The Slow Fast Track:
Law and Practice After the Suspension of the Detained Fast Track Processes

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Introduction

1. This note is intended to sketch out our thoughts on how to handle detained asylum cases following the recent successful challenge to, and suspension of, the Detained Fast Track (DFT). The note will address the following:

   1.1 Background and summary of the DFT challenge and its suspension;
   1.2 The current situation and Home Office 'interim' policy
   1.3 How to address claims previously dealt with in the DFT.

Background

2. The DFT was set up in 2000 and litigation challenging its operation began almost immediately. Domestic courts found that the operation of the DFT was lawful only in so far as it in practice incorporated safeguards critical to ensure that the process did not operate inflexibly or unfairly: *R (Saadi and Ors) v SSHD* [2002] UKHL 41, [2002] 1 WLR 3131, *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481.

3. In the *Saadi* litigation, the domestic courts (Court of Appeal and House of Lords) found that the DFT as it then operated was not unlawful under domestic law and was not contrary to Article 5 ECHR. In *Saadi v UK* [2006] INLR 638, (2007) 44 EHRR 50 the Strasbourg court confirmed that detention within the DFT for the purposes of deciding an asylum claim quickly did not breach Article 5(1) ECHR,

because detention was for the purposes of preventing unauthorised entry to the country and was not arbitrary given the time periods involved.

4. In *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481 [2005] 1 WLR 2219, the Court of Appeal was asked to consider whether the Harmondsworth fast track system was inherently unfair. The Court of Appeal held, dismissing the appeal, that

(1) no test or standard for the adaptation of the three day timetable to individual needs had been formulated by the Home Office. A clearly stated procedure which recognised that it would not be unfair to enlarge the standard timetable in a variety of instances was required.

(2) If the overriding goal of not compromising the integrity of the process was not to operate as a formula for refusing to extend the standard timetable, then interviewing officers had to have regard to the individual circumstances of each case. It was not enough to assert that a general policy of flexibility was deeply ingrained in the system.

(3) Furthermore, it was not sufficient to assert that there was an in built appeal process since an applicant was entitled not only to a fair appeal but also to a fair initial hearing and a fair minded decision. The consequences of an interview obtained in stressful circumstances which contained inconsistencies might not be susceptible to appeal.

(4) Nevertheless, the High Court judge had been right to conclude that the DFT, considered in the round and at the point of entry, did not carry an unacceptable risk of unfairness to asylum seekers and was not unlawful. There was a tension between flexibility, itself an essential part of the system, and an unwritten, imprecise but underlying policy of not compromising the system's integrity. If the policy were allowed to subvert individual requirements of more time, it would compromise the system because it would create unfairness.

(5) Provided that the system was operated in a way that recognised the various circumstances in which fairness would require an enlargement of the standard timetable, the present system was not inherently unfair. A written

flexibility policy would provide a necessary assurance that the three-day timetable was only a guide and not a straitjacket. Provided that the system operated flexibly it could operate without an unacceptable risk of unfairness.

5. Last year, in *R (Detention Action) v SSHD* [2014] EWHC 2245 (Admin), [2014] WLR(D) 310, Ouseley J commented on deficiencies in every aspect of the DFT process and found that the DFT "*as operated carries an unacceptably high risk of unfairness*" [197]. In particular, Ouseley J found that crucial safeguards to ensure that vulnerable / potentially vulnerable detainees and/or complex claims were not processed within the DFT, including Rule 35 and the API on claims accepted by the Helen Bamber Foundation and Freedom From Torture, were not working effectively. However, he judged that these problems could be remedied by ensuring that detainees had more time with legal representatives prior to their substantive asylum interviews.

6. Subsequently, the Court of Appeal ([2014] WLR(D) 537, [2014] EWCA Civ 1634) granted a declaration that detention in the DFT following a substantive decision on the asylum claim and pending appeal was unlawful, because the policy was not sufficiently clear and transparent.

7. Following the Ouseley judgment, the SSHD introduced a policy which (mostly) ensured four working days between the appointment of duty representatives and the substantive asylum interview. However, this (combined with increasing numbers of detainees within the DFT) resulted in a sharp increase in the numbers of cases being referred to the Foundations, with the result that by January 2015 the Helen Bamber Foundation could no longer commit to giving appointment dates. Cases which would previously have been released under the API, because they were too complex to be determined quickly, were no longer being released and were being processed within the DFT. The problems of lack of capacity at the Foundations exacerbated the flaws in the Rule 35 process, and in particular the ineffectiveness of Rule 35 to identify and ensure the release of victims of torture.

