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Liberty's response to the Ministry of Justice's consultation on proposals to expedite appeals by immigration detainees

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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/

Contact

Bella Sankey
Director of Policy
Direct Line 020 7378 5254
Email: bellas@liberty-human-rights.org.uk

Rachel Robinson
Policy Officer
Direct Line: 020 7378 3659
Email: rachelr@liberty-human-rights.org.uk

Sara Ogilvie
Policy Officer
Direct Line 020 7378 3654
Email: sarao@liberty-human-rights.org.uk

Silkie Carlo
Policy Officer (Technology & Surveillance)
Direct Line 020 7378 5255
Email: silkiec@liberty-human-rights.org.uk

Sam Hawke
Policy Assistant
Direct Line 020 7378 5258
Email: samuelh@liberty-human-rights.org.uk

Background and context

1. On 12th October, the Ministry of Justice launched a consultation on a fast track procedure for determining the appeals of those held in immigration detention. The Government was forced to suspend the last incarnation of a detained fast track following a series of damning judgements culminating in the Court of Appeal decision in *R (Detention Action) v First-tier Tribunal and others* (the Detention Action Case) in July 2015.[1] The Court of Appeal upheld the decision of the High Court quashing the fast track procedure rules set out in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum) Rules 2014. It concluded that the fast track system was *"structurally unfair and unjust"*,[2] finding:

> "The scheme does not adequately take account of the complexity and difficulty of many asylum appeals, the gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from clients that are in detention."[3]

2. As acknowledged in the consultation paper, it is not for the Government to set new Tribunal Procedure Rules. Parliament has reserved that task to the Tribunal Procedures Committee (TPC).[4] The Government explains that its intention is *"to assist the TPC by providing a considered Government policy position"*.[5] At the same time it makes clear that it is considering pursuing primary legislation which would allow the Government, by Order, to set time frames for appeals in the Immigration and Asylum Chamber.[6] Liberty believes that this would be an inappropriate incursion into the judicial function. We are also concerned that the Government is attempting to influence the TCP's deliberations which should be guided by its statutory duty to "*secure that the proceedings are handled quickly and efficiently, but in a way which ensures that justice is done in the particular proceedings and that the system is accessible and fair.*"[7]

3. In the Detention Action case, the Court of Appeal expressed similar concerns about historic attempts by Government to influence the decision making of the TPC:

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[1] [2015] EWCA Civ 840.
[2] *Detention Action* judgement, paragraph 45.
[3] *Detention Action* judgement, paragraph 45.
[4] Tribunals, Courts and Enforcement Act 2007, paragraph 28 of Part 2 of Schedule 5.
[5] Ministry of Justice, *Immigration and Asylum Appeals: Consultation on proposals to expedite appeals by immigration detainees*, paragraph 12.
[6] Consultation, paragraph 49.
[7] Court of Appeal's statement of the statutory objectives set out at section 22(4) of the Tribunals Courts and Enforcement Act. *Detention Action* judgement, paragraph 22.

> "The material that we have been shown indicates that during the consultation process the Tribunal Procedure Committee itself and most of the consultees expressed great concern about the unfairness of the proposed [Fast Track Rules]. It should be noted that the Tribunal Procedures Committee decided to support the proposed rules after correspondence from the then Lord Chancellor in which he raised the possibility of his overruling the Tribunal Procedure Committee's initial view and supporting the position of the [Home Secretary]."[8]

4. In defending the previous system before the Court of Appeal, the Government argued that the Court must show adequate respect to the decisions of the TPC.[9] Liberty urges Ministers to heed their own advice. The TPC is a body tasked with matters central to the administration of justice. The Government's apparent willingness encroach on its decision-making powers reveals both disrespect for its independence and for the vital separation of executive and judicial functions which underpins the rule of law. The Government argues that there would be Parliamentary oversight of its new order-making power, but in reality, executive orders are subject to strictly limited democratic oversight.

The proposals

5. The overarching areas of difference between this proposed system and its discredited predecessor are longer time-scales; the introduction of a routine "paper review" by judges prior to the appeal hearing; and the extension of the scheme to include everyone pursing an immigration or asylum appeal whilst detained. 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 judgement 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.

