Case No: CO/588/2015

Neutral Citation Number: [2015] EWHC 1689 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2015

Before :

MR JUSTICE NICOL

- -

Between :

Detention Action	**Claimant**
- and -	
(1) First-tier Tribunal (Immigration and Asylum Chamber) **(2) Upper Tribunal (Immigration and Asylum Chamber)** **(3) Lord Chancellor**	**Defendants**
-and-	
Secretary of State for the Home Department	**Interested Party**

(4)

- -

Nathalie Lieven QC and Charlotte Kilroy (instructed by **Migrants Law Project at Islington Law Centre**) for the **Claimant**
Oliver Sanders (instructed by **Treasury Solicitor**) for the **3rd Defendant**
Cathryn McGahey (instructed by Treasury Solicitor) for the **Interested Party**

Hearing dates: 19th and 20th May 2015

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Judgment

Mr Justice Nicol :

1. In most cases when the Secretary of State for the Home Department ('the SSHD') refuses an application for asylum, there is a right of appeal before removal takes place. The appeal is determined by the First-tier Tribunal (Immigration and Asylum Chamber) – 'the FTT'. The unsuccessful applicant is the Appellant, the SSHD is the Respondent. From the FTT there is a right of appeal with permission on a point of law to the Upper Tribunal (Immigration and Asylum Chamber) - 'the UT'.

2. The procedure to be followed in the FTT is governed by The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2014 No. 2604 – 'the FTT Procedure Rules'. Two different regimes are created by these Rules. Rules 1-46 establish the ordinary procedure. They are referred to in the Schedule as 'the Principal Rules' and it is convenient to use that terminology. The Schedule itself is entitled 'The Fast Track Rules'. I will refer to them as 'the FTR' and the procedural regime which they establish as 'the Fast Track appeals'. I will explain later what the consequences are of being a Fast Track appeal, rather than one subject to the Principal Rules and what are the features which determine the applicable regime. It is sufficient to say at this stage that all of those in the Fast Track appeal system are detained.

3. Procedure in the UT is governed by The Tribunal Procedure (Upper Tribunal) Rules 2008 SI 2008 No 2698. They provide the procedural regime in several of the Chambers of the UT, not just the Immigration and Asylum Chamber. However, the special character of a fast track appeal is maintained, since abbreviated time limits are applied to Fast Track appeals which reach the UT – see r.36A.

4. Detention Action, the Claimant, is a charity set up in 1993 to support individuals in immigration detention and to campaign on issues relevant to immigration detention. The main issue in these proceedings is whether the FTR are *ultra vires* i.e. beyond the power to make procedural rules which Parliament has conferred. The Lord Chancellor is named as a Defendant because he has approved the FTR, as the enabling legislation requires. Permission to bring this application for judicial review was granted by McGowan J. on 6th March 2015.

5. All the appellants whose appeals are subject to the FTR had their applications for asylum determined by the SSHD in a particularly speedy process known as Detained Fast Track – 'DFT'. It is called *Detained* Fast Track because all of those subjected to this quick process are detained. Sometimes the expression DFT is used to embrace the subsequent appeal against a refusal of asylum in a Fast Track appeal. Sometimes it is used to refer only to the administrative decision making stage. I shall try to make clear in which sense I use the expression.

6. The Claimant brought a previous action in 2013 against the SSHD (CO/6966/2013). This was a challenge to the DFT (I will need to say more a little later as to the extent to which DFT in the wider sense was relevant). Ouseley J. gave judgment on 9th July 2014 - *Detention Action v SSHD* [2014] EWHC 2245 (Admin) ('*DA 1'*). While he rejected some of the Claimant's arguments, he accepted others. He heard further argument as to what relief was appropriate in view of his judgment and gave a second decision on 25th July 2014 - [2014] EWHC 2525 (Admin) ('*DA 2*'). He decided that while some declaratory relief was necessary, a declaration that the operation of the

DFT was unlawful without explaining why would not properly reflect the limited basis of the Claimant's success in *DA 1*.

7. Detention Action appealed to the Court of Appeal. The Court, comprising Longmore, Patten and Ryder LJJ, dealt with the appeal so far as it concerned *DA 2*. The appeal was dismissed – [2014] EWCA Civ 1270. ('*DA 3'*). The remainder of the appeal was heard by Beatson, Floyd and Fulford LJJ. They gave judgment on 16th December 2014 – [2014] EWCA Civ 1634 ('*DA 4*'). In *DA 4* the Court held that the SSHD's criteria for determining which cases were suitable for fast-tracking after the refusal of asylum and pending appeal were not objectionable in principle but lacked the requisite clarity and transparency. As criteria for detention beyond the general detention criteria they also appeared (so far as the Court could tell) to lack justification.

8. The Claimant's second ground for seeking judicial review is that, in consequence of *DA 4*, the only rational and lawful response of the FTT and the UT would have been to treat all asylum appeals as subject to the Principal Rules and not the FTR. I shall refer to this as the rationality challenge.

9. Although the First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber) were named as the first two defendants, neither took part in the proceedings. The Lord Chancellor was named as the Third Defendant. He (represented by Mr Sanders) and the SSHD (who was an Interested Party and who was represented by Ms McGahey) opposed the claim.

The differences between the two procedural regimes in the First-tier Tribunal

10. ***Much shorter time limits***

i) Under the Principal Rules the notice of appeal must be received by the Tribunal not later than 14 days after the person concerned is sent the decision against which an appeal is brought - Principal Rules r.19. A Fast Track notice of appeal must be received within 2 working days of the day on which the person concerned was provided with the decision – FTR r.5(1).

ii) In a case under the Principal Rules the Respondent has 28 days to provide (in summary) any statement of evidence, record of interview, any unpublished document relied on by the Respondent and any fresh decision or further grounds - Principal Rules rr.23 and 24. The equivalent period under the FTR is 2 working days – FTR r.7.

iii) No specific time is set by the Principal Rules for the listing of the appeal. A Fast Track appeal must be listed for hearing not later than 3 working days after the provision of the Respondent's evidence, unless the Tribunal is unable to arrange a hearing within that time, in which case it must be as soon as practicable - FTR r.8(1). This means that the hearing of a Fast Track appeal will normally be within 5 working days of the notice of appeal being lodged and within 7 working days of the decision against which the appeal is brought.

iv) The Principal Rules set no specific time for giving a judgment of the FTT which has been reserved. In the case of a Fast Track appeal the decision and

the reasons for it must be given not later than 2 working days after the day of the hearing – FTR r.10.

v) If a case has been heard under the Principal Rules, an application for permission to appeal to the UT must be received not later than 14 days after the date on which the applicant was provided with the decision of the FTT - r.33(2). In the case of a Fast Track appeal, the time limit is 3 working days – FTR r.11.

11. ***More restricted case management powers***

i) When an appeal is subject to the Principal Rules the Tribunal may extend or shorten the time for complying with any rule, practice direction or direction – r.4(3)(a). When dealing with a Fast Track appeal the Tribunal has no such power – FTR r.1 Table 2, although there is a limited power to extend time for lodging a notice of appeal if that would be in the interests of justice – FTR r.5(2)-(6).

ii) The hearing of an appeal under the Principal Rules can be adjourned or postponed by the Tribunal – r.4(3)(h). When hearing a Fast Track appeal the Tribunal has no such broad power – FTR r.1 Table 2. On the contrary there is a presumption that the hearing must be concluded on the same day – FTR r.9(1). FTR r.12 does allow the Tribunal to adjourn or postpone a Fast Track appeal hearing if it could not be justly decided on the listed day, but only if there is an identifiable date, not more than 10 working days later, on which the Tribunal can conclude the hearing and justly decide the appeal within the timescales provided for in the Fast Track Rules – FTR r.12.

iii) It is right to note that when the Tribunal is dealing with a Fast Track appeal, it has a general power to transfer the appeal out of the fast track "if the Tribunal is satisfied that the case cannot justly be decided within the timescales provided for in the Fast Track Rules." – FTR. r.14(1) Both Mr Sanders and Ms McGahey placed considerable reliance on this provision and I will have to consider it again later.

