Public Law Project

Response to 'Immigration and Asylum Appeals: Proposals to Expedite Appeals by Immigration Detainees' consultation

22 November 2016

The Public Law Project (PLP) is a national legal charity founded in 1990 which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage. Within this broad remit PLP has adopted three main objectives:

- **increasing the accountability of public decision-makers**
- **enhancing the quality of public decision-making;**
- **improving access to justice.**

Uniquely for an organisation of its kind, PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.

The issues raised in this consultation fall squarely within PLP's specific areas of interest and expertise, in particular access to justice, the right to a fair hearing and legal aid, judicial review, human rights and immigration law. We summarise some of our relevant expertise in these issues below:

- PLP was the claimant in the challenge to the legal aid 'residence test'.[1]

- PLP acted for Medical Justice in its challenge to 'zero notice' removal directions as it abrogated the constitutional right of access to the court.[2]

- PLP acted for the Official Solicitor in individual[3] and systemic[4] challenges to the exceptional case funding scheme.

- PLP acted for a number of solicitors firms and charities in a challenge to the civil legal aid regulations that put payment for work done at the pre-permission stage in judicial review 'at risk'.[5]

[1] R(Public Law Project) v Lord Chancellor [2016] UKSC 39
[2] R(Medical Justice) v SSHD [2011] EWCA Civ 1710
[3] R(Gudanaviciene & ors.) v Director of Legal Aid Casework & or. [2014] EWCA Civ 1622
[4] Director of Legal Aid Casework & Anor v IS [2016] EWCA Civ 46
[5] R(Ben Hoare Bell Solicitors & Ors) v The Lord Chancellor [2015] EWHC 523 (Admin)

- PLP acted in a landmark case in the Supreme Court on unlawful detention in the immigration context.[6]

- PLP frequently acts for individual claimants in immigration related judicial review in the Administrative Court and Upper Tribunal including unlawful detention claims, judicial reviews of fresh claims, certification challenges, claims for victims of trafficking, asylum support and community care claims for migrants.

- PLP has acted in SIAC cases[7].

- To investigate and counter the impact of the Legal Aid Sentencing and Punishment of Offenders Act 2012 on vulnerable and disadvantaged groups PLP ran a Legal Aid Support Project. As part of that wider project PLP ran an Exceptional Case Funding Project to assist lawyers, NGOs and individuals with applying for Exceptional Case Funding legal aid in areas that were no longer within the scope of legal aid following LASPO 2012. PLP has engaged in outreach and training to lawyers and NGOs in making ECF applications.

- PLP is accredited by the Office of the Immigration Services Commissioner and two of its in-house solicitors are accredited under the Law Society's Immigration and Asylum Accreditation Scheme.

- PLP is a member of the Immigration Law Practitioners' Association.

This proposal is described variously as an 'expedited appeals process' 'new fast track procedure', 'new fast track rules'. For ease of reference we will refer to the proposal as 'New Detained Fast Track' or 'New DFT'.

Introduction[8]

The Tribunal Procedure Committee (TPC) is the independent rule making committee which has been given the responsibility for making Tribunal Procedure Rules by Parliament.

The TPC is under a duty under s22(4) of the Tribunals Courts and Enforcement Act 2007 to make rules that ensure that:

a) in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
b) the tribunal system is accessible and fair,
c) proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
d) the rules are both simple and simply expressed, and
e) the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

Amongst those factors 'speed and efficiency do not trump justice and fairness. Justice and fairness are paramount.'[9]

[6] Lumba (WL) v Secretary of State for the Home Department [2011] UKSC 12
[7] ZZ v SSHD [2014] EWCA Civ 7; W and ors v SSHD (SC/34/2005)
[8] This should be read as part of PLP's response to question 9
[9] Lord Chancellor v Detention Action [2015] EWCA Civ840 at [22]

In order to carry out its statutory duty the TPC must consult before making procedure rules and it must submit procedure rules it has made to the Lord Chancellor for approval. If the Lord Chancellor disapproves those procedure rules then she must provide written reasons for doing so.[10]

The Government's new DFT proposal in this consultation bears a marked resemblance to the Home Office proposal to the TPC in November 2015 to introduce new fast track rules (Accelerated Detained Appeals Procedure). The TPC rejected that proposal.

The Home Office requested the TPC introduce new fast track rules because it said that the Principal Rules[11] 'have demonstrably failed to deliver, despite detained appeals having been prioritised.' However, in response[12], Mr Justice Langstaff, the Chair of the TPC refused to do so because the Home Office failed to provide sufficient evidence that the Principal Rules were failing to deliver. Langstaff J stated that the TPC would keep the matter under review and would consult widely to see whether the Principal Rules were working.

PLP views this consultation with considerable disquiet, as it appears to be no more than a renewed attempt by Government to introduce a new DFT, notwithstanding the rejection of its recent attempt to do so by the TPC and despite the evidential deficiency identified by the TPC not having been filled.

Parliament created an independent rule-making body to "complete the long process of divorcing administrative justice from departmental policy"[13]. The importance of making fair procedure rules and the importance of the TPC's independent impartial role in rule making is illustrated by the abolition of the old detained fast track and the TPC's response to the Government's renewed attempt to reintroduce it. The state will always be a litigant party in any DFT proceedings. Individuals are placed in the DFT by the state and have no element of choice in that. If the state places individuals in the DFT then that in itself could prejudice the individual's prospects of success in the appeal and the state may gain an unfair litigation advantage. The old DFT was inherently unfair. Procedure rules must secure that proceedings are fair otherwise they will be unlawful and it is the TPC's duty to ensure that they are.

In those circumstances it is of critical importance that the Government maintains the integrity of and respect for the independent rule making committee. That would include permitting it to conduct its business in the manner it considers most appropriate – the TPC has already indicated that it is keeping the position under review and will consult. The Government should not seek to circumvent that process.

