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Bingham Centre

# Response to the Ministry of Justice inquiry into the use of expedited immigration and asylum appeals for detained appellants

## INTRODUCTION

1. The Bingham Centre for the Rule of Law welcomes the Government's inquiry into the use of expedited immigration and asylum appeals for detained appellants, and submits the following response. The response is authored by Justine Stefanelli (Maurice Wohl Associate Senior Research Fellow in European Law) with input from other members of the Bingham Centre.

### *About the Bingham Centre and its work on immigration detention*

2. The Bingham Centre for the Rule of Law was launched in December 2010 and is devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework within which it can operate; and fashioning the practical tools to support it. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. It is part of the British Institute for International and Comparative Law, a registered charity based in London.

3. The Bingham Centre has a particular interest and expertise in immigration detention, having published a report on Immigration Detention and the Rule of Law in 2013, which was written by Michael Fordham QC, Justine Stefanelli and Sophie Eser.[1] The report set out 25 Safeguarding Principles to promote the accountability of immigration detention under the rule of law, and is based on legal instruments, promulgated standards, working illustrations, judicial observations and includes 'soft law' sources. The Centre also submitted evidence to the October 2014 joint inquiry into the use of immigration detention in the UK, by the All-Party Parliamentary Groups on Refugees and on Migration.

4. The Bingham Centre was a drafting partner for the Council of Europe's Commission on Democracy through Law (Venice Commission) in its May 2016 publication, a Rule of Law Checklist for its member States.[2] Many of the principles in the Checklist were drawn from Lord Bingham's definition of 'rule of law'. They are referenced in sections A through F below.

[1] Bingham Centre for the Rule of Law (M Fordham, J Stefanelli, S Eser), 'Immigration Detention and the Rule of Law: Safeguarding Principles' (2013), available at: http://www.biicl.org/files/6559_immigration_detention_and_the_rol_-_web_version.pdf.

[2] Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), available at: http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

*Summary of this submission*

5. In this submission, we respond to questions 1-4 and 6-9 from a rule of law perspective.

6. We do not support the use of detained expedited processes to deal with immigration appeals.

7. However, should the Government determine that such a system is necessary, we offer some recommendations aimed at helping the system develop in a way that is as compliant with rule of law standards as possible.

8. In particular, such a scheme should be mindful of the following principal considerations:

    - Sufficiently accessible and precise rules should be introduced to promote legality, legal certainty and non-arbitrariness (Part A).

    - Expedited processes should be presumptively applied, but should be applied only at the request of the appellant, in consideration of whether a quick decision is possible, and whether the appellant has any vulnerability that may counsel against application of the expedited process (Part B).

    - An overall time limit informed by specific time limits for each stage of the process will enhance legal certainty and predictability for appellants and their legal representatives. However, a degree of flexibility should be permitted to extend the time periods in certain circumstances (Part C).

    - The expedited process should include a mandatory oral case management review hearing to guard against unlawful detention (Part D).

    - Access to justice should not be denied by virtue of its cost (Part E).

    - The Tribunal Procedure Committee should develop these rules according to a principle of transparency. (Part F).

9. We make specific recommendations with regard to each of these issues.

*Immigration Detention and the Rule of Law*

10. The comments in this submission are made with a particular focus on compliance with the rule of law. In particular, the following elements of the rule of law are emphasised: **legality, legal certainty, non-arbitrariness and access to justice**. Moreover, we emphasize that legal certainty and non-arbitrariness are vital in ensuring meaningful access to justice and the protection of rights.

11. The rule of law is part of the fabric of the UK's constitution and society. It underpins the nation's adherence to its legal and political obligations domestically and internationally. Compliance with the rule of law ensures equality, dignity, respect and justice for all individuals. It is of paramount importance that those vulnerable to immigration detention are not denied the protections of the rule of law.

12. The principle of **legality** requires that state action be exercised in accordance with, and authorised by, the law. This requirement ensures that public officials act within the limits of the powers conferred upon them by law, and respect procedural and substantive law.

13. **Legal certainty** is a fundamental aspect of the rule of law. It requires that the law must be definite and clear, made public and not be capable of retrospective application. It also ensures that

individuals subject to the law are able to regulate their conduct in light of the law. Legal certainty also forms one of the general principles of interpretation of European Union (EU) law, and is an important aspect of the Venice Commission's definition of the rule of law.[3]

14. Legal certainty is related to the **prohibition against arbitrary application of the law**. Having clear rules in place will reduce the risk that a government task, such as detaining an individual, is exercised in an arbitrary manner.