The criteria for application of the FTR rather than the Principal Rules

12. FTR r.2(1) provides,

> "The Fast Track Rules apply to an appeal to the Tribunal or an application for permission to appeal to the Upper Tribunal where the appellant -
>
> (a) was detained under the Immigration Acts at a place specified in paragraph (3) when provided with notice of the appealable decision against which the appellant is appealing; and
>
> (b) has been continuously detained under the Immigration Acts at a place or places specified in paragraph (3) since that notice was served on the appellant."

Paragraph 3 of Rule 2 then lists Colnbrook House and Harmondsworth Immigration Removal Centres, both of which house men, and Yarl's Wood Immigration Removal Centre, which accommodates women.

13. On the face of the Rules, therefore, the application of the FTR is relatively straightforward. The Appellant must have been detained. The Appellant must have been detained at one of the three centres. The Appellant must have been detained at one of those centres when served with the immigration decision against which he or she is appealing. The Appellant must since have been continuously detained at one of those centres. On the face of the Rules those are the necessary and sufficient conditions for the FTR to apply.

14. However, while Ms McGahey agreed that they were *necessary* conditions, she did not accept that they were *sufficient*. She said that, in practice, the SSHD exercised a discretion as to whether an appellant (who met these necessary criteria) should be treated as a Fast Track appeal case. That is reflected in a document entitled 'DFT Consolidated Detention Review Guidance'. The document is undated but it was sent to the Claimant under cover of a letter dated 30th January 2015. Ms. McGahey argued that in practice such discretion was essential. Yarl's Wood was the only establishment where women immigration detainees could be held. It was not the SSHD's position that all women who had been detained since their immigration decision and who continued to be detained should have their appeals dealt with in the fast track process. Although the position was not quite as stark with men (since there were detention facilities for them apart from Colnbrook and Harmondsworth) it would be detrimental to the orderly administration of the immigration detention estate if a male detainee whom the SSHD considered not to be suitable for a Fast Track appeal but who was being held at one of those two centres had to be moved elsewhere in order that he should be subject to the Principal Rules rather than the FTR. In addition, it had always been the SSHD's practice to apply the fast track procedures only to asylum seekers. Other immigration detainees were not put in DFT at either the decision making stage or the appeal stage even if they were being held at one of the listed centres.

15. Ms McGahey initially submitted that I should read r.2(1) of the FTR as saying "The Fast Track Rules *may* apply to an appeal to the Tribunal or an application for permission to appeal to the Upper Tribunal …(where the conditions in (a) and (b) are satisfied)". However, she reflected and said that it was not her case that the rule should confer a discretion on the Tribunal to take a case out of the Fast Track Rules (over and above that which existed in FTR r.14). She then argued that the rule should be read as saying, "The Fast Track Rules apply to an appeal to the Tribunal or an application for permission to appeal to the Upper Tribunal *where the SSHD so determines and* … (the conditions in (a) and (b) are satisfied)".

16. Given the nature of Detention Action and its aims, it is unsurprising that it is no part of the Claimant's complaint that *fewer* people are being subjected to Fast Track appeals than the FTR strictly require. That said, Ms Lieven agreed that I had to judge the *vires* of the impugned Rules by reference to their proper interpretation and she struggled to see how Rule 2 could bear the interpretation which Ms McGahey was advocating. I shall return to this issue below. For the time being I will assume that the Rule does indeed permit the SSHD to exercise the discretion for which Ms McGahey advocates.

The Enabling Legislation for the Procedure Rules

17. The Tribunals Courts and Enforcement Act 2007 ('the 2007 Act') s.22 provides as follows,

> "(1) There are to be rules, called 'Tribunal Procedure Rules' governing –
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> (a) the practice and procedure to be followed in the First-tier Tribunal, and
>
> (b) the practice and procedure to be followed in the Upper Tribunal.
>
> (2) Tribunal Procedure Rules are to be made by the Tribunal Procedure Committee.
>
> (3) In Schedule 5 –
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> Part 1 makes further provision about the content of Tribunal Procedure Rules,
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> Part 2 makes provision about the membership of the Tribunal Procedure Committee,
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> Part 3 makes provision about the making of Tribunal Procedure Rules by the Committee, and
>
> Part 4 confers power to amend legislation in connection with Tribunal Procedure Rules.
>
> (4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing -
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> (a) that in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
>
> (b) that the tribunal system is accessible and fair,
>
> (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
>
> (d) that the rules are both simple and simply expressed, and
>
> (e) that 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."

18. Schedule 5 Part 1 paragraph 19 provided that "Rules may make different provision for different purposes or different areas." In Part 3, which concerns the making of Rules by the Tribunal Procedure Committee ('the TPC'), paragraph 28 provides that the Committee must consult such persons as it considers appropriate. The Rules must be signed by a majority of the members of the Committee and then submitted to the Lord Chancellor who has the power to allow or disallow them. The Rules then come into force on the day the Lord Chancellor directs. They are subject to the negative

resolution procedure – see 2007 Act Schedule 5 paragraph 28 (although I was told that there was no such resolution proposed in relation to the FTT Procedure Rules which I am considering).

19. The 2007 Act established the FTT and UT. It was envisaged that over time the functions of certain existing tribunals would be transferred to these new bodies. When that happened, s.31(1) of the 2007 Act gave the Lord Chancellor the power to abolish the old tribunal and, by s.31(7), "by order provide for procedural rules in force immediately before the transfer to have effect, or to have effect with appropriate modifications, after the transfer (and, accordingly, to be capable of being varied or revoked) as if they were – (a) Tribunal Procedure Rules."

20. One such tribunal whose functions were taken over by the new unified system was the Asylum and Immigration Tribunal – 'the AIT'. It operated under twin procedural sets of rules which very closely match the current scheme. Thus the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 SI 2005 No. 560 established a fast track procedure for those in detention at specified places when served with an immigration decision and who remained in such detention – r.5. The specified detention centres were similar to, but not identical to, those in the present FTR - Schedule 2. All other cases were governed by the Asylum and Immigration Tribunal (Procedure) Rules 2005 SI 2005 No 230. When the AIT's functions were transferred to the FTT and the UT in 2010, the Lord Chancellor exercised his power under s.31(7) to order that the two sets of AIT Procedure Rules should have effect as if they were Tribunal Procedure Rules – see The Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 SI 2010 No. 21 Article 4. The FTT Procedure Rules which I am considering were made by the TPC on 24th September 2014, allowed by the Lord Chancellor on the same day and came into force on 20th October 2014. They revoked the two sets of AIT Procedure Rules – see Principal Rules r.45. It follows that what was being considered in the earlier litigation brought by Detention Action, in Ouseley J's judgments *DA 1* and *DA 2* and in the Court of Appeal in *DA 3* and *DA 4* were those AIT Procedure Rules.

Whether the FTR are *ultra vires*: the Claimant's submissions

21. In short the Claimant argues that the procedural regime created by the FTR imposes a timetable which is so short and curtails the case management powers of the FTT to such an extent that justice cannot be done. Furthermore, that significant procedural disadvantage is a consequence of a decision (one way or another) of the SSHD. It is inimical to justice that one party to adversarial litigation should be able to impose that disadvantage on her opponent. In consequence, Ms Lieven argues, the FTR are *ultra vires* because they do not comply with the requirements of s.22 of the 2007 Act, involve improper delegation to one party to the appeal and are contrary to the independence of the Tribunal judiciary.