6. Under the proposed new system, all stages of an appeal would be required to conclude within 25 working days. A further 10 days would be granted for determination of whether an applicant has permission to appeal to the Upper Tribunal. The consultation seeks views on whether or not set time limits should be introduced for each stage of the appeals process. It suggests, for example, 5 working days for the appellant to lodge a notice of appeal, with the appeal to be listed 10 working days after the respondent serves its

[8] *Detention Action* judgement, paragraph 29.
[9] *Detention Action* judgement, paragraph 28.

bundle.[10] Under the principle Tribunal Procedure Rules, appellants have 14 days in which to issue a notice of appeal and there is no time limit for the listing of an appeal. Yet representatives of those in detention face far greater obstacles to accessing their clients than exist 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."*[11] 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."*[12] The expedited, detained procedure proposed by Government would be manifestly unfair for the same reasons.

7. 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 engrained 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."[13]

As a claimed concession to the concerns of the Court of Appeal around the difficulties of securing a transfer out of the fast track, the Government is offering a routine paper review of expedited cases and a judicial discretion to order a case management hearing. 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 the parties. The Government further fails entirely to respond to the Court's concern that an expedited procedure will likely be viewed as the default position by judges.

8. The new proposed procedure would expand the fast track system to scoop up all those pursuing appeals in the detention estate, without reference to the complexity or nature of their claim. This would exacerbate the Court of Appeal's concern at the unfairness caused by a system that fails to accommodate *"the complexity and difficulty of many asylum appeals"*.[14] Absorbing those pursuing immigration or asylum claims from any place of immigration detention – including prisons – into the process would also exacerbate concerns

[10] Consultation, p.10.
[11] *Detention Action* judgement, paragraph 19.
[12] *Detention Action* judgement, paragraph 37.
[13] *Detention Action* judgement, paragraph 44.
[14] *Detention Action* judgement, paragraph 45.

about the limited access representatives have to their clients. The severe difficulties faced by immigration detainees held in prisons have been well-documented by groups such as Bail for Immigration Detainees and Her Majesty's Inspectorate of Prisons, amounting to obstacles additional to those already serious problems faced by those in the immigration detention estate.[15]

9. The proposed timescales, combined with the expansion of the system, would lead to tangible unfairness in a great 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 Government proposes no screening process for entry onto its new fast track system. The injustice inherent in the system is therefore 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. The removal of legal aid in Article 8 deportation cases will further leave many of these individuals unrepresented. The Government has created an internal *"family test"* to encourage its departments to consider the impact of their policies on *"promoting strong and stable families"*.[16] Liberty believes that the Ministry of Justice has failed the Government's *"family test".*

10. The Government does not commit to ensuring Tribunal fee exemptions would apply to all those in the proposed system, noting that the Court system loses revenue from fee exemptions.[17] Those in detention have no means of generating income. An astonishing barrier to the Tribunal which would be created if these individuals were required to pay recently and dramatically increased Tribunal fees, including the £800 cost of an oral hearing. The paper further leaves the question of the future availability of legal aid in detained cases open, reserving the option to devise a system which would be even more unfair, if implemented, than that already attempted.

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[15] See, for example, Bail for Immigration Detainees (BID), 'Denial of justice: the hidden use of UK prisons for immigration detention', September 2014, available here: http://www.biduk.org/new-bid-report-hidden-use-prisons-immigration-detention, and HM Inspectorate of Prisons, 'People in prison: Immigration detainees', November 2015, available here: https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2015/11/HMIP-Immigration-detainees-findings-paper-web-2015.pdf.

[16] Consultation, paragraph 66.

[17] Consultation, paragraph 47.

The alternatives

11. The Government argues that it has responded to the criticisms of the Court in proposals for a new expedited appeals procedure for detainees. Liberty strongly disagrees. We are also disappointed to see that the Government lacks the imagination and ambition to consider the benefits of overcoming its expensive dependence on immigration detention. Liberty shares the Government's stated aim *"to reduce the time some appellants spend in detention while their appeal is being determined."*[18] We are, however, baffled by its suggestion that the two policy options available for achieving this aim are (a) doing nothing; and (b) slightly modifying, extending and reintroducing the discredited fast track system.[19] The obvious policy alternatives that the Government has failed to explore are those which would allow individuals to pursue claims and appeals in the community. This approach brings the dual benefits of respect for basic human rights and a massive reduction in public spending on the immigration detention estate.

