Tribunal Procedure Committee consultation on Rules in Relation to Detained Appellants

October 2018

Introduction

1. The Law Society of England and Wales ("The Society") is the professional body for the solicitors' profession in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law. This response has been prepared by the Society's Immigration Law Committee and follows our response to the government consultation of November 2016 which is annexed.

2. It will not be surprising to the Tribunal Procedure Committee (TPC) following our previous engagement that the Law Society maintains serious and fundamental concerns about the lawfulness of fast track appeal procedures for detained appellants. Our consistent view has been that such procedures present grave obstacles to access to justice and are inherently unsuitable for immigration detainees. The passage of time since the decisions in the case of *Lord Chancellor v Detention Action* has not reduced the impact of the judgments on the feasibility of fast track appeal procedures to deliver both fairness and access to justice for appellants, while meeting the Home Office's requirement for speed in pursuit of targets. At the outset we reject the suggestion that fairness and access to justice can be achieved by a 25-day timetable beginning, just as the Court of Appeal did, or by the addition of a further three days. We are unaware of any research or other evidential justification that supports the view that this timescale will allow appellants sufficient time to properly prepare cases.

3. The timetable suggested by the Home Office is disturbing in its failure to acknowledge the force of the judgments in the Detention Action case. This is not to mention the complex systemic issues in the operation of detained casework and obstacles to access to legal advice, representation and justice more generally within the detained casework regime and within immigration removal centres (IRCs). These obstacles continue to exist some three years after the judgment.

4. Our investigations into recently determined detained immigration appeals reveal that if it were not for the suspension of the detained fast track, and the use of the principal rules for these cases, the denial of procedural fairness would be a very frequent and unacceptable occurrence. The TPC will be well aware that fundamental rights (including the right not to be refouled and the right not to be tortured or subjected to inhuman or degrading treatment) are at stake in these cases.

5. The TPC is right to consider the wider context of detention in coming to its decision but this is by no means the only factor in considering fast track appeal procedures. It is perturbing that the Home Office is unable to provide the information sought by the TPC as to mean detention timescales. We say that this is indicative of a laissez-faire approach to detention timescales in the pursuit of 'arresting, detaining and removing illegal immigrants' and achieving inappropriate removal targets[1]. It should be of real concern to the TPC that fast track procedures for detained cases have been specifically cited in controversial ministerial correspondence with the Prime Minister that has emerged since the Court of Appeal's judgment in the Detention Action case. A copy of this correspondence is annexed to this response.

6. Unfortunately, it appears that this pursuit, allied with a strong desire for administrative convenience, underpins immigration detention policy in the UK. The cases which we

[1] Letter from Amber Rudd to the Prime Minister, January 2017

have examined reveal immigration detainees, often with significant medical and mental health problems and complex factual and legal issues associated with their appeals languishing unnecessarily in detention centres (often in hideous conditions) while awaiting substantive Home Office decisions and other administrative steps towards removal. Periods of detention of well over a year are not isolated: against such periods, a 28-day appeal timetable pales into insignificance.

7. The Home Office's recent track record in its administration and enforcement of removal procedures does not inspire confidence in the suggestion that now is the time to resurrect fast track appeals. Whilst the Home Office seeks to justify its persistence in seeking a fast track detained appeals timetable by emphasising their need to increase efficiencies (even if of limited impact to mean detention periods), we are only too aware of the potentially egregious costs for detainees – refoulement and/or removal occasioning significant risks to personal safety and the stripping of the rights detainees enjoy under the European Convention. This persistence is all the more disconcerting only months after the pinnacle of Windrush crisis when legitimate UK residents were forcibly detained and removed from the UK whilst Home Office officials were seemingly oblivious to their right to lawful immigration status.

8. The TPC, in its consideration of the Home Office proposal would do well to consider recent appeal statistics in considering relevant factors in its balancing exercise. They reveal extremely poor-quality Home Office decision making. This makes it clear that fair and truly accessible appeal procedures are critical to remedying flawed and overtly removal focussed and target driven decisions. Fourth quarter Tribunal figures for the 2017/18 business year reveal that:

    - **56% of Human Rights appeals are allowed/granted**
    - **40% of deportation appeals are allowed/granted**
    - **66% of Deprivation of Citizenship appeals are allowed/granted**
    - **41% of Asylum/Protection/ Revocation of protection appeals are allowed/granted**

9. A departure from the flexibility which is found only in the Principal Rules cannot be justified in the face of these figures. At a bare minimum, detainees must be afforded proper time to prepare and present their cases to the Tribunal in order to challenge such decisions. Correspondingly, the Tribunal itself must have the full array of powers to release detainees and exercise flexibility in managing cases so that justice can be done. We say that this can only be achieved by the continuing use of the Principal Rules.