22. The Claimant argues that the short time scales for Fast Track appeals and the curtailment of the power of the FTT to ameliorate them speak for themselves. However, Ms Lieven additionally relied on the evidence of the Claimant's solicitor, Sonal Ghelani. In her second witness statement of 2nd March 2015, Ms Ghelani gives examples of Fast Track appeal hearings which were observed by a researcher from the University of Exeter and which took place at Harmondsworth between 30th January 2015 and 13th February 2015 and the difficulties which the appellants,

particularly when unrepresented, faced. Two other case studies, provided by Wilsons solicitors, are noted. She also lists the tasks which a representative will have to accomplish in the 7 working days between service of the SSHD's refusal of asylum and the substantive hearing of the appeal. They include:

i) Checking whether the general detention criteria have been properly applied. Since *DA 4*, these, rather than the DFT criteria must be used to justify detention.

ii) Making representations, where appropriate, that the appellant is unlawfully detained.

iii) Applying for bail which itself involves identifying sureties, taking instructions from them, and checking their availability for any bail hearing and finding a bail address.

iv) Taking instructions from the appellant on the refusal letter. Restrictions on visits to detainees may mean this has to be done over more than one day.

v) Preparing the appellant's statement, checking it with the appellant and having it signed.

vi) Arranging the translation of any necessary documents.

vii) Arranging for any expert evidence, including identifying an appropriate expert, applying for an extension to the controlled legal representation certificate to fund this or any other additional expense, further representations to the legal aid authorities (if necessary in the event of initial refusal), arranging for the expert to attend the appeal hearing.

viii) Making an application where appropriate for the appeal to be transferred out of the Fast Track appeal procedure. Considering the response to such an application from the SSHD.

23. At the hearing itself, the representative must be ready to challenge the appropriateness of detention[1] and/or apply for bail and make any application to transfer the appeal out of the Fast Track appeal process as well as be ready to argue the substantive appeal in the event that the FTT judge refuses the other applications. Ms McGahey accepted that in practical terms there was not an opportunity for an oral hearing at which the appellant could argue that the judge should exercise the power under FTR r.14 to transfer the appeal out of the Fast Track any earlier than the day listed for the substantive appeal.

[1] In an email dated 6th February 2015 FTT Judge Froom relayed the views of the President of the Immigration and Asylum Chamber of the FTT that, "It will be necessary for judges hearing fast track appeals to consider on their own initiative the legality of detention as a precursor to considering the substantive merits of the fast track appeal. It will be for the Home Office to provide the necessary information and show lawful detention. It should not be left to the appellant or their representative to raise the issue." Ms Ghelani's evidence was that this advice was not always followed. Even where it is, an appellant's representative will need to be ready to adduce any evidence or argument to counter the Home Office's case that detention is lawful under the general detention criteria.

24. In her 2nd and her 5th witness statement (the latter made on 6th May 2015) Ms Ghelani refers to the additional problems and delay which appellants might experience in establishing that they satisfied the financial and merits eligibility criteria for legal aid. In her 5th statement Ms Ghelani also recounts further examples of Fast Track appeal hearings which she witnessed on a visit to Harmondsworth on 13th March 2015 and where the expedited timetable caused practical difficulties for the appellants.

25. In arguing that the FTR place an appellant at a serious procedural disadvantage, Ms Lieven relies as well on the views initially expressed by the TPC. As I have already noted, when the AIT's functions were first given to the FTT and the UT the previous AIT Procedure Rules (for both ordinary and fast track appeals) were carried over. However, the Tribunal Procedure Committee took on the task of reviewing them. It put out a consultation paper in 2013 in which it said (at para 108) that its preliminary view was that the new rules should not include a similar fast track procedure to those in the 2005 Rules. It said,

> "The Draft Rules provide for extensive case management powers, including shortening of deadlines. The Chamber President may also issue Practice Directions and Statements, making provision for particular classes of cases. The TPC is aware of concerns that the current Detained Fast Track does not give appellants a reasonable opportunity to prepare and present their appeal – thereby creating injustice."

26. The Consultation Paper acknowledged that the Home Office was concerned that,

> "leaving procedures to the discretion of Tribunal Judges would not deliver the clear, consistent and truncated timetable that the current rules provide for. It is concerned that if the strictly reduced time limits are no longer guaranteed, there may be the following results: increased detention costs; lack of detention capacity; prolonged detention that increases the risk that detention is challenged successfully; the risk of a challenge to the DFT process as a whole as incompatible with Article 5 right to liberty. The DFT process is justified on the basis that it is detention for the purposes of preventing unauthorised entry, which is permitted under Article 5(1)(f) [of the ECHR]. In considering its legality the courts have considered the periods in which individuals are detained under DFT. Any increase to this time risks making a successful challenge more likely."

27. As part of the present proceedings, the Lord Chancellor has disclosed minutes of the meetings of the TPC and its Immigration sub-group as well as related correspondence. In a Note to the TPC meeting on 3rd October 2013 the Immigration Subgroup said,

> "15. All of the consultation responses supported the removal of fast-track - with the exception of the Home Office. …16. The President of the FTT(IAC) has also said that he would be unwilling to recreate the existing fast-track in a practice direction. 17. This puts us in a tricky position. The Home Office is plainly determined to maintain fast-track as it exists now. The subgroup has grave doubts that doing so is compatible with our statutory duties to ensure that justice is done and the tribunal system is accessible and fair."

28. The minutes of the October 2013 meeting record the following,

> "BL [Langstaff J, the chair of the Committee] highlighted the Bar Council's consultation response that had questioned a party to an appeal being able to select the judicial process to be followed, and consequently put the other party at a disadvantage. The Committee agreed; entrance to the DFT was at the behest of the HO and this did not appear to fit with the Committee's remit for making procedural rules under s.22(4) of the 2007 Act. PL [Upper Tribunal Judge Peter Lane] said that the DFT had grown in scope, and pointed out the Home Secretary's comment that the HO intended to develop it further….Finally, he reminded the Committee that Tribunal judiciary had the discretion to remove people from the DFT, or adjourn proceedings, so it was possible to relax the timescales slightly."

The Committee agreed with its Chair's proposal that they should engage in discussions with the Home Office.

29. The discussions continued. For its May 2014 meeting the possible options were summarised by one of the Committee members (Michael Reed). One option was not to enact any fast track rules. If this was adopted, Mr Reed noted that it would still be possible to shorten time-limits, either in an individual case or in the context of a Practice Direction dealing with detained appellants. However, he added,

> "our understanding is that Immigration Judges would not, if given discretion, replicate the current regime because of the risk of injustice."

At the meeting which took place on 15th May 2014 the minutes record,

> "[Michael Reed] reiterated his concern that extremely short time limits did not give someone with a meritorious appeal sufficient time to assemble a case and present it to a judge particularly if there were language difficulties. This view had been supported by respondents to the TPC's consultation, and by members of the judiciary. The first opportunity someone had to seek more time was when they appeared before a judge, and under r.28 [this was the equivalent in the 2005 Fast Track Rules to r.12 of the current FTR] the Tribunal could only adjourn for 10 days or under r.30 [the equivalent under the 2005 Fast Track Rules to r.14 under the current FTR[2]] transfer the case out of the fast track in exceptional circumstances. Current adjournment rates were 23% which appeared unacceptably high; although [Paula Waldron] highlighted this meant 77% were successfully being dealt with within these very short timescales. [Simon Ennals] made the further point that it demonstrated judicial oversight was working. [Jason Yaxley] reported HMCTS was hoping to reduce the adjournment rate and was working with the HO on this. The current presumption, but not borne out by the figures, was that much of the 23% would be due to late evidence. The consensus of the Committee was to agree option 3 of [Michael Reed's] paper: Retain fast track rules, but with modified time limits."

[2] Rule 30 of the AIT Fast Track Rules required there to be "exceptional circumstances" as well as the inability to determine the appeal justly but in *SH (Afghanistan) v SSHD* [2011] EWCA Civ 1284 at [3] the SSHD was recorded as accepting that this imposed no additional test since it was impossible to conceive of circumstances where an appeal could not be justly determined in accordance with the Fast Track timetable but was not exceptional. For this reason the omission of "exceptional circumstances" in r.14 of the FTR represented no practical difference.

30. In the event, the time limits in the 2005 Fast Track Rules were adopted by the TPC with only minor modification.

31. Thus, in summary, Ms Lieven submitted, concerns as to the unfairness of the fast track appeals system were acknowledged by the TPC in its consultation paper and that view was endorsed by all the consultees, including the Bar Council, with the exception of the Home Office. Absent specific Fast Track appeal rules, the Tribunal judiciary would (apparently) be unwilling to replicate the system through a Practice Direction because of the risk of injustice. The Home Office did not wish to leave the pace of such appeals to the discretion of the Judges because that would not deliver the clear, consistent truncated timetable which the fast track regime produced and appellants would spend longer in custody with the attendant cost and resource implications.