15. **Access to justice** to enforce rights is a fundamental aspect of the rule of law. In this regard, Lord Bingham reiterated the notion attributed to Gladstone that 'justice delayed is justice denied'.[4] In the context of immigration detention where people who have not committed crimes are deprived of their liberty for significant periods, quick and effective access to justice is imperative.

### *The Use of Expedited Processes*

16. The overarching recommendation in this submission is that a fast-track appeals process for detained individuals should not be used in the UK. Such a process risks resulting in the unnecessary detention of individuals pursuing appeals who might otherwise be suitable for release into the community, pending conclusion of their appeals. This is made clear in the Impact Assessment in paragraph 25, which states that "For a substantial proportion of [detained appellants], it is expected that a substantially faster appeal process would justify detention until their appeal is determined, possibly increasing the average time such individuals spend in detention."

17. Moreover, as underscored by the Court of Appeal ruling which quashed the Fast Track Rules 2014,[5] the previously-applicable Detained Fast Track system was the subject of much criticism, especially from the United Nations High Commissioner for Refugees (UNHCR). In particular, the UNHCR was concerned that safeguards relating to the screening and routing of applications into the fast track were insufficient to identify complex claims and vulnerable applicants.[6] The Law Society of England and Wales called the Fast Track system "so fundamentally flawed that it places applicants at an unacceptable risk of unfairness in the processing of their claims."[7] Other domestic bodies shared similar concerns.[8] Indeed, the Court of Appeal specifically highlighted "problems faced by legal representatives of obtaining instructions from individuals who are in detention" and "the considerable number of tasks they have to perform".[9] This can have considerable effect on detainees' ability to fairly present their case, especially where timetables are prescriptive and do not allow for flexibility to take into account the particular circumstances of a case.

18. In the event, however, that the Government considers it necessary to move forward with its proposals, we make several recommendations below. However, the recommendations should not be regarded as an endorsement of the Consultation Paper's proposals; rather, they seek to

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[3] European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law', CDL-AD(2011) 003rev, 10-11.

[4] Tom Bingham, *The Rule of Law* (Penguin 2010) 88.

[5] *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

[6] UNHCR, 'Quality Integration Project: Key Observations and Recommendations' (August 2010) p. 4.

[7] Written evidence submitted to the House of Commons Home Affairs Committee by the Law Society of England and Wales (April 2013), para 23, available at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71we-14.htm.

[8] See, e.g., Independent Chief Inspector of the UK Border Agency, 'Asylum: A thematic inspection of the Detained Fast Track' (July-September 2011); Detention Action, 'Fast Track to Despair: The unnecessary detention of asylum-seekers' (May 2011);

[9] *The Lord Chancellor v Detention Action* (n 5) [38].

minimise the problems that would arise, or are already evident, as highlighted by the Court of Appeal.[10]

## A. THE NEED FOR SPECIFIC RULES (Question 1)

19. The rule of law requirement of legality suggests that it is appropriate to develop specific Rules. We therefore agree that specific Rules are the best way to ensure that any expedited process for detained appellants is fair and just.

20. Specific Rules will help guard against the potential for inconsistencies in time limits, and the risk that judicial determinations may lead to inappropriate delays. Unnecessary delay is of acute concern to immigration detainees who suffer a prolonged deprivation of liberty and may also suffer distress, physical and mental illness and separation from loved ones as a result of their detention. It is also prejudicial to taxpayers and to the state which bear the costs of detention.

21. Appropriate specific rules will also define the process in a way that allows disputes about the way it is carried out to be resolved more easily. They would also provide a basis upon which individuals can challenge any breach thereof, and will increase the likelihood that time limits will be adhered to by the First-tier Tribunal (FtT).

22. Any Rules should take into account the judgment of the Court of Appeal which held that the rules must provide "an irreducible minimum of due process" to ensure that the system for expedited proceedings are "accessible and fair" overall.[11]

23. **Recommendation 1:** We agree that specific Rules should be introduced for an expedited appeals process. Such rules should be accessible and precise to prevent arbitrariness and promote the rule of law requirements of legality and legal certainty.

## B. SCOPE OF APPLICATION OF EXPEDITED APPEALS (Questions 2 & 3)

24. The previously-applicable Detained Fast Track process was partly motivated by the aim to dispose of cases for which "it appear[ed] that a quick decision [was] possible".[12] This principle should continue to guide the decision of whether a fast-track process is suitable for appellants who are not in detention at the time they file for an appeal.

25. Therefore, there should be no presumption of the application of the expedited appeals process. Rather, entry into the proposed expedited process should only be at the request of the appellant, due to the inherent risk of unfairness for appellants in expedited processes, as underscored by the Court of Appeal.