One of the principal reasons that PLP is participating in this consultation is serious concern that the Government's approach is undermining the role of the TPC. In particular, PLP is extremely concerned by the proposals underlying question 9 of the consultation (about whether the new DFT should be introduced by primary legislation) which appears to indicate an intention by Government to bypass the TPC should it not agree to introducing DFT procedure rules.

It is stated in the consultation document that the object of the consultation is to gather evidence to assist the TPC. This underscores that the Government does not have the

[10] Tribunal Courts and Enforcement Act 2007, schedule 5, part 3, paragraph 28

[11] the ordinary (non-fast track) procedure in rules 1 – 46 of The Tribunal Procedure (First-tier Tribunal) Immigration and Asylum Chamber Rules 2014

[12] Letter from the Tribunal Procedure Committee chairman, Mr Justice Langstaff to Rob Jones, Head of Asylum and Family Policy, Home Office, 12 February 2016

[13] *R(Cart) v Upper Tribunal* [2012] 1 AC 663 at [54]

evidence that the TPC requested in February 2016 which would demonstrate that the Principal Rules are not working. If that is still the case then this consultation serves no further purpose other than to inform Government that it should not renew its failed attempt to reintroduce the DFT.

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?

No.

Failure to address the concerns of the Tribunal Procedure Committee

PLP considers that the consultation document has failed to address the concerns of Mr Justice Langstaff and to provide the evidence requested. PLP considers that the reasons for the TPC refusing to make rules for a new DFT in February 2016 answer this question. In short the Principal Rules meet the TPC's statutory duty to ensure that regard has been given to the factors in section 22(4) of the Tribunals Courts and Enforcement Act 2007 and in ensuring that amongst those factors justice and fairness is paramount. The proposed new DFT does not do so, will result in an unacceptably high risk of unfairness and is likely to be unlawful if it is introduced as proposed.

In PLP's view, there are a number of considerations, explained in more detail below, which support its view that a prescribed expedited timetable for appeals brought by those in detention is neither necessary nor justified and that the need for expedition in individual cases should continue to be dealt with under the Principal Rules. Those considerations are:

- The cohort of appeals that will be affected by the new DFT by definition involve serious issues about fundamental rights, which the Home Office has accepted in each case are not "clearly unfounded" and cannot fairly or lawfully be pursued after removal.

- The statutory framework and the requirements of fairness mean that the Rules must retain sufficient flexibility to deal with individual cases and that it is appropriate that the independent Tribunal judiciary should be responsible for ensuring that in each case the right balance is struck between fairness and efficiency.

- If the period of time required for the fair determination of an appeal is longer than the period for which detention can be justified in an individual case then the answer is to release the appellant, subject to suitable conditions, not to truncate the appeal procedure in an unfair manner.

- The proposal is premised on incomplete information and flawed assumptions, including assumptions about the impact on detention numbers which are inconsistent with the Government's stated intention to reduce the use of detention.

- The Government has not substantiated the assumption that a greater degree of certainty would benefit appellants or their representatives, or that this objective justifies the adverse impact on fairness of a fixed expedited timetable.

- The difficulties for detainees (who are unlikely to be able to afford to pay for their own representation) in accessing legal aid, both "in-scope" legal aid and exceptional case funding, are a significant obstacle to access to justice for detained appeals and would be exacerbated by the introduction of the new DFT. The inaccessibility of ECF and the risks involved in providing legal aid pre-permission in judicial review proceedings play an important role in this regard. The Government has failed to demonstrate how it will ensure that legal aid supports the delivery of its proposals. In practice this would require a significant expansion of the circumstances in which legal aid is available.

<u>The cohort of appeals that will be affected by the new DFT</u>

As a consequence of the Immigration Act 2014, appeal rights have been removed in a wide number of immigration case categories. At present the areas in which appeal rights remain are as follows:

- Protection appeals – removal would breach the Refugee Convention or the obligation to grant Humanitarian Protection under EU law
- Human rights appeals – removal would breach the Human Rights Act 1998
- European Economic Area ('EEA') appeals – removal would breach EEA law rights
- Deprivation of citizenship.

Moreover even where the above grounds are relied on by an individual the SSHD has certification powers so that appeal rights are removed or will only entitle the individual to bring an appeal after they have been removed from the UK. The power to certify can be used where the SSHD considers that:

- a protection (Refugee Convention or Humanitarian Protection) or human rights claim (including under Articles 2, 3 or 8) is *clearly unfounded*.[14]
- a human rights appeal by a person who is liable to deportation could be brought from outside the UK because there is *no risk of a breach to the individual's ECHR rights (including a risk of serious irreversible harm) in the removal of the person from the UK pending the outcome of the appeal*[15]
- A similar certification power as above exists in relation to appeals where *EU law rights* are asserted.[16]

The SSHD also has the power to certify that there is no right of appeal at all against a decision if[17]:

- The matter could have been raised in an *earlier appeal* and there is no satisfactory reason for not doing so.

[14] S94 Nationality Immigration and Asylum Act 2002
[15] S94B NIAA 2002 – note that this power which currently applies to deportation cases will be extended to all cases from 1 December 2016 following amendment by the Immigration Act 2016.
[16] Regulation 24AA of the Immigration (European Economic Area) Regulations 2006
[17] S96 NIAA 2002

- The matter could have reasonably been raised in an *earlier one-stop notice* and there is no satisfactory reason for not doing so.

Therefore the cohort of appeals that would be processed in the new DFT will by definition involve serious issues of fundamental rights and are also likely to have merit because: they are not considered to be clearly unfounded; they are new issues that could not have been raised in an earlier appeal or one-stop notice; and, individuals relying on article 8 or EU law rights will be able show risk of breach of their human rights if removed pending an out of country appeal.