32. Ms Lieven argued that the FTR could not lawfully confer on the SSHD the power to place the appellant under such a serious procedural disadvantage:

    i) It amounted to an improper delegation of a power which ought to be a judicial function.

    ii) It was contrary to the requirement in s.22(4)(a) that Procedure Rules had to be made with a view to securing that "justice was done". While there were other objectives in s.22(4), the doing of justice should be the priority.

    iii) It was contrary to the Lord Chancellor's duty in the Constitutional Reform Act 2005 s.3(1) and (6) to uphold and defend the independence of the judiciary.

    iv) Since it is one party to the litigation who determines whether the other should be subjected to this procedural disadvantage, there is an impression of bias in favour of the SSHD. That was reinforced because in the lead-up to the FTR, the Tribunal Procedure Committee engaged in discussions with the SSHD which were not shared with those who represented appellants.

33. In Ms Lieven's submission, the validity of the FTR was not saved by the limited provision for adjournment in r.12 since that could only be for a maximum of 10 days. Nor were they valid because of the power to transfer out of the FTR in r.14. As Ms McGahey accepted, any such application could only be made effectively on the day listed for the substantive hearing of the appeal. That meant the appellant had to prepare both the transfer out application and the substantive appeal at the same time. This was unfair. It added to the burdensome nature of what had to be done in the 7 working days between the SSHD's decision and the hearing by an appellant who was invariably in custody. Furthermore, in order to explain why the Fast Track time scales were unjust, the appellant would have to identify all the evidential holes in her or his case. Yet, if the transfer out application was refused, the appellant would then have to seek to persuade the Judge that the appeal should be allowed, notwithstanding all those gaps.

Whether the FTR are *ultra vires*: the Lord Chancellor's and Home Secretary's submissions:

34. Mr Sanders submitted that the 2007 Act allowed the TPC to make different procedure rules for different purposes or different areas – 2007 Act Schedule 5 paragraph 19. That could not be limited to different rules for the different chambers of the FTT and the UT because paragraph 19 would otherwise have been so confined in express terms. The FTR made different provisions for Fast Track appeals from ordinary appeals. There was no delegation of any rule making power to the Secretary of State. Nor was there delegation of any other kind to her. It was simply the case that if one set of facts existed (as stated in FTR r.2) the FTR would apply to the appeal; if they did not then the Principal Rules would apply. There was nothing in this arrangement which interfered with the independence of the Tribunal judiciary or constituted actual or apparent bias.

35. Mr Sanders did not accept that the FTR was seriously disadvantageous to an appellant. Whether it was depended on the individual facts of the case and whether the appeal could be determined fairly and justly within the Fast Track appeal process. If it could not, the Tribunal would have to remove the case from the Fast Track pursuant to r.14. He submitted that that question could be fairly assessed without serious disadvantage to the appellant at the hearing which was listed for the substantive determination of the appeal. The individual examples given by Ms Ghelani (even if taken at face value) did not assist the Claimant's argument. The purpose of the FTT Procedure Rules (both Principal Rules and FTR) was to create a procedure for dealing with appeals. In any scheme it was possible for there to be instances of unfairness. What mattered was that the model was capable of being operated fairly and was not inherently likely to be operated unfairly. The FTT Rules satisfied that test.

36. Furthermore, the issue as to the fairness of the fast track system had been considered by Ouseley J in *DA 1*. While the Rules which he considered were the two sets of AIT Procedure Rules, for practical purposes those were the same as current FTT Rules. Ouseley J had summarised Detention Action's case in [68] of his judgment. It included the following,

> "(8) The appeal process provided few safeguards if any: entry into the fast track appeals process was automatic for those detained in the DFT; there was no prior or separate consideration of the continued suitability of the DFT for an individual's appeal; timescales were too short to permit the proper presentation of evidence; the combination of an accelerated appeals process and detention the while was a substantial impediment to the fairness of the process; the FTT was very reluctant to permit the removal of a case from the fast-appeals track, because the hearing itself was the only effective point at which such an application could be made; a significant percentage of appellants were unrepresented."

37. The Judge had then examined Detention Action's criticisms of the appeal process in detail at [182] – [197]. At [184] he observed that the fast track appeal procedure did not require a Case Management Review Hearing and so no opportunity to argue that the appeal should be taken out of the fast track before the substantive appeal, but the Judge said the rules "cannot be regarded as *ultra vires* or unfair on that account, nor am I persuaded that that difference between the DFT and non-DFT process creates an unacceptable risk of unfairness." He accepted at [194] the submission of Ms McGahey (who in that case as well had represented the SSHD) "that individual case histories where something had gone wrong do not show that the system is so unfair as

to be unlawful or there is an unacceptable risk that cases will be processed unfairly. They show individual error, where some error is bound to arise at times." Nonetheless, the evidence from the Claimants could not be viewed "without real unease about cases which may go through the DFT system when they should not have done so."

38. He reviewed the whole of the DFT process (i.e. both decision-making by the SSHD and the appeal process). He considered that there were certain deficiencies which did not require the whole process to be scrapped but did require remedial action, principally the earlier instruction of legal representatives - see [197]. In his overall conclusion at [219] he said "The inclusion of the appeal process in the DFT is lawful."

39. Mr Sanders submits that if Detention Action were dissatisfied with these findings, they should have appealed them to the Court of Appeal, but they did not. He has not submitted that it is an abuse of process for them to rely on the complaints of unfairness in the Fast Track appeal process in the present proceedings (not least because the same points could be taken without being an abuse by some other applicant for judicial review), but he does submit that I should give great weight to these comments of Ouseley J.

40. Mr Sanders also argued that in passing the 2007 Act, Parliament should be taken to have been aware of the procedural regime which then existed for dealing with asylum appeals under the two sets of 2005 AIT Procedural Rules and which included a fast track process. Section 31(7) of the 2007 Act expressly authorised the Lord Chancellor to treat existing procedural rules as Tribunal Procedure Rules for the new FTT and UT. From this I could infer that Parliament was content for a similar fast track scheme to be applied by the new unified Tribunals.

41. Mr Sanders also submitted that I should recognise that the TPC had to construct rules which served all of the objectives in s.22(4) of the 2007 Act. Indeed the rules which they made realistically could not guarantee those objectives, instead they had to be drafted "with a view to securing" them. All of this required a judgement. Since the Rules could be made by a majority decision – Schedule 5 paragraph 28(2)(a), Parliament recognised that there might even be a difference of view within the Committee itself as to how the different objectives should be accommodated. He accepted that the aim of "seeing that justice was done" ought to have an element of priority. He accepted as well that the nature of my review was not limited to *Wednesbury* irrationality, but, he observed, where immigration procedural rules had been found to be *ultra vires* in the past on fairness grounds, it was because they had denied the very essence of the right and effectively nullified a statutory right of appeal – see *R v SSHD ex parte Saleem* [2001] 1 WLR 443 (CA) and *FP (Iran) v SSHD* [2007] EWCA Civ 13. There was no such denial of the right of appeal in the present case.

42. He submitted that the correct approach was that of Sedley LJ in *R (Refugee Legal Centre) v SSHD* [2005] 1 WLR 2219 (CA) where the Court had been considering a challenge to the legality of the DFT system (in the narrower sense of the system up to the SSHD's decision – see [15]. Sedley LJ said at [8],

> "The choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-round of asylum applications. But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less expediency; and whether it has done so is a question of law for the courts. Without reproducing the valuable discussion of the development of this branch of the law in Craig, *Administrative Law* (5th ed), ch.13, we adopt Professor Craig's summary of the three factors which the court will weigh: the individual interest at issue, the benefits to be derived from added procedural safeguards, and the costs to the administration of compliance. But it is necessary to recognise that these are not factors of equal weight. As Bingham LJ said in *Thirakumar* [1989] Imm AR 402,414 asylum decisions are of such moment that only the highest standards of fairness will suffice; and as Lord Woolf CJ stressed in *R v Home Secretary ex parte Fayed* [1998] 1 WLR 763, 777, administrative convenience cannot justify unfairness. In other words, there has to be in asylum procedures, as in many other procedures, an irreducible minimum of due process."