8. In February, a number of similar claims were brought to challenge the operation of the DFT in relation to the Foundations policy, arguing that the DFT as operated carried a systemic risk of unfairness which could not/had not been eliminated by simply allowing more time for detainees to consult lawyers. In March, four lead claims were identified in what has been known as the Helen Bamber Foundation cases ('HBF cases') and a number of other cases were stayed pending resolution of those claims. A separate challenge was brought in a group of cases involving victims of trafficking. ('T&E' cases)

9. Meanwhile, Detention Action brought a further challenge to the Fast Track Procedure Rules (*Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin)), where on 12 June 2015 Nicol J declared that the Procedure Rules were unlawful. The appeal of the Lord Chancellor was dismissed on 29 July 2015. At [37] the Master of the Rolls acknowledged that asylum appeals are often factually complex and raise difficult issues of law and stated that:

> *38. I have no doubt whatsoever about the independence and impartiality of the tribunal judges who deal with the appeals. I accept that they are specialist judges who can usually be trusted to get the right answer on the basis of the material that is presented to them. I am also sure that they do their best to comply with the overriding objective of dealing with appeals justly. Nevertheless, in view of (i) the complex and difficult nature of the issues that are often raised; (ii) the problems faced by legal representatives of obtaining instructions from individuals who are in detention; and (iii) the considerable number of tasks that they have to perform (see para 20 above) the timetable for the conduct of these appeals is so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases under the FTR regime.*

10. In upholding Nicol J's decision to quash the Procedure Rules, the Master of the Rolls gave the following reasons at [42]-[45]

    (1) It may be difficult for the appellant to persuade the tribunal that the appeal cannot be justly determined in the limited time available. There may not have been sufficient time to complete inquiries into possible further evidence. An appeal is bound to seek to challenge the reasons given by the SSHD for refusing the asylum claim. Many refusals turn on adverse

findings on the appellant's credibility. 7 days between the date of the refusal decision and the appeal hearing is bound to be insufficient in a significant number of cases. There are difficulties facing legal representatives who have to take instructions from clients who are in detention. It may not be possible for them to say whether the further inquiries that they wish to make are likely to be fruitful. In such a situation, it may be difficult to persuade the tribunal that there are cogent reasons to transfer a case out of the fast track: [42]

(2) The fact that the opportunity to transfer out of the fast track only arises at the appeal hearing itself has the consequence that the appellant is required to argue that the evidence that has already been submitted in support of the appeal is insufficient. The appellant is placed in a very difficult position. The stronger the case he seeks to advance for a transfer on the footing that there are material gaps in his evidence which he needs time to fill by obtaining further evidence, the more he damages his prospects of succeeding in his appeal if the tribunal refuses to transfer the case out of the fast track. In order to explain why the time scales are unjust, the appellant has to identify all the evidential gaps in his case. But if the application to transfer is refused, the appellant will then have to persuade the judge that the appeal should be allowed notwithstanding these gaps. This puts the appellant in an invidious position, is unfair and unjust: [43]

(3) It is likely that judges will consider the FTR time limits to be the default position. The rule 12 power and the rule 14 duty are mechanisms 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 FTR would be defeated. There is bound to be a reluctance to postpone or transfer an appeal on the day of the hearing when time has been allocated for the full hearing of the appeal and the parties and witnesses have come to give their evidence and advance their submissions. The tribunal would be likely to be more sympathetic to an application to postpone or transfer out if it were made at a case management hearing *before* the date of the hearing. But the timescales of the FTR do not permit this. Rule 10 requires the decision and the reasons

for it (which may be extensive and detailed) to be given no later than 2 working days after the day of the hearing. By the time of the hearing, the SSHD and the FTT will have prepared for the appeal and there will be a momentum in favour of proceeding with the hearing which it will be difficult for an appellant to stop: [44]

(4) The time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases. For the reasons that I have given, the safeguards on which the SSHD and the Lord Chancellor rely do not provide a sufficient answer. The system is therefore structurally unfair and unjust. The scheme does not adequately take account of the complexity and difficulty of many asylum appeals, the gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from their clients who are in detention. It seems to me that some relaxation of the time limits is necessary, but it is not for the court to prescribe what is required to remedy the problem: [45]

(5) *"A lawful scheme must, however, properly take into account the factors to which I have referred whilst, I acknowledge, giving effect to the entirely proper aim of processing asylum appeals as quickly as possible consistently with fairness and justice."*

11. In the HBF litigation, at the eleventh hour, the SSHD conceded the HBF cases and the lead cases were settled by consent with Blake J giving a short judgment relating to the order and statement of reasons. As set out in the consent order and statement of reasons, the SSHD accepted that:

> *"1. The Detained Fast Track (DFT) as operated at 2 July 2015 created an unacceptable risk of unfairness to vulnerable or potentially vulnerable individuals within the meaning of 2. below. There was an unacceptable risk of failure:*
>
> *a. to identify such individuals; and*
>
> *b. even when such individuals were identified, to recognise those cases that required further investigation (including, in some cases, clinical investigation).*
>
> *This created an unacceptable risk of failure to identify those whose claims were unsuitable for a quick decision within the DFT.*

2. In paragraph 1 above "vulnerable" or "potentially vulnerable" individuals include but are not limited to asylum seekers who may be victims of torture, significant ill-treatment, human trafficking, or may be suffering from mental disorder or other physical or mental impairment which may affect their ability to present their claims in the DFT.

3. It also includes but is not limited to individuals identified in R (Detention Action) v Secretary of State for the Home Department [2014] EWHC 2245 (Admin) at paragraphs 114, 198 and 221 of the judgment."

12. Blake J stressed that it was the *indicator* of vulnerability or potential vulnerability that ought to have triggered identification of the person as unsuitable for a quick decision within the DFT.

13. On 2 July, the Immigration Minister announced[1] that the DFT was suspended temporarily pending a review of safeguards within the process.

14. On 20 July, the T&E cases were settled by consent, and the order and reasons were again approved by Blake J in open court. As set out in a consent order and statement of reasons, the SSHD accepted that:

1. *Each of the Claimants in these proceedings falls within the categories of vulnerable or potentially vulnerable applicants as identified in the declaration at paragraphs 1-3 of the HBF Order.*

2. *In the circumstances of each case, the Defendant acted unlawfully, and in breach of her published policies on DFT and trafficking and of Article 4 ECHR in failing:*

   i) to identify indicators that the Claimant was a potential victim of trafficking and;

[1] http://www.parliament.uk/documents/commons-vote-office/July%202015/2%20July/6-Home-Asylum.pdf

ii) to recognise that the Claimant's case required further investigation (including referrals to the NRM and/or the police)

and was therefore unsuitable for quick determination in the DFT; and further

(iii) to ensure that each Claimant had been informed fully of the NRM process and / or to document adequately how the Claimant had been so informed.

3. *In the case of Y, the Defendant further acted unlawfully in routing him into the DFT because his claim based on sexual orientation was one which on its facts required further investigation to obtain corroborative evidence and was therefore unsuitable for a quick determination within the DFT.*

4. *The DFT as operated at 2 July 2015 was operated without full compliance with section 149 of the Equality Act 2010, to the extent that certain vulnerable groups were at unacceptable risk of unfairness.*

5. *Having regard to what IK and Y said in their asylum screening interviews, and to the disclosures of PU set out in her rule 35 report, each of the three representative Claimants in these proceedings should have been but was not identified as having a claim that was unsuitable for a quick decision and was, therefore, unlawfully subject to the DFT process from entry into it.*

6. *Each of the three Claimants was unlawfully detained contrary to common law and Article 5, ECHR:*

   6.1. *In the case of Y, from 26 November 2014 having regard to what he said in the asylum screening interview;*
   6.2. *In the case of IK, from 29 January 2015 having regard to what she said in the asylum screening interview;*
   6.3. *In the case of PU from 3 February 2015 when a Rule 35 report was received confirming there was independent evidence of torture and that she fell within the exclusion criteria at paragraph 2.3 of the DFT policy and Chapter 55.10 EIG.*

7. *In PU and Y, the Defendant acted unlawfully in refusing to accept the Rule 35 report as indicating that a quick decision could not properly be made and hence that the claim was not suitable for processing within the DFT.*

8. *Each of the three Claimants is entitled to substantive damages to be assessed if not agreed.*

15. A few points of note:

(1) The challenge was to the DFT / DNSA processes (and not exclusively the DFT process);

(2) The litigation involved claimants in *both* The indicators in the test litigation are those arising at screening. The claimants did not all state explicitly in answer to the questions regarding suitability for the DFT that they would be unsuitable but their interview answers gave information which indicated their unsuitability;

(3) The rule 35(3) in each case, where available, concluded that the individual may be a victim of torture. Blake J's emphasis on *indicators* and the SSHD's acceptance that this meant each should have been removed from the DFT, importantly point to these being indicative of vulnerability / potential vulnerability and indicative that the case was unsuitable to be processed within the DFT;

(4) A majority of the test cases were enforcement cases (rather than port / ASU applicants) and thus by virtue of being an enforcement case did not make it less unsuitable to process the individual in the DFT;

(5) Decisions made in the DFT were quashed and to be retaken on further representations.