In those circumstances it is very likely that for many in this cohort, their appeals will be complex and will require substantial preparation. A new DFT with rigid and accelerated timetable is likely to be entirely unsuitable for most appeals within this cohort.

Flexibility and the role of judges

The overriding objective[18] of the Tribunal's procedure rules/Principal Rules is to enable it to deal with cases fairly and justly, which includes avoiding delay so far as compatible with proper consideration of the issues.

The overriding objective and the general powers available within the Principal Rules enable judges to tailor make directions to ensure that the correct balance is struck in each individual case so that it can be heard fairly and quickly.

Procedures already exist within the Principal Rules that can be used to expedite cases, so there is nothing to prevent the Home Office or an appellant from applying for expedition.

Flexibility is an essential feature for any fair procedure. In R(Refugee Legal Centre) v SSHD[19] which was a case that concerned the Harmondsworth fast track for asylum claims (and relied on in the consultation document at paragraph 6) the Court of Appeal emphasised the critical importance of a flexible process otherwise there could be an unacceptable risk of that process being inherently unfair. The Court held that:

- if all cases, save those which were taken out of the system altogether, were dealt with in three days then the system would carry an unacceptable risk of unfairness [22];

- in the absence of a written policy setting out the circumstances in which the fixed three-day timetable would be extended, a general assertion that flexibility was deeply ingrained in the system was not good enough [19];

- In order to be lawful and avoid an inherent risk of unfairness, the system had to be operated in a way that recognised the variety of circumstances in which fairness would require an enlargement of the standard three-day timetable [23, 25]

The crucial role that flexibility plays in a fair procedure was also highlighted in the letter from Mr Justice Langstaff to the Home Office referred to above. He explained that imposing a rigid expedited timetable for a particular class of case fetters a judge's ability to tailor make directions. It is obvious that each case is different. Some cases may be quicker to

[18] Rule 2, The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

[19] [2005] 1 WLR 2219

determine and others may take longer. Judges must have flexibility when deciding how to case manage and this is an important aspect of dealing with cases fairly. Furthermore a rigid expedited timetable runs counter to the statutory obligation to confer on members of the Tribunal the responsibility of ensuring that proceedings are handled quickly and efficiently.

No evidence has been produced by the Government, nor has it been suggested that the variations in timescales in different appeals is due to judges wrongly or improperly exercising their case management powers when deciding how long is needed before an appeal is ready to go ahead. The judge will have to consider in each case whether it can be fairly determined.

Justification for detention

The new DFT proposal relies on the courts' endorsement of a fast track process. What the courts endorsed in *Saadi* was a process which allowed claims (not appeals) to be determined in a fast track procedure for the administrative convenience of the state. In *R (Detention Action) v SSHD* [2014] EWCA Civ 1634, the Court of Appeal held that the Secretary of State had not shown that the use of detention for the purpose of the fast track appeals procedure was lawful, and therefore detention pending appeal can only be justified under the normal detention criteria in Chapter 55 of the Enforcement Instructions & Guidance.

It follows that detention pending an appeal should be used as a last resort, for the shortest period possible and only where there is no other reasonable alternative to detention. In order for detention to be lawful, there must be a realistic prospect of removal within a reasonable timescale, having regard to the risks of absconding and reoffending. If the appeal takes so long to fairly determine that detention would exceed a reasonable period, having regard to those risks, then the answer is *to release the individual, not to attempt to shorten the appeals procedure*.

Imposing a fixed timescale for all detained appeals because delays are undesirable is the tail wagging the dog. Delay is not a justification for making the process unfair; if the appeal cannot be fairly determined in a reasonable timescale, the appellant must be released: it all depends on the particular facts of the case.

Delays in deciding appeals – incomplete information and flawed assumptions

The proposal for a new DFT is premised on the assumption that the average length of detention is too long due to delays in the FTT deciding appeals or variations in the time that it can take to decide an appeal. The evidence relied on in support of this contention is Home Office management information which indicates that detained asylum cases between August 2015 to March 2016 took an average of more than 65 calendar days from receipt of the appeal to its determination in the First-tier Tribunal (FTT)[20] and that in 70 cases handled by the Home Office Detained Asylum Casework team (DAC) in the first 11 months of its operation (July 2015 – June 2016) the average time for reaching a decision on a detained appeal was 61 calendar days[21].

However these figures must be treated with extreme caution as they may not reflect the true picture and evidence for a substantial part of this period has already been considered by the TPC and rejected as an insufficient justification for departing from the Principal Rules.

[20] Consultation document, para 3 and 20
[21] Consultation document, para 20

The figures relate to an unusual period of activity in the Tribunal where there were backlogs caused by the abolition of the old DFT and delays were related to that (including the oral rehearing of 317 cases). Mr Justice Langstaff in his letter has already explained that delays in the Tribunal from this period could not properly lead to the conclusion that the Principal Rules had 'demonstrably failed to deliver, despite detained appeals having been prioritised.' The period referred to in Mr Justice Langstaff's letter is July 2015 to end of January 2016.

The fact that there can be variations in the time it can take for an appeal to be decided is most likely to be due to variations in the particular circumstances of each case. The Government in this consultation document does not consider the reasons for the average length of time it takes to determine a detained appeal. No explanation has been sought from the President of the FTTIAC, nor HMCTS officials for the reasons behind any delays or backlogs, whereas the TPC did so (see its letter of 12 February 2016).

