporting and electronic monitoring, and can detain individuals when return is imminent. Indeed, this would reduce costs by preventing lengthy periods of detention.

Conclusion

19. Liberty agrees that people should spend as little time as possible locked up in detention. However, judicial scrutiny and access to justice should not be sacrificed for this aim. The wider context of detention, especially the periods of detention either side of an appeal need to be examined when considering the worthwhile aim of reducing the amount of time individuals spend in immigration detention.

20. A discredited and unfair process with no robust screening process and a reliance on paper hearings cannot be the starting point for ensuring the correct balance of between speed and justice. Liberty urges the TPC and the Government to move away from an expedited track model.