43. Similar views were expressed in *FP (Iran)* (above) which had concerned the *vires* of immigration procedure rules regarding deemed service of notices of hearings for appeals and the power of the tribunal to proceed in the absence of a party. Sedley LJ said at [48] that the rules as framed were objectionable because they were "productive of irremediable procedural unfairness." Arden LJ said at [58],

> "Section 106(1A) [the provision of the Nationality, Immigration and Asylum Act 2002 which gave the Lord Chancellor the power to make procedural rules] requires the Lord Chancellor to seek to make rules which balance the requirements for fairness, speed and efficiency. In this field, speed and efficiency are unquestionably important, but there must be a limit to the degree to which fairness can be sacrificed in order to achieve speed and efficiency. It must still be possible to say that a rule which has been designed to achieve speed and efficiency is fair in its operation. Otherwise the balance required by section 106(1A) is not achieved. The requirement of fairness must depend on context. When the issue of fairness arose in *SSHD v Thirakumar* [1989] Imm AR 402 at 414, Bingham LJ, as he then was, held that asylum applications are of such moment that only the highest standards of fairness will suffice, and Sir John Donaldson and Mann LJ agreed with his judgment on that issue."

44. Mr Sanders noted that at times in the Claimant's submissions there had been criticism of the TPC for holding one-sided correspondence with the Home Office without seeking the comments of other consultees. However, the grounds for seeking judicial review of the FTR did not include any deficiency in the consultation process.

45. Ms McGahey adopted Mr Sanders' submissions.

46. She stressed, as the SSHD had done in correspondence with the TPC, the value of a speedy determination of certain asylum claims. She explained that when an asylum application is received it may be certified as clearly unfounded under s.94 of the Nationality Immigration and Asylum Act 2002. In that case, the person concerned may still appeal but only once they have left the UK: their right of appeal is non-suspensive. If the asylum claim is not certified the SSHD will decide following a

screening interview whether it is suitable for a fast track decision. If it can, the applicant is detained at one of the specified detention centres and the application proceeds in the DFT. The lawfulness of detention in those circumstances was approved in *R (Saadi) v SSHD* [2002] 1 WLR 3131 (HL), *Refugee Legal Centre* (above) and (with certain qualifications) in *DA 1*. If the application for asylum is refused, then after *DA 4*, the SSHD decides whether detention is justified according to the general detention criteria which are set out in Chapter 55 of the published Enforcement Instructions and Guidance. If the decision is to maintain detention then, initially, the SSHD will assume that the fast track will still be appropriate. However, Ms McGahey said that after the notice of appeal is received, the SSHD will review whether in her opinion the case is still suitable for a Fast Track appeal. If it is, the FTR will apply. If the SSHD considers that the appeal is not suitable for a Fast Track appeal, it will continue under the Principal Rules. In the latter case, a male detainee may or may not be moved to another detention centre, a female detainee cannot be moved anywhere else because, as previously noted, Yarl's Wood is the only immigration detention centre for women.

47. While under this system it is the SSHD who decides whether an appeal is dealt with under the FTR or the Principal Rules, Ms McGahey supported Mr Sanders' proposition that critically the FTT had the power under r.14 to transfer the case out of the Fast Track if it considered that the appeal could not be dealt with justly under those Rules. Ouseley J in *DA 1* had endorsed the view that this did not constitute an unfair system and I should come to the same conclusion.

48. Ms McGahey asked for the opportunity to reflect and provide written submissions after the hearing on other comparable situations in other litigation contexts. I agreed and I am grateful to her for her Note dated 27th May 2015 and to Ms Lieven and Ms Kilroy for their Note in Reply dated 2nd June 2015.

49. In her Note Ms McGahey gave the following examples of primary legislation which had this effect:

    i) Nationality, Immigration and Asylum Act 2002 s.94 which, as I have already noted, allows the SSHD to certify a protection or human rights claim as clearly unfounded. The effect of certification is that an appeal to the FTT can only be brought once the person concerned has left the UK. The appeal, in other words, does not suspend the SSHD's power of removal.

    ii) Nationality, Immigration and Asylum Act 2002 s.97 which allows the SSHD to certify that a decision was made wholly or partly in the interests of national security. If the SSHD so certifies, the person concerned cannot appeal to the FTT but only to the Special Immigration Appeals Commission.

    iii) Crown Proceedings Act 1947 s.10 which permits the Secretary of State to certify that death or injury was during military service. If a certificate is given neither the Crown nor any serviceman who inflicted the injury can be sued in tort. Recourse can only be had to various compensation schemes for members of the armed forces. The power to certify is now limited to those who were injured before 1987.

50. Ms. McGahey gave two other examples where a combination of primary and secondary legislation allowed one party to determine procedure:

    i) A claimant could choose to bring a claim for wrongful dismissal in the County Court (or the High Court if the County Court limit was exceeded) or in an Employment Tribunal as a result of Employment Tribunals Act 1996 s.3 (previously the Employment Protection Consolidation Act 1978 s.131) and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Different limitation periods, provisions for maximum damages, interest and costs apply depending on which jurisdiction is chosen by the claimant.

    ii) The Employment Tribunals Act 1996 s.10 and the Employment Procedure (Constitution and Rules of Procedure) Regulations 2013 SI 2013 No 1237 Schedule 1 paragraph 94 allow a Minister to direct an Employment Tribunal to conduct proceedings in private, exclude a person from the proceedings or to take steps to conceal the identity of a witness in the proceedings.

51. Ms McGahey accepted that none of these analogies was exact. However, she submitted that in the present context a similar combination of primary and secondary legislation authorised the SSHD to determine whether the FTR applied. The FTR applied to those who were detained at particular detention centres (see FTR Rule 2(3)). That was the secondary legislation. The comparable primary legislation was the Immigration Act 1971 Schedule 2 paragraphs 16 (which gave immigration officers the power to detain individuals who were liable to removal) and 18 (which gave the SSHD a power to direct places of detention). The SSHD had made a direction in 2011 which included the three specified centres in Rule 2(3).

Whether the FTR are *ultra vires*: discussion

52. I have to decide whether s.22(4) of the 2007 Act authorised the TPC to make, and the Lord Chancellor to allow, the Fast Track Rules. I accept Mr Sanders' submission that Schedule 5 paragraph 19 allowed the TPC to make different rules for different purposes and this would permit different rules to be applied in different circumstances even by the same Chamber of the FTT or UT. I also agree that, if a particular category of appeals can be fairly dealt with swiftly, then there can be no objection to such a category being dealt with under a distinct and expedited procedural regime. Mr Sanders submitted that the logic of the Claimant's position was that this could not be so. However, I did not understand Ms Lieven to be advancing such a proposition. It would, in any case, be untenable. One of the objectives which the TPC must strive to achieve by the rules which they make is that proceedings before the FTT and UT are handled quickly and efficiently – s.22(4)(c). But the important qualification to the proposition that a separate category of appeals can be hived off for fast track treatment is that they can be *fairly* dealt with.

53. This is clear from s.22(4) of the 2007 Act. Paragraph (a) provides that the TPC must exercise its power to make procedural rules with a view to securing that "justice is done" and by paragraph (b) that "the tribunal system is accessible and fair."