26. In particular, detainees have great difficulty in accessing quality legal representation. For example, legal advice surveys conducted by Bail for Immigration Detainees (BID) have highlighted four key barriers to accessing immigration legal advice in detention:

    - Substantial delays in obtaining an appointment in legal advice surgeries in immigration removal centres (IRC);

[10] *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

[11] ibid [22], [25].

[12] Home Office, 'Detained Fast Track Processes' sections 2.1-2.2, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370322/Detained_Fast_Track_Processes_v6_0.pdf.

- Poor communication by lawyers;
- Lack on ongoing legal advice for individuals detained long-term; and
- The impact of detainee transfers between IRCs on the ability to retain a lawyer.[13]

The most recent legal advice survey conducted by BID concluded that only 54% of detainees have a legal representative.[14]

27. In addition to difficulties with legal representation, individuals with vulnerabilities, such as a mental health disability, who are subject to expedited processes may be unnecessarily detained and may suffer as a result of such processes, as their heightened pace may mean that appellants are unable to comprehend the process or engage with it in a meaningful way. This is exacerbated in situations where the appellant does not have legal representation.

28. **Recommendation 2**: The expedited process should not be presumptively applied to all detainees; it should only be applied at the request of the appellant, in consideration of whether a quick decision is possible, and whether the appellant has any vulnerability that may counsel against application of the expedited process.

## C. TIME LIMITS (Question 4)

29. In setting time limits, the judgment of the Court of Appeal should be considered. Lord Justice Briggs stated that:

> the rules must 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. Speed and efficiency do not trump justice and fairness. Justice and fairness are paramount.[15]

30. In his view, the standard for determining whether an appellate system is unfair so as to be lawful was "whether the system 'considered in the round' carried 'an unacceptable risk of unfairness'".[16]

31. We believe it is preferable to introduce an overall time limit which is informed by reference to specific time limits for each stage.

32. Imposing specific time limits at each stage of the appeal process promotes certainty and clarity for practitioners and appellants. In addition, stage-based deadlines provide an opportunity to consider at various times throughout the appeal whether the deadlines are being respected or whether it is appropriate to remove the case from the expedited process. Requiring only an overall time limit risks a situation where the appellant or the state may not realise until the end of the proceedings that the time limits have not been respected and that therefore, the appellant may have been detained unnecessarily.

33. Some flexibility will be required. For example, where a detained appellant makes submissions that he or she is unable to complete a particular stage of the proceedings within the envisaged timeframe, the Tribunal should consider extending the time period. If the extension requested is

[13] Bail for Immigration Detainee's submission to the APPG on Refugees and APPG on Migration's parliamentary inquiry into the use of immigration detention in the UK (September 2014), available at: http://www.biduk.org/sites/default/files/media/docs/BID%20submission%20to%20detention%20inquiry_Access%20to%20legal%20advice%20in%20IRCs%20Sept%202014%20(2).pdf.

[14] Bail for Immigration Detainees, 'Legal Advice Survey – Spring 2016', available at: http://www.biduk.org/sites/default/files/Legal%20Advice%20Survey%20-%20Spring%202016.pdf.

[15] *The Lord Chancellor v Detention Action* (n 5) [22].

[16] ibid [25], quoting Sedley LJ in *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481[20].

lengthy for legitimate reasons, the Tribunal should consider removing the appeal from the expedited procedure. If, however, the Secretary of State cannot complete within a given timeframe, the appellant should be removed from the expedited processes.

34. **Recommendation 3:** An overall time limit informed by specific time limits for each stage of the appeal process should be implemented to enhance legal certainty and predictability for appellants and their legal representatives. The Tribunal should be given a degree of flexibility to consider at multiple points during the appeal whether the case remains suitable for the expedited process, or whether an extension at the request of the appellant is appropriate. Where it becomes evident that the Secretary of State is unable to comply with the time periods for good reason, the appeal should be removed from the expedited process.

## D. MANDATED CASE MANAGEMENT REVIEW (Questions 6 & 7)

35. We do not agree that the opportunity for an appellant to apply for a case management review on the papers, with discretion for a judge to hold an oral case management review, is sufficient to guard against situations where an appellant has been inappropriately included in the expedited appeals process and perhaps detained further as a result.

36. An oral case management review will provide detained appellants with an opportunity to argue at the start of the process that they have been inappropriately placed in expedited processes.

37. Moreover, an oral case management review will enable the FtT to identify or verify, first-hand, any other reasons for postponing the merits hearing or transferring the case out of expedited proceedings, such as a vulnerability which might be exacerbated by expedited proceedings, or which may render expedited proceedings unfair in a particular case. In such cases, the possibility to speak with the appellant in person is of vital importance.