12. In its consultation paper the Government expresses the view that:

> "…there will always be some individuals who are determined not to comply with immigration laws …for these individuals a decision to detain in order to enforce immigration control pursues a legitimate aim…"[20]

At other points in the paper the Government speaks to its concern that *"those who are determined to breach the UK's immigration laws may abscond. This results in extra resources being required to relocate individuals."*[21] Yet there is a large and growing international evidence base which demonstrates that alternatives to detention are not only a more humane and less expensive option, but also encourage greater compliance with negative decisions and reduce absconding rates.

13. Earlier this year, Detention Action published a comprehensive report highlighting the many examples of successful alternatives to detention based on engaging individuals in the asylum or immigration process.[22] In Australia, the process for in-country asylum applicants makes extensive use of alternatives to detention. Many migrants are supported in the

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[18] *Immigration and asylum appeals. Proposals to expedite appeals by immigration detainees*: Impact Assessment, page 1.
[19] Impact Assessment, page 1.
[20] Consultation, paragraph 22.
[21] Consultation paragraph 22.
[22] Detention Action, *Alternatives to Detention in Returns Procedures,* September 2016. Available at: http://detentionaction.org.uk/wordpress/wp-content/uploads/2016/09/Without-Detention.pdf.

community by Status Resolution Support Services which assist people to engage with the immigration system and work towards the resolution of their cases. Meanwhile, NGO case managers help individuals to meet needs such as housing and welfare in the community, making people feel respected and engaged in the process. A pilot evaluation of this scheme had a compliance rate of 93% and the programme led to a 70% saving in expenditure.[23]

14. In Sweden, an emphasis on case management has allowed for a significant shift away from the use of immigration detention, yet the rate of compliance with decisions to refuse asylum remains extremely high.[24] In 2015, the Parliamentary Inquiry into the Use of Immigration Detention in the UK urged the Government to follow the example set by countries like Sweden and pursue community-based alternatives to detention. Inquiry panel members reviewed the operation of the Swedish system and reported that its early intervention case management model means the country:

> "rarely has to resort to coercion when removing unsuccessful asylum seekers. Indeed, there are only 255 detention places available in the entirety of Sweden and the detention capacity has been stagnant for the last decade."[25]

15. Detention Action also reported on successful pilot projects in the US which led to a national roll-out of government funded alternatives to detention.[26] The involvement of local NGO partners allowed for a level of community support to be provided to individuals to enable engagement with the immigration process. Again, a focus on support and case management meant people felt they were treated fairly. As a result they were more willing to comply with adverse immigration decisions.[27] The Women's Refugee Commission in the US details the impact of a joint scheme run by the Immigration and Naturalization Service and the Lutheran Immigration and Refugee Service. It involved management of the claims of previously detained Chinese asylum seekers in the community. Individuals were provided with shelter, food and medical assistance and there was a focus on case management. The costs of this service were 3% the cost of detention, yet there was a 96% rate of appearance at required hearings.[28] A further, larger study sponsored by the Immigration and Naturalization Service and involving over 500 individuals, including asylum seekers,

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[23] Detention Action, *Alternatives to Detention in Returns Procedures*, page 37.
[24] Detention Action, *Alternatives to Detention in Returns Procedures*, page 37-38.
[25] All Party Parliamentary Group on Refugees and the All Party Parliamentary Group on Migration, *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom*, p. 28.
[26] Detention Action, *Alternatives to Detention in Returns Procedures*, p. 38.
[27] Detention Action, *Alternatives to Detention in Returns Procedures*, p. 39.
[28] Women's Refugee Commission, *The Real Alternatives to Family Detention*, available at: https://www.womensrefugeecommission.org/rights/gbv/resources/1183-atd-july-2015.

produced similarly encouraging results:

> "The program saved taxpayers $4,000 per participant, boasted a 91% overall appearance rate at required hearings, and a 93% appearance rate for asylum seekers."[29]

16. Liberty urges the Government to abandon its commitment to the discredited detained fast track and investigate policy alternatives based on close engagement with individuals in the community and a thorough process of case management. These alternative approaches offer considerable savings and the 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. Most critically, in Liberty's view, they also offer the opportunity to uphold the basic rights of individuals in our asylum and immigration system.

Rachel Robinson
Sam Hawke

[29] Women's Refugee Commission, The Real Alternatives to Family Detention.