Consultation Questions

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

10. No, and we say this because:

(a) The proposed timetable of 25 or 28 days provides insufficient time for representatives to carry out the wide range of tasks necessary to provide effective representation at an asylum appeal hearing. This includes obtaining legal aid, the instruction of experts, adequate time with detainees to take instructions and prepare statements and pursuing adequate disclosure from the Home Office in order to prepare an appeal.

(b) The Home Office's previously proposed forms of case management review and time limits on judicial discretion within the fast track rules are insufficient as safeguards, particularly where appellants are unrepresented and/or vulnerable
(c) The TPC has rightly identified that timescales can be affected in a number of ways without the requirement for specific rules 'including by resourcing decisions made by HMCTS and judicial decisions'
(d) Screening out vulnerable appellants continues to be extremely poor despite strong criticism of the 'adults at risk' policy.

Views of the TPC since the judgments in the Detention Action case

11. Law Society representatives met members of the TPC in January 2016 to discuss the parameters of a potential new fast track framework then being suggested by the Home Office in response to the Court of Appeal's judgment. Those discussions, and related Home Office correspondence with the TPC at the time were about a timetable similar to the current proposals put forward by the Home Office with the exception that it is now proposed that the rules should not apply to Foreign National Offenders who remain in prison (for the time being). At that time the TPC was not persuaded, in principle, of the lawfulness of an accelerated procedure and indicated that, even if it were persuaded:

    (a) The criteria for entry into the relevant cohort needed to be clear and workable, but no such criteria had been identified
    (b) The departure from flexibility would have to be justified by evidence, but the evidence seen by the TPC did not justify doing so; and
    (c) It was far from certain that the Principal Rules were failing[2]

12. The TPC emphasised that timetables for classes of cases prescriptively prejudice the flexibility of judicial response. It also identified that this runs counter to the TPC's statutory obligations under section 22(e) TCEA 2007 which empower the TPC to assess what fairness in proceedings demands and how it can be achieved. These are strong conclusions made by a statutorily appointed committee empowered to formulate rules and delegate such powers to the tribunal judiciary via those rules as it sees fit.

13. The Society considers that the TPC's conclusions still hold good in the absence of any new/and or credible supporting evidence from the Home Office. The Principal Rules provide all the necessary case management tools to achieve the fair determination of detained immigration appeals. For the Principal Rules to work efficiently in the context of detained casework they must be supported by adequate judicial and administrative resources which Government departments must be willing to deploy. The lack of resources cannot be said to be evidence that the Principal Rules are failing, such that fast track rules should now be adopted at any expense. Indeed, the TPC has indicated that it is unaware of any criticism of how timescales are currently operating under the Principal Rules.

14. The series of judicial reviews brought by Detention Action and the evidence considered by both the Administrative Court and Court of Appeal demonstrated the significant risks to fairness that arise from the use of fast track timetables, whether before or during the appeal stage. The Home Office has acknowledged that wide ranging criticism was made of the wider DFT process and the fast track appeal rules. In summary, these encompassed: unduly restrictive timescales and practical obstacles to consultation with lawyers; similarly restrictive timescales for the preparation of cases and applications to

[2] See page 5, Letter from TPC to Rob Jones, Home Office, 12 February 2016

the Tribunal; limited time to properly evidence cases and seek additional supporting evidence, including from experts; limited time to ensure public funding was in place; poor screening out of the vulnerable and those with mental health issues, and the sub-standard application of Rule 35.

15. These obstacles would certainly not be remedied by a fast track timetable of 25 days, 28 days or significantly longer. Specific expedited timescales prevent lawyers from carrying out their professional duties and preparing cases effectively. They also hinder judicial independence and flexibility in handling cases fairly. This is especially so where timescales are imposed by the respondent to the appeal and which strengthens the appearance of bias. Our analysis of a sample of cases dealt with under the current DIA procedures below strongly support this position.

16. It is for the reasons above that we support the maintenance of the view held by the TPC in 2016 that the Principal Rules be used to secure Home Office objectives. These Rules are ready and able to provide expedited case management if they are supported by adequate administrative and judicial resources in hearing centres.

17. Our views do not depend on the reason/s why an individual may be in detention. Whatever the basis for detention, the TPC correctly emphasised the real or perceived prejudice that may taint any case within a fast track and this will continue, notwithstanding that the Home Office has now jettisoned its earlier criteria for entry to the fast track i.e. 'cases, which, in general appear to be unnecessarily late, opportunistic, abusive or highly likely to fail'.

Legal Aid

18. The legal aid position continues to be precarious. The regulations mean that many appellants' cases will be partly or wholly 'out of scope' for legal aid due to their case being in part or as a whole a non-asylum matter or because they do not fall into limited exceptions such as those that exist for trafficking victims and victims of domestic violence. A large proportion of the new cohort are unrepresented appellants who will most likely have to apply for 'Exceptional Case Funding'. We are aware that current times for determining these applications are lengthy (indeed, the application may well not be determined within the proposed 25 or 28-day time limit to disposal) meaning that many appellants will go either wholly unrepresented or parts of their appeals will not be prepared at all or properly due to lack of funding, thereby fundamentally undermining their ability to properly present their appeals or do so at all. It would also put representatives in an invidious position of not being able to properly discharge their professional duties towards their client due to lack of funding and representatives' inability in the current financial climate to carry out work on a 'pro-bono' basis. The provision of, and accessibility to legal representation is a crucial element in assessing fairness within an expedited appeal procedure.