The consultation document fails to consider if any delay in hearing appeals could be avoided by increasing the efficiency of the Tribunal without fettering judges' ability to fairly case manage an appeal. The President of the Chamber of the FTTIAC has stated that there are a number of measures that could increase its efficiency such as cross-ticketing of judges in different Chambers of the FTT, use of IT, improvements to video-linking, rationalising the layout of hearing rooms to maximise use of judicial time, and he noted that additional financial resource meant that appeal hearing backlogs were reduced.[22] It could be that measures that increase the efficiency of the FTT could address unnecessary delays without compromising on fairness. The chairman of the TPC suggested that the Home Office explore alternative approaches with the Chamber President. The consultation document and impact assessment do not consider any such alternatives.

Furthermore no consideration has been given to the impact of the amendment to the 'deport first, appeal later' certification provisions under s94B which on 1 December 2016 will be extended to all individuals that are liable to removal. At present this power only applies to appellants that are liable to deportation. For the avoidance of doubt PLP does not agree with this use of s94B – however the power is there for the SSHD to use and it is unclear at present what impact this will have on the volume of human rights appeals in the Tribunal and therefore the time taken to list appeals.

Length of detention

PLP considers that the assumption that the new DFT proposal will shorten an appellant's length of detention is flawed – not least because the information in the consultation document and impact assessment does not support this conclusion.

The Government's impact assessment is unclear about how the new DFT would affect the average length of detention time, whether the use of detention will increase and the total number of detained appeals.[23] The Government expects that as a consequence of the new DFT either the use of detention will be increased or the length of detention will increase.

The use of detention could be increased because if appeals are expedited then beds will be freed meaning other individuals can be detained. Or, the average length of detention may increase as a substantial proportion of appellants who at present would be released after

[22] Senior President of Tribunals' Annual Report 2016 - President of the Immigration and Asylum Chamber's report at p74 - 78

[23] Impact Assessment MoJ 027/2016, para 26

lodging their appeals would instead be detained until their appeal is determined in the new DFT.[24] However, the Government is unable to reach any conclusion about the effect on overall detention time. It states that it is unknown.[25]

An increase in the average length of detention of these appellants would defeat the purpose of the proposed new DFT which is said to be to shorten detention and provide more certainty. Alternatively if the new DFT resulted in the increased use of detention, so that more people were being detained that would be contrary to 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*.[26]
>
> *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.*[27]

Thus, on the Government's expectation the new procedure will either increase the number of detainees or increase the length of detention, whereas the Immigration Minister's statements are that the Home Office wants to *reduce both*.

In summary, it is accepted by the Government that it is far from clear that the DFT will in fact shorten average detention periods. The likely effects are that people who would otherwise not have been detained at present will be detained under the new DFT. That is not only in conflict with current Government policy but it also undermines one of the main stated policy objectives of the new DFT which is to shorten detention.

Absconding risk

A further justification for the new DFT is that without clear timescales for determining an appeal a person is more likely to be released on bail, notwithstanding some absconding risk. Therefore there is a risk that persons who have been granted bail may abscond, notwithstanding any conditions imposed on them on release.

This is a very broad assertion which is entirely unsubstantiated. PLP does not agree that such an assertion justifies the introduction of the new DFT. No evidence has been provided in support of this contention. No information is provided about the number of individuals who since the end of the old DFT have absconded from bail while their appeals are pending, and have required additional resource so that they can be relocated. It is unclear whether this is in fact a problem and if so the scale of it.

This issue is related to 'justification for detention and we refer to our comments above. If, however, the justification for detention is absconding risk then that *may* in some cases, be

[24] Impact Assessment, para 25
[25] Ibid, para 66
[26] Rt Hon James Brokenshire MP HC Deb 10 September 2015, col 600
[27] 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

held to justify longer periods of detention pending appeal. If the absconding risk is not sufficient to justify detention for the period necessary to fairly decide the appeal then the individual should be released. Again, to unjustifiably shorten the appeal process just to ensure people are not released is to approach the issue in the wrong way. It should not be the starting point.

In any event, even if some individuals have absconded from bail, it is very difficult to understand how this can be relied on in support of a new DFT. Detention should only be used as a last resort. If a person cannot be lawfully detained in accordance with well settled principles then he must be released. If a person has bail then either the Home Office will have accepted that bail is appropriate and will release him, or it will be a judicial decision following a bail hearing. A decision to grant bail will only be taken after all the relevant factors are considered including absconding risk and issues that are relevant to that. Absconding risk will not preclude a grant of bail as it will depend on the likelihood of the risk eventuating and whether there are suitable conditions that can be imposed and sureties accepted to manage any risk.

There are also specific powers available to the Home Office if a breach of bail is suspected or if there is an actual breach. In those circumstances a person can be arrested and brought before the Tribunal within 24 hours for revocation of bail.[28]

Certainty and benefits to appellants

The Government's view is that a set timeframe provides certainty in terms of planning and benefits all parties including detained appellants and their lawyers.

It may be the case that some appellants would benefit from an expedited timetable. However, PLP does not agree that this justifies the introduction of the new DFT with a rigid expedited timetable applied to all detained appellants. The Government's view entirely overlooks the fact that there is no element of choice in the new DFT proposal: a person who is detained would be subject to the new DFT and would not be able to "opt out" of it if he instead considers that there is a far greater benefit in having sufficient time to prepare his case so that he has a fair hearing.

It does not appear from the consultation document or the impact assessment that the views of appellants themselves have been sought and instead an unsubstantiated assumption has been made that all appellants would benefit from the new DFT timetable. PLP is aware that Detention Action have conducted research which indicates that detainees prefer to have more time to prepare for their appeal even if that means spending a longer time in detention. In view of the very serious consequences that many appellants will face if they lose their appeals[29] it is entirely unsurprising that if more time were needed for the preparation of their case appellants would agree to this if they thought it would increase their prospects of success at appeal.