16. Following the Court of Appeal's lifting of the stay imposed by Nicol J (per Sullivan LJ on 26 June 2015), the SSHD continued to seek to remove persons who have had their appeals heard within the DFT. This was so even though Sullivan LJ's dicta

when lifting the stay had the clear effect of suggesting that all appeals heard within the DFT should be re-heard.

17. Injunctive relief was obtained in respect of 8 applicants (*Alvi and Ors v SSHD*) to prevent their removal by charter flight on 30 June 2015. In addition to a stay on removal and a quashing of the decisions of the Tribunal in their individual cases in order to give effect to the judgment in *Detention Action*, the applicants sought generic relief so that a ruling can be obtained that would benefit anyone who has had an appeal heard within the DFT (and was vulnerable to removal now) so that they might have their appeals heard afresh and be protected from removal. This was dealt with on 10 August 2015 with the President of the First-Tier Tribunal (Immigration and Asylum Chamber) relying on rule 32 of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 to set aside the decision of the FTT in each of the individual's case in the light of the Court of Appeal's decision in *Lord Chancellor v Detention Action* to find there being procedural irregularity in the proceedings and it being in the interest of justice for the decision to be set aside.

18. The FTT President Michael Clements has provided a draft letter which individuals may use to set aside previous DFT appeal determinations.

The 'interim' policy

19. On 2 July, the Home Office issued an interim policy ("Detention: interim Instruction for cases in detention who have claimed asylum, and for entering cases who have claimed asylum into detention"). That policy was circulated to caseworkers in Detained Fast Track (DFT) process, all staff in the National Removals Command (NRC), National Asylum Allocation Unit (NAAU), staff with ICE commands and reporting centres, CCU, NEXUS, Border Force staff and all staff in UKVI Asylum processing and decision making units, but was not published.

20. On 16 July, the Home Office issued version 2 of the interim instructions and published those instructions.[2]

21. The policy provides that :

21.1 DFT staff should review the detention of all applicants in DFT awaiting an initial decision on their asylum claim in accordance with the general detention criteria as set out in Chapter 55 of the EIG. In any detention review, suitability for detention must also be considered in accordance with EIG55.10.

21.2 DFT staff should review all cases at any stage of the process with a Rule 35 report on file in accordance with EIG55.10.

21.3 DFT and NRC staff should review the detention of all applicants in DFT who have an in-country right of appeal, following a negative decision by the Secretary of State, in accordance with the general detention criteria as set out in EIG55.10. Decisions to maintain detention should be clearly documented. Where an applicant has a Rule 35 report, this should be reviewed first.

21.4 DFT and NRC staff should review the detention of all applicants in DFT who are appeal rights exhausted (ARE) or who have had their case certified by the Secretary of State as clearly unfounded, in accordance with the general detention criteria as set out in EIG55.10.

Problems with the interim policy

22. The interim policy is likely to be unlawful for a number of reasons:

22.1 The interim policy refers to the principle of making a quick decision on an asylum claim, but there is no reference to the reason why the DFT was suspended, i.e. that the quick decision principle cannot apply to potentially vulnerable people or those whose claims require further investigation;

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446421/Asylum_in_detention_-_interim_Instruction_V2.pdf

22.2 The interim policy accepts that the way in which the DFT operated meant there was an unacceptable risk of unfairness to "vulnerable" asylum applicants (para 2), but does not define what vulnerability / potential vulnerability is (even though the DFT consent order and statement of reasons set out a clear agreed definition). There is therefore no way for Home Office caseworkers to ensure that precisely those individuals who were supposed to be unsuitable for detention pending a decision on their claims are not detained;

22.3 In fact, the policy goes further – it refers to an indicative timescale of 28 days to decide the claim, but when it mentions the need for flexibility it refers only to situations in which the detainee needs to get more evidence or "operational reasons"). There is no reference to vulnerability or potential vulnerability as a reason why flexibility might be needed;

22.4 The interim policy assumes that applications for asylum can still be processed whilst an individual remains in detention (para 3) but does not put this in context by reference to the presumption in favour of liberty (EIG 55.1 & 55.3), nor the use of detention as a last resort and for the shortest possible period (see also the factors under EIG 55.3.1). Article 5 ECHR is not mentioned, nor any reference to the need to ensure detention is not arbitrary;

22.5 The starting presumption as to how the power to detain can / should be exercised is by reference to EIG 55.3, not 55.10 (which relate to the exclusionary criteria);

22.6 The manner in which the policy refers to EIG 55.10, which are *exclusionary* criteria, carries an unacceptable risk, on the face of the policy, of indicating a presumption of detention save for those who appear to be vulnerable and fall within the exclusionary criteria under EIG 55.10. This is wrong in circumstances where the presumption in favour of liberty apples not only to those who are vulnerable or potentially vulnerable but to all individuals seeking asylum in the UK.