38. The quashed Fast Track Rules provided several factors in Rules 12 and 14 that the FtT should consider in deciding whether to adjourn or whether to transfer out of Fast Track. Rule 12 provided that adjournment or postponement is proper only if the FtT "is satisfied that (a) the appeal could not justly be decided if the hearing were to be concluded on the date fixed under the Fast Track Rules". Rule 14(1)(b) required order out of the Fast Track where the FtT was "satisfied that the case cannot justly be decided within the timescales provided for in the Fast Track Rules".

39. The Fast Track Rules did not specify which factors the FtT should consider in making such a decision. However, Presidential Guidance Note 1 of 2014 on The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provides a number of factors to consider when determining whether adjournment is proper in relation to non-expedited appeals.[17] Guidance Note 1 suggests in section 7 that "each application to adjourn must be considered on its own merits, examining all the factors brought to the Tribunal's attention." In particular, it provides in section 8(a) that the FtT should take into account "sudden illness or other compelling reason preventing a party or a witness attending a hearing" (emphasis added).

40. The Bingham Centre has previously suggested that "[e]very detainee must promptly be brought before a court" to review the legality of detention.[18] This automatic requirement is no less important in the context of fast-track appeals, where appellants may be detained only for expediency.

41. **Recommendation 4:** The expedited process should include a mandatory oral case management review hearing within 24 hours of the appellant being placed in the fast-track system. At such a

[17] Sections 6-9. Section 10 refers to Rules 12 and 14 of the quashed Fast Track Rules in relation to adjournment in that context.

[18] Fordham et al (n 1) p. 109.

hearing, the FtT should consider "arguments from both parties regarding the readiness of the case to proceed to a full hearing",[19] as well as arguments regarding the personal circumstances of the appellant, particularly with regard to his or her suitability for continuation in the fast track. If the FtT considers that the case is not ready to proceed, the FtT should adjourn the case and set another date that it considers to be reasonable in all the circumstances.

This will allow the FtT to consider the progress of the case to date and the appellant's particular circumstances at that time which might impact the readiness of the case to proceed to a full hearing. In addition to the factors set out in Guidance Note 1, we therefore suggest that the FtT should consider:

(a) the personal circumstances of the appellant (e.g., whether the appellant was never, or should no longer be considered, suitable for the expedited process due, for example, to vulnerability);

(b) Whether the complexity of the case is such that it cannot fairly be determined in an expedited process; and

(c) the nature of access to the detained appellant by his or her legal representation, including the particular detention centre's rules regarding obtaining access permission.

## E. PAYMENT OF FEES FOR EXPEDITED PROCESS (Question 8)

42. The Consultation Paper asks whether appellants subject to the new proposed expedited appeals process should be required to pay a fee in order to bring their appeal to the FtT, and states that the Government "will work hard to make sure that legal aid arrangements support delivery of the proposals in this consultation."[20]

43. The Bingham Centre is opposed to the payment of fees for access to justice generally, and particularly among vulnerable appellants.

44. In *The Rule of Law*, Lord Bingham wrote that the "denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law". Indeed, the rule of law is not served where access to justice is barred by virtue of its cost.

45. This applies a fortiori to immigration detainees who are in a position of special vulnerability. These individuals have particular difficulty accessing legal representation, amassing required fees or obtaining documents needed in relation to applying for legal aid.

46. **Recommendation 5:** No fees should be payable by those in the expedited process.

## F. LEGISLATIVE PROCESS (Question 9)

47. We do not think that the correct approach is for the Government to take a power in primary legislation to introduce and vary time limits for different types of appeal.

48. Rather, we suggest that the significance of the issue and its potential impact on the detention of migrants counsels in favour of selecting the independent Tribunal Procedure Committee as a more suitable source for such rules.

[19] Consultation Paper, para 38.

[20] ibid, para 48.

49. We make this suggestion for two reasons. First, the rule of law requires that the process for enacting law be transparent and accountable.[21] This in turn requires, inter alia, that the public has a meaningful opportunity to provide input into proposed legislation. The Tribunal Procedure Committee should therefore undertake this task according to principles of public consultation and transparency.

50. Second, the Tribunal Procedure Committee has developed expertise in this field, which can help to guard against the imposition of unfair time limits.

51. **Recommendation 6**: The Tribunal Procedure Committee should be responsible for adopting rules on expedited immigration appeals, subject to principles of transparency and public consultation.

[21] Venice Commission Rule of Law Checklist (n 2), section 5.