PLP disagrees that a new DFT would necessarily benefit appellants' legal representatives if they did not have sufficient time to complete the numerous tasks that will normally need to be completed before a case is ready to proceed.

[28] Immigration Act 1971, schedule 2, part 1, paragraph 24

[29] Also see the section above on 'The cohort of appellants that will be affected by the new DFT' – the issues in all of these appeals are very likely to be important

PLP disagrees that the new DFT could increase certainty if an appellant was only able to obtain the necessary evidence in support of his appeal outside the expedited timeframe and it resulted in that appellant quite properly making further representations and a fresh claim - that would ultimately defeat the purpose of an accelerated procedure if it made the entire process substantially longer than if an appellant had initially been given enough time to prepare his case for appeal.

Legal Aid

Legal aid is an issue which could arise in relation to a number of the consultation questions, but it is apt to turn to it here because it is a key consideration in terms of whether there should be specific new DFT rules.

That makes the absence of any meaningful consideration of legal aid in the consultation paper all the more striking.

The right of an individual to have access to the court is a fundamental constitutional right. Individuals must have sufficient time to find and instruct a lawyer who is ready, willing and able to provide legal advice and to act in proceedings within the limited time available and this might also entail obtaining legal aid to ensure the lawyer is paid.[30]

An accelerated appeals procedure that did not allow for early instruction of lawyers and their participation at each stage would have a high risk of being inherently unfair. Legal representation at an early stage is a critical safeguard. Mr Justice Ouseley in the *Detention Action* challenge to the old DFT stated:

> *At each stage, however, it has been the prospective use of lawyers, independent, giving advice, taking instructions having gained the client's confidence, which has seemed to me to be the crucial safeguard, the crucial ingredient for a fair hearing, whilst maintaining the speed of the process, but which can protect against failings elsewhere, and avoid an unacceptably high risk of an unfair process.*[31]

In view of the safeguard provided by lawyers it is clear that there will need to be suitable arrangements for legal aid.

The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) has resulted in the provision of civil legal aid being dramatically reduced since it came into force in April 2013. Since then there have been large reductions in legal help workload in all civil legal aid categories (which includes controlled legal representation – the type of legal aid which is available for representation for in-scope immigration appeals) and it now stands at approximately one third of pre-LASPO levels[32].

In immigration in-scope legal aid was removed from almost all non-protection/asylum matters. The matters that remain in-scope[33] are:

- Asylum claims (under the Refugee Convention)
- Protection claims (under Articles 2 and 3 ECHR, the Temporary Protection Directive and Qualification Directive)

[30] R(Medical Justice) v SSHD [2010] EWHC 1925 (Admin) at [45]
[31] Detention Action v SSHD [2014] EWHC 2245 (Admin) at [195]
[32] Legal Aid Agency - Legal Aid Statistics in England and Wales – April to June 2016 at [5]
[33] s9 and schedule 1, part 1 , paras 24 – 32 LASPO 2012

- Bail, temporary admission and restrictions as to residence
- Applications for leave and residence cards by victims of domestic violence
- Applications for leave by recognised victims of trafficking and modern slavery
- Asylum support (where accommodation is in issue)
- Appeals to the Special Immigration Appeals Commission[34]
- Judicial review.[35]

Thus the cohort of detained appellants in the new DFT would all have in-country appeals – unless they are later certified. But only those who were appealing on asylum and protection grounds would be eligible for legal aid as that remains in-scope.

Those who have in-country appeals that raise EU law issues or article 8 ECHR issues (respect for private and family life) or any other ECHR right other than articles 2 or 3, will not be in-scope for legal aid. This would include deportation appeals where article 8 is raised as a ground of appeal, or in which EEA rights are in issue. Even if those appellants have raised protection grounds of appeal in addition to grounds of appeal which are out-of-scope, legal aid will not cover the work that is out-of-scope. So for example in an appeal where the appellant has raised mixed asylum and article 8 grounds, the asylum appeal will be remunerated but any work done on article 8 appeal will not.

If the matter is outside the scope of legal aid, an individual can apply for Exceptional Case Funding (ECF)[36].

The Government appears to acknowledge that the availability of legal aid is a crucial aspect of the fairness of the process as it is stated in the consultation document that:

> *'We will work to make sure that legal aid arrangements support delivery of the proposals in this consultation.'* (paragraph 48)

Against that background, it is striking that the impact assessment states that the new DFT will not be accompanied by any widening of the scope of legal aid[37]. Moreover the assessment itself is incomplete and inadequate. The MoJ is unable 'to confidently monetise the costs to the Legal Aid Agency' and is 'unable to estimate all the potential costs'. It is noted that non-asylum matters will be ineligible for funding unless ECF is granted, but there is no recognition of the difficulties involved in obtaining ECF, particularly in the context of an accelerated procedure.

Therefore, either the consultation document is only paying lip-service to the importance of legal aid arrangements when in reality there is no intention to make any such arrangements, or the impact assessment is entirely inadequate and is at odds with the consultation document. Either way, treatment of legal aid in both the consultation document and the impact assessment is both inadequate and inconsistent.

Exceptional Case Funding

ECF is likely to be of most commonly applied for in cases where Article 8 ECHR grounds arise, including deportation cases of those who have lived in the UK from a young age and

[34] These cases are few and SIAC has its own special procedure rules - as far as PLP can tell this group would not and could not be part of the new DFT.
[35] In immigration cases, there are a number of exceptions to the general availability of legal aid for judicial review: see paragraph 19 of Part 1 of Sch 1 LASPO.
[36] s10 LASPO 2012
[37] Impact Assessment, paragraph 48

those with strong family connections to the UK, who may have had indefinite leave to remain.