54. The Tribunal Procedure Rules, with which s.22 is concerned, cover a very broad range of subject matter. For all Tribunal appeals there is advantage in a procedural regime which is quick and efficient. I accept, as Mr Sanders and Ms McGahey

emphasised, that in the context of detained asylum seekers there is the extra factor of the cost of keeping appellants in custody while the appeal process takes place. There is a cost in straightforward financial terms, but there is also a cost in another sense. Immigration detention places are limited. If they are occupied by detainees going through an appellate process, they will be unavailable for other immigration detainees. Ms Lieven argued that such a cost was not obvious: the appellants might alternatively be released. I do not accept this. In *DA 4* the Court of Appeal said that detention during the appeal stage could not be justified simply because the appeals would be dealt with quickly; the general detention criteria had to be satisfied. As the judgment of the Court of Appeal explained, a decision on this issue was not strictly necessary – see [71] – but the point had been argued, the Court gave its reasons and, importantly, the order of the Court sealed on 16th January 2015, included declarations to this effect. All who are therefore now subject to the FTR are those whom the SSHD believes should be detained in accordance with the general detention criteria. That may not mean that in making a decision as to whether those general detention criteria are fulfilled the SSHD is indifferent to the likely length of the proceedings. On the contrary, Ms McGahey observed that paragraph 55.14 of Chapter 55 of the Enforcement Instructions and Guidance says that where a person is exercising a right of appeal "removal may still legitimately be considered imminent if the appeal or other proceedings are likely to be resolved reasonably quickly". Assuming that this is a position which the SSHD is entitled to take (a point which it is not necessary for me to determine), I am not in a position to decide on the evidence before me whether that is a critical factor in a significant number of cases. Accordingly, it seems to me right to proceed on the basis that, if there were not a fast track procedure, there would be additional expenditure for the SSHD in detaining asylum appellants whose cases took longer to complete and those appellants would occupy places that could not then be used for other immigration detainees.

55. Mr Sanders and Ms McGahey at stages in their argument submitted that the FTR benefited appellants whose cases would be determined more swiftly and who would therefore be in detention for a shorter period. I do not think this carries much weight. After all an appeal is subject to the FTR only because of the SSHD's decisions. There is no way that an appellant can trigger them, even if he or she believes that a speedy hearing will quickly vindicate his or her right to asylum.

56. As to the nature of the review, I reach the following conclusions:

i) None of the parties suggested that I should simply decide on a *Wednesbury* (i.e. *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) basis whether the TPC could rationally conclude that the FTR were an appropriate balance of the objectives in s.22(4).

ii) On the other hand, the objectives in s.22(4) may not always or all point in the same direction. It is likely that a balance will have to be struck. That involves a judgement. The fact that the Committee may reach a decision by a majority shows that Parliament contemplated that there may be a difference of views even within the Committee itself.

iii) The objectives are not all of equal status. Mr Sanders accepted that the first, that justice be done, ought to have an element of priority. I agree. I bear in mind as well that the Lord Chancellor must approve (or may disapprove) the

Rules. The Constitutional Reform Act 2005 s.2 gave the Lord Chancellor responsibility for upholding the independence of the judiciary. Section 1 of the same Act reaffirms his role in relation to the existing constitutional principle of the rule of law. Arden LJ alluded to this in *FP (Iran)* (above) at [59] – [61] and its relevance to ensuring that, where a right of access to a court exists, the opportunity must be a real one.

iv) The need to accommodate objectives apart from fairness and justice in devising procedural rules means that a set of rules will not be outside the terms of s.22 simply because they *could* give rise to cases of unfairness or injustice. In any event that would be to set an impossible, or at least unrealistic, standard. As the Court of Appeal said in *Refugee Legal Centre* at [7] "no system can be risk-free."

v) On the other hand, in my judgment, the Rules will not be valid and within the enabling provision if they have structural unfairness built into them. In *Refugee Legal Centre* at [7] Sedley LJ spoke of "a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself." And at [8] he said there must be an "irreducible minimum of due process" and this level of fairness cannot be sacrificed "on the altar of speed and convenience". Likewise, Arden LJ in *FP (Iran)* at [59] said "a minimum level of fairness must be achieved".

vi) Since I am told that only asylum appeals are dealt with in the FTR, only the highest standards of fairness will suffice – see Bingham LJ in *Thirakumar* (above) followed in *Refugee Legal Centre* and *FP (Iran)*. In the context of an appeal against a fast track decision, Moses LJ (with whom Patten and Ward LJJ agreed) echoed the same point in *SH (Afghanistan) v SSHD* [2011] EWCA Civ 1284 at [8].

vii) Because I should be looking to see whether there is structural unfairness in the FTR, I agree with Mr Sanders that the examples given by Ms Ghelani in her witness statements have a limited value. They are not irrelevant, though. If, on their face, the FTR would seem to be structurally unfair, the examples are capable of showing that these are problems which are not just theoretical. The Strasbourg jurisprudence emphasises that the Convention rights should not just be theoretical and illusory but practical and real. It is well established that deportation and removal do not engage the rights under Article 6 of the Convention, but that is immaterial since the common law, on which our notions of procedural fairness are based, similarly prides itself on conferring rights which are practical and real.

viii) The TPC is given responsibility for drawing up Tribunal Procedural Rules by Parliament and I must give its judgement respect. It undertook a consultation process. Mr Sanders is correct that the FTR are not challenged on the grounds that this process was flawed. I have not been shown all the responses, but I can gain an impression of them indirectly from the minutes of the Committee and its Immigration Subgroup. Although Detention Action or similar bodies were not party to all the correspondence with the Home Office, part of it, at least, was reflected in the TPC's Consultation Paper. I bear in mind that the TPC is not conducting adversarial litigation and is not obliged as a matter of law to

share all the discussions it has with one party to the consultation with all the others.

57. In my judgment the FTR do incorporate structural unfairness. They put the Appellant at a serious procedural disadvantage. I have summarised above Ms Ghelani's evidence of the kind of tasks which the representative of an appellant in a Fast Track appeal must accomplish in the 7 working days before the first opportunity to come before Tribunal and argue that the case should be taken out of the Fast Track. I shall assume that the appellant is represented, although that is not always so (according to Ms Ghelani's first witness statement approximately 43% of the detainees at Harmondsworth in the Fast Track in the period July- September 2014 were unrepresented. These figures come from HMCTS. The evidence of Daniel Smith on behalf of the SSHD suggests that there was a significant increase in representation rate after October 2014 since, according to him, between 1st July 2014 and 31st December 2014 only 7.4% of Fast Track appellants at Harmondsworth were unrepresented).

58. The appellant is always detained and, as is obvious, but which Ms Ghelani confirms, the fact of detention places additional obstacles in the way of achieving all that has to be done before the Tribunal hearing. Furthermore, the representative has to prepare simultaneously an application for adjournment or taking the case out of the Fast Track and the substantive appeal itself. The case histories presented by Ms Ghelani do indeed show, as Ms Lieven submitted, that these are real, not just theoretical difficulties for appellants' lawyers.

59. Of course, those lawyers are not the only ones who will have to prepare an application to adjourn and, at the same time, the client's substantive case in the event that the adjournment request is refused. That can happen in the context of other litigation. However, it is then the result of one of two things (or sometimes both). It may happen because the adjournment application is made late. Any difficulties this causes the lawyers are their client's own fault. Alternatively, the court or tribunal may have decided that the adjournment request should be considered at the full hearing. Then there will have been a judicial determination that this is a fair way to proceed. The problems which a Fast Track appellant's lawyer faces has neither of these causes. The procedural disadvantage is not because of the client's dilatoriness, nor because the FTT has decided that this is a fair way to proceed, but because his opponent in the appeal, the SSHD, has decided that this is what should happen.

60. What seems to me to make the FTR structurally unfair is the serious procedural disadvantage which comes from the abbreviated timetable and curtailed case management powers together with the imposition of this disadvantage on the appellant by the respondent to the appeal.

61. Mr. Sanders and Ms. McGahey argued that there was no serious procedural disadvantage because the power to adjourn in r.12 and the power to take a case out of the Fast Track in r.14 were sufficient to ensure that justice would be done.