Law Society analysis of recently decided and ongoing detained appeals

19. In September 2018 the Society undertook a review of detention cases held by a reputable detention advice contract provider in order to inform its response to this consultation and to assist the TPC in its deliberation. Our findings and conclusions leave us with no doubt that a fast track appeal timetable remains inherently unrealistic and carries with it a real risk of unfairness in too many cases thereby undermining the rule of law. Our review of the cases also serves to confirm that prescriptive timetables for classes of cases are unworkable because each case has its own unique factual and

legal matrix that require conscientious representatives to undertake multifarious and time-consuming tasks in order to properly prepare for an appeal. These vital tasks carried out by representatives are in many cases determinative of a successful appeal outcome and cannot be carried out properly or at all under the severely restricted timetable proposed by the Home Office.

20. We were particularly struck by the time necessary to carry out basic investigations and other actions necessary in many cases to prepare a robust appeal for clients. These include but are not limited to:

    - **Applying for Exceptional Case Funding (ECF)** – in the cases we examined applications for ECF took between 4 weeks and 4 months for a decision to be given even though the applications were clearly marked as urgent. This is despite the current Legal Aid Agency timescales for determination of ECF applications being 10 days for urgent cases and 25 days for other cases. The timescales for determining ECF applications would eat up a significant portion of, or all of the proposed 25 or 28-day timetable leaving appellants unrepresented and/or significantly hinder proper investigation and preparation of appeals.

    - **Medico-legal, psychiatric, trafficking and country information reports** – finding and confirming the availability of experts to provide reports central to issues within an appeal is time consuming. Experts (particularly medical professionals) then need to visit detainees in IRCs in order to interview clients – access is often restricted and significant time is required to complete and submit reports for representatives to then consider. A majority of cases we examined led to extensive adjournments in order for expert reports to be obtained by representatives.

    - **Subject Access Requests** (SARs)- bearing in mind the paucity of Home Office standard disclosure, representatives are often required to make SARs in order to elicit the full history and detail of a client's immigration history. Again, information contained in SAR disclosure can be determinative in cases and uncover serious failings in Home Office disclosure as to a client's immigration history. Whilst the publicly stated timescale for a response to a SAR is 30 days, this is often significantly exceeded in practice. Indeed, on occasion where a copy of a full Home Office file is requested only a summary is provided within the timescale leading to a further request and a new 30-day period commencing. In deportation cases, representatives will need to obtain their clients' files through SARs from the Ministry of Justice in addition to making the SAR request to the Home Office itself.

21. It is apparent from the above that the time taken to carry out standard actions required of representatives, including even gaining public funding to be able to represent clients, make a fast track timetable unworkable. The cases we examined and feedback from our members reveal that other practical obstacles continue to hinder the work of legal representatives where clients are detained. These include:

    - **Access to clients** – Despite the suspension of the DFT there are likely to be delays of several days in arranging a legal visit to Morton Hall for example, where there are only three interview rooms which are also used by the Home Office. Visit times are also restrictive. All the detention centres have an enforced 1 ½ or 2-hour break in the middle of the day so if representatives need to see the client for the full day this is not possible. In many cases taking a client statement can take days. Visit times are also significantly eaten into by the security process e.g. a consultation slot from 9am to

11.30am does not mean the appointment will begin at 9a.m. 9 a.m is the time visitors are processed through security. In most cases, representatives will need to have the appeal statement completed before experts can be instructed.

- **Communication with clients** - mobile phone reception is a real issue in Morton Hall. Most of the centre does not have any or adequate phone reception. Clients need to be in a certain part of the centre to get reception, so contacting clients there causes a lot of difficulties and delays. Also, clients are transferred to other detention centres without representatives being informed of this or the reason why.

22. Our analysis of detained client's files also reinforces the widely held view amongst stakeholders that **the Adults at Risk policy is failing** a significant number of detainees. It was clear from our investigations that highly vulnerable individuals continue to be detained for administrative convenience despite strong medical and other evidence that release is appropriate.

23. The TPC will no doubt be considering in detail the analysis and conclusions reached by Stephen Shaw in his most recent report on the welfare in detention of vulnerable persons[3]. It is clear from his findings that policy and guidance since his first and highly critical report have engendered little, if any positive impact on decisions to release vulnerable detainees. Tellingly, Stephen Shaw reports: "Indeed, I think 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)". It must then be the case that even greater caution be exercised in the re-introduction of fast track appeal procedures on the basis that vulnerable detainees will and do require longer to prepare and participate in the appeal process.

FOR FURTHER INFORMATION

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