The Court of Appeal has stated that deportation cases are of particular concern as it will often be the case that a decision to deport will engage an individual's article 8 rights. Where this occurs, the Court has said that individual will usually be able to say that the issues at stake for him are of great importance and this is a relevant factor to be taken into account.[38]

In order to qualify for ECF an applicant would have to demonstrate that he satisfied the ordinary means and merits criteria for eligibility for legal aid, and would have to show that it is necessary to provide legal aid because failure to do so would either be a breach of the individual's ECHR rights, or EU rights, or that it is appropriate to provide legal aid, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.[39]

Since the commencement of the ECF scheme, PLP has run a grant-funded ECF project to provide assistance to both lawyers and clients with applying for ECF. Many of those who required assistance were immigration cases, including those who had Article 8 claims and appeals.

Through the work done under the ECF project and statements taken from many lawyers and applicants, PLP gathered substantial evidence of the difficulties faced by those applicants and lawyers in applying for ECF. That evidence was relied on in the case of '*IS'* a challenge by the Official Solicitor to the operation of the ECF scheme on the ground that there was an unacceptable risk that applicants would not be able to obtain ECF funding.[40] The evidence was not substantially disputed[41] and it showed that there were very serious difficulties for applicants and lawyers in applying for ECF which included:

- the complexity of the application process;
- the lack of any emergency procedure for dealing with urgent applications;
- the substantial amount of unpaid work that lawyers had to undertake in order to prepare an application for ECF and how that acted as a disincentive to many solicitors in applying for it;
- the inaccessibility of scheme to unrepresented individuals – the overall impact is that lawyers cannot afford to spend the time making the applications and individuals without lawyers cannot access the scheme.

Complexity of the application process and unwillingness of lawyers to make ECF applications

[38] *R(Gudanaviciene) v Director of Legal Aid Casework* [2015] 1 WLR 2247 per Lord Dyson MR [77].
[39] ss10(1), 10(2), 10(3) LASPO 2012
[40] IS v Director of Legal Aid Casework [2015] EWHC 1965 (Admin), [2015]; *Lord Chancellor vs IS* [2016] EWCA Civ 464
[41] 'There is no substantial dispute as to primary fact; the argument on both sides is in truth directed towards the inferences to be drawn from the facts for the purpose of applying the test of inherent unfairness to the scheme.' *Lord Chancellor vs IS* [2016] EWCA Civ 464, [2016] WLR per Laws LJ at para 22. Whilst Laws and Burnett LJJ considered that the evidence did not demonstrate that the ECF scheme was inherently unfair, Briggs LJ dissented and considered that it was unlawful. Nevertheless Laws LJ observed that the extent of the difficulties posed by the ECF scheme were 'troubling' (para 56). The Official Solicitor has applied for permission to appeal to the Supreme Court and that is pending.

The latest figures from the Legal Aid Agency[42] indicate that the grant rate in immigration is 76%. Whilst that seems to demonstrate that the substantial majority applications for ECF in immigration cases have merit, the actual number of new applications remains very low: 145 in the period January to March; 67 per month nationwide in immigration in the period April to June.

It should be pointed out that many applications for immigration ECF will not be for immigration detainees and an even smaller number will be for those detainees who are pursuing appeals. Of the applications that both PLP and other not-for-profit organisations have assisted with, we are aware that many applications are for non-detained applicants and are in other categories such as family reunion cases, and article 8 applications for families in the community seeking to regularise their status. It should also be pointed out that the inaccessibility of the scheme to unrepresented individuals who need ECF has to be even more acute for people in immigration detention and in particular those in prisons who will have restricted (if any) access to the internet and telephone thus also to application forms/methods to submit an application/advice on making an application as well as the documents needed to support it.

PLP's experience from the ECF project, is that notwithstanding some improvements, the difficulties that were identified in *IS* persist and it appears that the numbers of ECF applications remain relatively low since many lawyers do not appear to make ECF applications because they are not required to do so and the process continues to be complex, very time-consuming and unpaid. It appears that there continues to be little incentive for lawyers to make applications for ECF.

Lack of an urgent procedure

However even in cases where ECF applications are being made, there is no emergency procedure which would ensure that ECF claims are processed quickly enough for lawyers to start acting as early as possible in the new DFT timetable.

In urgent cases the LAA must first agree that a situation is urgent before it will prioritise it before non-urgent applications. If so it will consider it within 5 working days but cannot guarantee the application will be determined before a hearing day or before specified urgent work is needed.[43] If the application is refused and an internal review by the LAA is requested, it aims to complete the review within a further 5 working days.

However the turnaround time for each ECF application starts on the date it is received by the LAA ECF team and finishes on the day a decision over the case is made, excluding weekends, bank holidays and time spent waiting for further information, for example financial information to support the means assessment. It also does not take into account the time that might be taken by the applicant and/or his lawyer in preparing the ECF application, which can be a complex and time-consuming task. If an application is not correctly completed with all the required information then it may be rejected. Moreover the overall length of time would be further extended if the application is initially refused and a review is requested.

[42] Legal Aid Statistics in England and Wales – April to June 2016
https://www.gov.uk/Government/statistics/legal-aid-statistics-april-to-june-2016
[43] Exceptional Case Funding Provider Pack, section 6
https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/540265/ecf-provider-pack.pdf

Latest LAA figures are that the average turnaround time for new ECF applications is 14.1 working days and that the average for reviews (i.e. following a refusal of ECF) is 9.7 working days. As far as we are aware this is the average turnaround time for all ECF cases including the urgent cases, and there is no other data available on whether the 5 working day target in urgent ECF cases is being met.