62. In my judgment the power to adjourn has a very limited role because of the stipulation that the adjourned hearing must take place within 10 days. In any case, the Tribunal has to be satisfied that the case cannot be justly decided on the same day and can be justly decided on the adjourned date. The Tribunal will only take the case out of the

FTR under r. 14 if it is satisfied that the appeal cannot justly be determined within the Fast Track timescales. The onus is on the appellant to demonstrate these matters and there is a real risk that 7 working days will be simply too short to assemble such an argument (and, at the same time, prepare for the full appeal in case the Tribunal decides to proceed). Thus the high proportion of cases which currently proceed to a determination of the appeal under the FTR does not demonstrate that the process is working fairly. Ouseley J made the same point in *DA 1* at [199] when he said,

> "Although the decisions of the FTT judiciary on whether or not to keep a case in the DFT cannot be used to show that the policy is unlawful, the fact that so many are kept in does not show that there is no prior unfairness since what is available at the substantive hearing affects that decision and what is then available for an appeal."

63. It is not entirely clear why the TPC resiled from the preliminary position in its consultation document that the Fast Track appeal process was unfair. So far as it is possible to tell from the minutes of the meeting of 15th May 2014, it was because a high proportion of cases proceeded without adjournment and for one member of the Committee at least this showed that judicial oversight was working. But with respect, that is not so. It may alternatively demonstrate the difficulty of preparing a successful application to adjourn and for the substantive appeal in 7 working days.

64. In the Explanatory Memorandum which accompanied the final version of the FTT Procedure Rules and which was drafted by the Ministry of Justice, the TPC's preliminary view is recorded but the Memorandum continues,

> "7.5 However the TPC recognises that speedy adjudication is desirable where a person is detained; not least for the individual concerned who should not be deprived of freedom for longer than is necessary. Following detailed consideration and engagement with HMCTS and the Home Office, the TPC decided that the DFT process should be catered for in the Principal Rules. The language and structure of the Schedule has been harmonised with the rules in place in other Chambers, and several of the DFT time limits have been adjusted where the TPC considers there is a practical need to do so for justice. These are: the listing of an appeal, applications for permission to appeal to the Upper Tribunal, and relisting of a case after adjournment. As mentioned above (paragraph 3.1), powers have been conferred to pilot a 6 day time limit for the hearing of DFT cases instead of the 3 day time limit contained in Fast Track rule 8(1). The TPC considers that giving the appellant a slightly longer period to prepare for a hearing will reduce the number of DFT cases that have to be adjourned on the day of the hearing or transferred out of the fast track."

65. I have commented above on the argument that the FTR benefits *appellants*. I have also described the extension of time limits in the FTR (by contrast with the previous AIT Fast Track Rules) as minor. I had in mind that an appeal must be listed within 3 working days after provision of the SSHD's material (rather than 2 under the AIT Fast Track Rules) and that the time for applying for permission to appeal to the UT is also now 3 working days after the FTT's decision (rather than 2 under the AIT Fast Track Rules). Under both the FTR and the AIT Fast Track Rules, an adjourned hearing has, or had, to be listed no more than 10 days later. I can see no significant change

between the two sets of Rules in that regard. None of the parties before me relied on the possibility of the pilot extension of the period for listing the appeal.

66. I recall that the SSHD opposed the TPC's preliminary view that separate Fast Track Rules should be abolished and the Tribunal judiciary be left with discretion to shorten time limits either on an individual basis or through Practice Directions from the Chamber Presidents. As the TPC's consultation document had said,

> "the Home Office is concerned that leaving procedures to the discretion of Tribunal Judges would not deliver the clear, consistent and truncated timetable that the current rules provide for."

From the perspective of an executive department that is a perfectly understandable objective, but it is not consistent with a procedural scheme which must give an element of priority to fairness and seeing that justice is done. On the contrary, it looks uncomfortably akin to what Sedley LJ in *Refugee Legal Centre* said should not happen, namely sacrificing fairness on the altar of speed and convenience.

67. I recognise that Ouseley J. in *DA 1* did not accept the broad attack on the Fast Track appeals process as put forward by Ms Lieven in that case and summarised by the Judge at [68(8)]. He placed importance on the judicial element in the Fast Track appeal process - see [87]. He did not consider that the absence of a Case Management Review hearing was fatal to the validity of the fast track appeals scheme – see [184]. The DFT procedure as a whole carried an unacceptably high risk of unfairness, but one which could be removed by the earlier instruction of lawyers - see [197]. In his overall conclusions he said that "The inclusion of the appeal process in the DFT is lawful" - see [219].

68. Ms Lieven argued that in *DA 1* the Claimant, Detention Action, was challenging the lawfulness of the SSHD's DFT. That included detention during the appeal stage and was one reason why the appeal stage featured in argument and the judgment. The second reason was that Detention Action had submitted that the Fast Track appeal was not a sufficient safeguard against unfairness at the earlier, SSHD decision-making, stage of DFT. Thus *DA 1* was not a challenge to the fairness or *vires* of the fast track rules as such.

69. Having seen the Claim Form and Claimant's Detailed Grounds for seeking judicial review in the previous action, I agree with Ms Lieven that the focus of attention was different. This is the first time that the legality of the Fast Track Rules (whether in their current form or earlier versions) has been considered. That said, the views of Ouseley J deserve respect. However, with the benefit of the evidence which has been produced for this case (and which was not before Ouseley J) and with the benefit of argument more closely directed at the *vires* of the Rules, I have reached the view that they cannot withstand the attack on their legality which the Claimant now brings.

70. Although a Fast Track procedure existed at the time the 2007 Act was passed, I do not consider that I can infer from this that Parliament implicitly authorised the TPC to adopt something similar. The statute was setting up a new unified structure. The machinery for making procedural rules applied across the board to all the chambers of the First-tier Tribunal and the Upper Tribunal. The TPC was itself a new creature with a new statutory mandate. In *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at [54]

Baroness Hale approved Sedley LJ's characterisation of the system created by the 2007 Act as having the aim, among other things "to complete the long process of divorcing administrative justice from departmental policy". The Asylum and Immigration Tribunal was not among the first of the existing tribunals whose functions could be transferred to the FTT and UT. These are specified in Schedule 6 of the 2007 Act and, in its original form, Schedule 6 did not include the AIT which was added in 2010 by the Tribunals Courts and Enforcement Act 2007 Order SI 2010 No. 20. Whenever existing tribunals were abolished and their functions transferred, the Lord Chancellor was empowered by s.31(7) to carry across their previous procedural rules to the new chambers which were to exercise those powers. Thereafter, the former rules were to be treated as Tribunal Procedure Rules. But the subsection expressly recognised that they could be varied or revoked by the TPC. Taking all of this together, I do not consider that it implies Parliamentary endorsement for the continuation of a Fast Track procedure beyond a transitional period.

71. I would agree with Mr Sanders and Ms McGahey that the situation created by the FTR is not really to be characterised as 'delegation' in the sense that the TPC did not delegate any rule making power to the SSHD. Nor is this appropriately classified as an example of actual or apparent bias: the SSHD is not exercising a judicial power. The complaint is in truth more straightforward. It is that by allowing one party to the appeal to put the other at serious procedural disadvantage without sufficient judicial supervision, the Rules are not securing that justice be done or that the tribunal system is fair. While the TPC had to make procedure rules "with a view to securing" these objectives and while it had to balance those aims against the others set out in the statute, it could not impinge on the minimum level of fairness or the irreducible minimum of due process bearing in mind the appropriate degree of fairness that asylum appeals require. For these reasons, in my judgment, the Fast Track Rules were *ultra vires*.

72. As I have said above, I have so far assumed that Rule 2 of the FTR does indeed give the SSHD a discretion to decide whether an appellant who was in detention at one of the 3 named detention centres at the time the refusal decision was served and who has remained in such detention continuously since then should be subjected to the Fast Track appeal procedure. I said that I would return to the question of whether that is the correct interpretation of Rule 2 and I do so now.