22.7 It fails to set out any or any adequate guidance for the questions necessary to ascertain whether a particular asylum applicant can suitably be detained pending the determination of his asylum claim. EIG 55.10 does not provide

such guidance. The question that needs to be asked is whether and in what circumstances can an individual be *included* in a detained asylum process in circumstances where there is a presumption in favour of liberty and detention powers must only be exercised sparingly and only as a last resort.

22.8 The policy refers throughout to detention in line with the general detention criteria set out in Chapter 55 (not the DFT detention criteria), but there is no recognition that those who would otherwise have gone into the DFT were not, in general, suitable for detention under the general detention criteria;

22.9 The policy's approach to rule 35 is also problematic. No guidance is given which reminds caseworkers that a Rule 35 report is an indicator of vulnerability and that such cases are inherently unlikely to be suitable for detention pending a decision on the claim.

22.10 The policy refers to suitability for detention on the basis of a reasonable likelihood of certifying the claim as unfounded, but again does not define vulnerabilities (nor is it clear what a 'reasonable likelihood' of certification means)

22.11 The policy refers to the ability to conclude claim within a 'reasonable' time frame – but what is 'reasonable' in the context of an asylum claim in the absence of a fast-track? Similarly, the policy refers to 'significant delay' being required before a claim can be removed from detention – this is unclear and appears to suggest that no lessons have been learned from the DFT litigation.

23. Overall the interim policy appears to suggest that notwithstanding the DFT litigation, the SSHD is in reality operating a 'slow track' detention policy whereby most if not all asylum claimants will be detained pending consideration of their claim. This is highly likely to be unlawful at common law and under Article 5 ECHR.

Claims arising from the DFT

24. Claims arising from the DFT fall into one or more categories:

24.1 **Asylum decisions (whether NSA or not) that were made in DFT under the previous unlawful system and / or in reliance on interviews and other material (Rule 35, etc) obtained in the DFT.** In these cases, whether detained or not, a request should be made for reconsideration and a fresh decision on the previous asylum claim, on the basis that the consideration of the claim was carried out through the unlawful DFT process. Where additional evidence can be/has been obtained which was not considered then the *de novo* consideration of the claim should also identify and / or include the new evidence, but this should not necessarily be presented as a fresh claim under rule 353;

24.2 **Appeals heard within the DFT under the previous ultra vires / structurally unfair appeal rules.** In the light of the judgment and order in *Alvi and Ors*, a request should be made to the FTT to have the FTT determination set aside and for a re-hearing of the appeal. There will be a further underlying unlawful decision made by the SSHD in the suspended DFT. A request for a reconsideration and a *de novo* consideration as above can be made.

24.3 **Judicial review claims in relation to *refusals* by the SSHD to consider asylum claims de novo**. These cases will all involve the same legal issues: i.e. fairness, the illegality of the previous DFT system, and the obligation to give anxious scrutiny to asylum claims;

24.4 **Unlawful detention claims for those currently detained –** general claims that detention pending a decision is arbitrary / unlawful, challenges to the interim policy, and cases, in particular (but not limited to), where vulnerability/unsuitability for detention has been raised at screening or through Rule 35;

24.5 **Historic unlawful detention claims, for those released from detention but previously considered/detained unlawfully within the DFT.** These should be relatively straightforward from the legal/factual point of view but there

are likely to be some cost-benefit issues and some arguments about substantive versus nominal damages;

24.6 **New detained asylum caseworker**. NSA cases appear still to be processed as DFT cases notwithstanding suspension, on the spurious basis that different process/criteria applies to NSA cases. These claims will involve challenges to application of detention criteria; lawfulness of detention for the purposes of NSA cases where the entire system has been suspended because of unacceptable risk of unfairness; any arguments around vulnerability / potential vulnerability if present; procedural irregularity, including detention reviews, reasons for detention, etc.

25. The priorities in all cases are:

25.1 Temporary Admission Request / Bail / High Court injunctive relief (probably in that order);

25.2 Reconsideration of claims processed within the DFT, with if possible new evidence;

25.3 Challenges to Detained Asylum Casework (pseudo fast-track even though DFT / DNSA suspended);

25.4 Challenges to certification (if decision made);

25.5 Challenges to detention;

25.6 Evidence gathering about Home Office decision-making.

Last updated 12 August 2015