It is almost certain that if the average turnaround times of 14.1 working days were to apply in an ECF case under the new DFT the early instruction of lawyers, which is considered to be a critical safeguard in any fair expedited process, would not be possible. It is highly likely that even if the LAA were to be able to determine the case within 5 working days it would still prevent the involvement of a lawyer at an early stage and would be unfair

There is no detail or information in the consultation document or impact assessment about any discussions or planning with the LAA to ensure that ECF funding applications in a new DFT are handled under a special or emergency procedure that would ensure that a decision on funding is made rapidly to enable the early participation of lawyers and at every stage of the process.

Therefore the combination of very low numbers of ECF applications due to the financial disincentives to lawyers and the lack of any satisfactory urgent procedure that would provide ECF funding at the early stages of the appeal is very likely to subject appellants who ought to qualify for ECF to an unfair process as they are likely to be unrepresented for some or most of the appeal and any delay could be highly prejudicial.

Moreover if individuals are eligible for ECF, and cannot access it, then their Convention and/or EU rights will be breached.

It is no answer that ECF can be backdated, because until ECF is granted any work undertaken and disbursements incurred would be at risk – that will act as a very strong financial disincentive for lawyers.

Judicial review of refusals to take cases out of DFT

Legal aid for judicial review remains within scope. Therefore a decision by the Home Office or Tribunal to refuse to take a case out of the new DFT could be challenged by judicial review and legal aid would be available. However funding at the pre-permission stage is at risk and if permission is refused or the claim does not proceed to the permission stage and inter partes costs are not recovered from the SSHD, then the individual's solicitor and counsel are at risk of not being paid for their work.

This was considered to be a serious concern by the Divisional Court in *Ben Hoare Bell and ors v Lord Chancellor* [2015] EWHC 523 (Admin). There was evidence that the risk of not being paid at the pre-permission stage would act as a financial disincentive for lawyers. The Court viewed this evidence with great concern and the Government undertook to keep the position under review.

The regulations were amended following the Court's decision to slightly extend the circumstances in which a provider would be paid at the permission stage, but essentially at the initial stages there still remained a risk of non-payment if permission was not granted. We are unaware of whether the review promised by Government has materialised, however the same concerns that were raised then about the potential disincentive to lawyers apply now. The concern in the context of a new DFT is that there will be very little time for a lawyer to assess merit as urgent action would be required to challenge a decision not to take

a case out of the fast track, so it may be very difficult for a lawyer to be able to evaluate that risk and that will act as a strong disincentive to act in such a case where payment is at risk.

The difficulty in evaluating risk, the risk of non-payment and the disincentive to taking on a judicial review of a refusal to take a case out of the new DFT is significantly compounded if a claimant is unrepresented and the advice of a new lawyer is sought.

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

No.

We do not consider that there should be a new DFT at all. There is flexibility in the Principal Rules which is applied by judges mindful of the overriding objective and using their expertise in this specialist area. Bespoke directions can be set to ensure that cases are progressed efficiently whilst ensuring that there is a fair hearing. What is required will differ from case to case. This is the most effective and efficient way of managing a case.

We are seriously concerned for the position of foreign national offenders (FNOs) particularly those detained in prisons. We understand from recent discussions with charities/NGOs that assist prisoners that FNOs in prisons have very serious difficulties in finding immigration lawyers to take their case, even where they are eligible for legal aid or have the means to pay, and that there is very little in the way of legal advice available in prison and this means that FNOs may be unrepresented.

There are particular difficulties in preparing a case for an appellant who is detained, such as arranging appointments to see the client, limited legal visit times, meaning that there may be a need for repeated appointments, travelling to the place of detention, the time spent going through security checks client being brought to appointments late, and difficulty or inability to communicate with client by phone if he is in prison. These considerations make a set expedited timeframe entirely inapt for detained cases.

The difficulties in imposing a rigid timetable in all detained cases are further compounded by the complexity of immigration cases. Asylum cases can be complex and credibility is often in issue. Article 8 cases are very fact sensitive and often require a substantial amount of evidence-gathering, such as taking instructions for witness statements from the appellant, his family, friends, instructing independent social workers to comment on strength of family links, obtaining relevant records which may be voluminous e.g. medical, detention, social services, Home Office subject access bundles.

The considerations set out in our answer to Question One are equally apposite here.

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

No, but this is because we disagree that there is a need for a new DFT nor that it will deliver the stated policy objectives. We maintain that the Principal Rules allow judges to effectively and fairly manage appeals, with expedition where appropriate.

The sole criterion for admission to the new DFT is detention. The mere fact that a person is in detention does not make their appeal inherently likely to be straightforward or capable of

being fairly determined by the FTT in an expedited timescale. However, if the new DFT is introduced then in deciding whether to maintain detention during an appeals procedure, there would have to be some consideration as to whether a person's appeal is suitable for the new DFT i.e. whether it can be fairly determined on an expedited timescale. The SSHD will need to consider any representations as to why a case cannot be transferred out of the new DFT and if not justify to a judge at a case management review why the case is suitable for it.

However it is unclear from the proposal set out in the consultation paper whether there will be a screening process or any particular criteria for caseworkers to apply when deciding whether a case is unsuitable for fast track. The risk is the same as highlighted by Mr Justice Langstaff in his letter of 12 February 2016, it is likely to be perceived that if your case is in the new DFT then it is because it is lacking in merit and this may result in systematising bias against that cohort of appellants.

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

We do not agree with either an overall timeframe or specific time limits for the reasons already given. In particular we agree with the chairman of the TPC that judges should be allowed the flexibility to decide the timetable that is appropriate for each case based on its own particular circumstances in order to efficiently progress that case and to ensure that it can be fairly heard.

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

It is not possible to answer this question because each case is different and it depends on the case. Some cases might be fairly decided within 25 days and some may not. However it should be left to the judge to decide on a case by case basis and his discretion should not be fettered. The TPC when making rules has a duty to ensure that responsibility is conferred on the judge and it is the judge who will ensure that proceedings are handled quickly and efficiently. There has been no evidence provided to show that judges have been too generous in allocating time with the result that appellants have spent unnecessarily long periods in detention.