73. I share Ms Lieven's difficulty in seeing how the proper interpretation of r.2 could be as Ms McGahey proposed. Ms McGahey submitted that the SSHD's policy as announced in the 'DFT Consolidated Detention Review Guidance' would bind the SSHD and preclude her from operating in an inconsistent manner. I do not find that a satisfactory argument. If, as I am inclined to believe, Rule 2 does not give the SSHD such a discretion then the Rule must be applied. A policy document cannot empower, let alone oblige, the SSHD to act in a manner which is inconsistent with this statutory instrument. Furthermore, the Rules are not exclusively addressed to the SSHD. Rule 2 determines whether *the FTT* must apply the Principal Rules or the FTR. I recognise that FTR r.14(1)(a) requires the Tribunal to take a case out of the Fast Track procedure if all the parties consent, but this is still dependent on an application being made to the FTT and the FTR continue to apply until the Tribunal makes an order.

74. I see that in a Note for the TPC meeting on 17th July 2014 prepared (it seems) by the Immigration Subgroup, this was said,

> "13. Discussion of this point [whether Campsfield should be on the list of DFT venues] has also raised the issue that some of the fast track venues also house detainees who are not being dealt with under DFT. *Neither draft rules or the current fast track rules allow for this possibility. If you meet the criteria in rule 2 you are assigned to the fast track.*
>
> 14. Some members of the subgroup therefore think that an additional provision should be added to rule 2(1):
>
> > 'has been designated by the Secretary of State as suitable for determination under the fast track procedure'
>
> Key Question: Should we add a provision limiting fast track to those designated as suitable by the SoS?" [my emphasis]

So far as I can tell from the Minutes of the TPC meeting on 17th July 2014 this 'Key Question' was not addressed by the Committee. Certainly, the final version of rule 2 in the Rules which it made did not include the addition proposed by the Immigration Subgroup.

75. It is fair to say that the matter of the proper interpretation of Rule 2 came up towards the end of the hearing and, precisely because it was not an issue on which there was adversarial argument, and even though the issue was canvassed to some extent in the post-hearing Notes from the parties, I should be cautious about expressing any final conclusion.

76. It is, in any case, not strictly necessary for the purposes of the argument which Ms Lieven does advance. She argues that the FTR put an appellant at a serious procedural disadvantage. The disadvantage is accentuated because the appellant will necessarily, even on Ms McGahey's interpretation, be in detention. Ms Lieven submits that it cannot be right that one party to the appeal (the SSHD) is able to determine that her opponent in that litigation (the appellant) should be subjected to that disadvantage. On Ms McGahey's interpretation of the rule, the SSHD can and does decide, in terms, whether the FTR should apply. Even if that is not the proper interpretation of the rule, it is plain that it is the SSHD who decides whether the appellant should be detained and (at least in the case of men), where they should be detained. Immigration Act 1971 Schedule 2 paragraph 18 (as Ms McGahey observed in her post-hearing Note) gives the SSHD the power to determine the place of detention and it is only if a person is detained at one of the centres listed in paragraph 2(3) that the FTR apply. Thus, if r.2 has the meaning which it appears to do on its face, it is still the SSHD's decision to detain and to detain at one of the listed detention centres at the time of the immigration decision and thereafter which triggers the application of the FTR. Further, if r.2 has the meaning which it appears to do on its face, it is over-inclusive. As Ms McGahey commented, it is not the SSHD's case that the appeals of all of those who have been detained at one of the listed detention centres are suitable for the Fast Track. Yet, on this interpretation they all are. There is no rational reason why that should be.

77. I was not persuaded that any of the examples of other litigation contexts given by Ms McGahey in her post-hearing Note assisted her case. Undeniably an asylum applicant is very seriously hampered if the SSHD certifies his or her claim as clearly

unfounded, since any appeal will not postpone removal. If the SSHD certifies that a decision involves national security any appeal will have to be brought in the very different procedural milieu of SIAC rather than the FTT. But these are direct consequences of ss.94 and 97 of the Nationality, Immigration and Asylum Act 2002. It must be relatively rare for the Crown Proceedings Act 1947 s.10 to be relevant now (since the injury must have occurred before 1987), but so far as it is, the different procedural consequences that flow from the Secretary of State's certificate are likewise the direct product of primary legislation.

78. Ms. McGahey's examples from the employment field were also of little assistance. A claim for breach of contract can be brought in the courts because of a combination of the common law and the Country Courts Act 1984. Parliament has expressly authorised the appropriate Minister to make regulations conferring a parallel jurisdiction (with some qualifications) on Employment Tribunals (see the Employment Protection Consolidation Act 1978 s.131(1)(4A) and (5) and, now, Employment Tribunals Act 1996 s.3). The power of a Minister to direct an Employment Tribunal to restrict access to a hearing or to require a witness to be anonymised is, it would seem, rarely, if ever, used – see *Tariq v Home Office* [2011] UKSC 35 at [11], but, more importantly for present purposes, in the Employment Tribunals Act 1996 s.10(5) Parliament expressly authorised the Minister to make procedural regulations for Employment Tribunals which included such a power.

79. There is nothing equivalent in the present context. I do not accept that an analogy is to be found in the statutory authorisation of the SSHD to direct the places of detention for those held pending removal. While the Immigration Act 1971 Schedule 2 paragraphs 16 and 18 allow the SSHD to circumscribe the liberty of those liable to removal, they are silent as to the procedure which should be adopted on any appeal they might have.

80. Ms Lieven relied in her Note on *R (Ignaoua) v SSHD* [2014] 1 WLR 651. In that case the SSHD had excluded the claimant from the UK on national security grounds. He challenged this decision by judicial review. The Justice and Security Act 2013 allowed the SSHD to certify that such a decision had been made on grounds which should not be made public and gave an opportunity to challenge the decision in SIAC. The Act allowed the SSHD to make transitional arrangements by statutory instrument. In purported exercise of that power the SSHD made The Justice and Security Act 2013 (Commencement, Transitional and Saving Provisions) Order 2013. One provision of this allowed the SSHD to certify an existing judicial review with the effect that those existing proceedings terminated. The Court of Appeal had to consider whether the 2013 Act enabled the SSHD to make such an Order. It decided that it did not. I agree with Ms McGahey that the consequences for the Claimant in *Ignaoua* were particularly severe (existing civil proceedings were brought to an end by the unilateral act of one party to those proceedings) and, while the allocation of an asylum appeal to the Fast Track procedure may entail significant procedural disadvantages, they are not in the same league. For that reason I did not find this authority to be of particular help.

The Upper Tribunal Rules

81. The focus of this application has been the FTR in the FTT. The Claimant alleged that the special time limits in the Upper Tribunal were also so short that they impacted on

the fairness of the proceedings. Thus, whereas notice of a hearing in all other types of case in the UT had to be at least 14 days, for a Fast Track appeal it was at least 1 day – Tribunal Procedure (Upper Tribunal) Rules 2008 SI 2008 No. 2698 r.36(2)(aa) and the hearing must take place not later than 5 working days after permission to appeal has been granted (unless the UT is unable to arrange a hearing that quickly, in which case it must do so as soon as reasonably practicable) – *ibid* r.36A. In addition, the Practice Direction for the Immigration and Asylum Chambers of the FTT and the UT, amended by the Senior President of Tribunals on 13th November 2014 paragraph 3.8 provides that the parties will be expected to attend with all necessary witnesses at the hearing in case the UT decides that the FTT's decision was wrong in law and should be set aside. The UT is given a like power to the FTT to take a case out of the Fast Track - *ibid* r.5(4).

82. These time limits are short. They may well add to the difficulties which a Fast Track appellant faces and to the fairness of the procedure as a whole. However, the parties were right to place emphasis on the FTR in the FTT. The UT Rules define a Fast Track appeal by reference to what happened in the FTT – *ibid* r.1(3). If, as I conclude, the FTR are *ultra vires* the provisions in the Upper Tribunal Rules which are parasitic on them must also necessarily be *ultra vires.*

The Claimant's rationality challenge

83. The parties were agreed that if I accepted the Claimant's first ground of challenge (i.e. to the legality of the FTR) the rationality challenge became moot. It is, therefore, unnecessary for me to deal with it.

Conclusion

84. In summary, therefore I find that the Claimant's challenge to the legality of the Fast Track Rules succeeds. I will invite submissions as to the appropriate form of order.