In terms of the steps that are required we have seen the draft response of ILPA in which it has set out the steps that might typically be taken in a detained case and we agree that there are numerous steps that need to be taken to fully prepare an appeal.

This can include taking instructions and completing the relevant applications to obtain legal aid including ECF, obtaining the necessary papers and instructions to prepare for the appeal, attending the appellant and witnesses for statements, identifying the issues and any expert evidence required, identifying experts, preparing instructions and considering expert evidence and considering any material relied on by the Home Office. It is likely to take longer to prepare a case when the appellant is detained as the opportunities to take

instructions are likely to be more limited then when an appellant is at liberty: see the considerations identified in our answer to Question Two above.

The most time spent in preparing a case is likely to be at first instance as the case will need to be fully set out and corroborated with evidence where possible as the Tribunal will be making findings of fact and its findings will be critical.

PLP considers that the new DFT timetable is one-sided and starkly illustrates the inequality between the state and the individual and the resources at their disposal. The short time limits for the appellant in the new DFT are unfair and unnecessary. The appellant will in most cases find it harder to act quickly due to the very fact of his detention and is likely to be unfairly disadvantaged by being subjected by the Home Office which is his opponent in the litigation to an expedited set timetable. However if an appellant is in a position to take the necessary steps swiftly then there is nothing to stop him from doing so. The Home Office on the other hand is far more likely to be in a position to act quickly (noting that fairness must not be compromised) and could do so if it is prepared to use greater resource – for example in expediting decision-making or providing documents. In PLP's view, at most, consideration could be given to truncated timescales for Home Office action in detained appeals. If the Home Office is unable to comply with the timescale then that should be a factor in favour of the appellant's release. It is however fundamentally unfair to impose fixed truncated timescales on detained individuals for the reasons set out above.

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

As stated above we do not agree that the new DFT is capable of ensuring fairness due to its inflexibility; therefore we do not agree that a case management review will ensure fairness. It is most likely that if a new DFT is introduced then judges will apply it in the majority of cases for the reasons identified by the Court of Appeal:

> *'it is likely (to put it no higher) that judges will consider the [fast track] time limits to be the default position. The [safeguards] are mechanisms which are intended to ensure that the tight time limits imposed do not produce injustice in individual cases. But the expectation must be that the time limits will usually be applied. Otherwise the object of the [fast track] would be defeated.'*[44]

However PLP considers that every appeal should have the opportunity for an oral case management hearing so that every case is reviewed for its readiness to proceed to a full hearing and for appropriate directions to be given to ensure that the necessary steps are taken to enable the case to proceed fairly and efficiently with minimum delay, while allowing sufficient time for both parties to prepare for the appeal hearing. Proper case management at the outset is likely to reduce the subsequent need for adjournments which are likely to result in a longer period determining the appeal overall.

If both parties agree that the review can take place on the papers then there should be the option for that.

However, even with a case management hearing it may be difficult to determine whether a case is ready to proceed. The lawyer might not have the papers.

[44] Lord Chancellor v Detention Action [2015] EWCA Civ 840 at [44]

There may be no prospect of a hearing due to the appellant being unrepresented. Unrepresented appellants at the case management review hearing may be a particular problem for FNOs who are in prison who have yet to secure representation and for those who apply for ECF but who have not yet secured funding due to the average turnaround time for ECF funding decisions.

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

No. The options for adjourning cases should be those contained in the Principal Rules as these provide flexibility and there is little evidence to show that they are not delivering.

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

PLP considers that the current level of fees for appeals to the First-tier Tribunal (IAC) is disproportionately high and constitutes a barrier to access to justice for all appellants. The position is exacerbated for detainees.

There should be no fees required for detainees subject to an expedited appeals process for the reasons given at paragraph 42 of the consultation document. Detainees cannot earn a living and have no income in detention and it may be difficult for them to even apply for a fee waiver.

The Government previously accepted, when introducing the Immigration and Nationality (Fees) Order 2011, the principle that there should be no fee where the state is taking action against an individual. PLP considers that the same principle should extend not only to administrative removal decisions (which are mentioned in the consultation paper) but also to deportation orders.

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 the 'introduction' to this response (above our response to question 1).

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 considered the impact assessment and have referred to its findings elsewhere in this response. The impact assessment is of limited value as it is incomplete, has failed to consider key issues and has failed to 'monetise' or provide sufficient evidence to explain the costs of the new DFT proposal (option 1) and has failed to undertake detailed modelling of the impact of the proposals on detention – in particular length of detention.

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.

We are unable to provide data. We note that the Government has not conducted a full equalities impact assessment. The old DFT was abolished because it operated with an unacceptable risk of unfairness. We are concerned that the proposal for a new DFT will place persons with protected characteristics at particular risk of their appeals being unfairly determined in a rigid expedited timetable. There are no screening criteria that would remove vulnerable persons or those with protected characteristics out of the new DFT. The 'Adults at Risk' policy would not act as a sufficient safeguard since it permits the detention of vulnerable individuals with protected characteristics.

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.

We do not have data on this issue. However we are aware that Bail for Immigration Detainees has conducted research on the damaging effect of the detention of a family member on children.

We observe that Article 8 appeals in the DFT which involve families are likely to be at particular risk of unfairness because of:

- difficulties in obtaining ECF within an expedited appeals procedure meaning that there is a greater risk of them not being represented from an early stage – which is a critical safeguard against any fast track procedure being unfair.

- significant difficulties in terms of preparing a case and will be oppressive and cause a great deal of anxiety for children and their families.

PUBLIC LAW PROJECT

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