Case No: C4/2015/2134

Neutral Citation Number: [2015] EWCA Civ 840
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
ADMINISTRATIVE COURT
Mr Justice Nichol,
CO5882015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2015

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE BRIGGS
and
LORD JUSTICE BEAN

- -

Between :

THE LORD CHANCELLOR	**Appellant**
- and -	
DETENTION ACTION	**Respondent**
and	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

- -
- -

James Eadie QC and Oliver Sanders (instructed by **Treasury Solicitor**) for the **Appellant and Interested Party**
Nathalie Lieven QC and Charlotte Kilroy (instructed by **the Migrant's Law Project**) for the **Respondent**

Hearing dates : 17 July 2015

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Judgment

Master of the Rolls:

1. In this litigation, the claimant challenges the legality of the Fast Track Rules 2014 ("FTR") which govern appeals to the First-tier Tribunal (Immigration and Asylum Chamber) ("the FTT") against refusals by the Secretary of State for the Home Department ("SSHD") of asylum applications. By a decision made on 12 June 2015, Nicol J held that the FTR were *ultra vires* section 22 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") and he made an order quashing them. In particular, he found that the appellate stage of the system introduced by the FTR was structurally unfair and put appellants seeking to challenge asylum decisions of the SSHD at a serious procedural disadvantage. The Lord Chancellor is named as a defendant because he approved the FTR as the enabling legislation requires.

The legislative framework

2. So far as material, section 22 of the 2007 Act provides:

> "(1) There are to be rules, to be called 'Tribunal Procedure Rules' governing –
>
> > (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.
>
> …..
>
> (4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing -
>
> > (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."

3. The procedure to be followed in the Immigration and Asylum Chamber of the FTT is governed by The Tribunal Procedure (First-tier Tribunal) (Immigration

and Asylum Chamber) Rules 2014, SI No 2604. Two different regimes are created by these Rules. Rules 1 to 46 establish the ordinary procedure. They are referred to in the Schedule itself as "the Principal Rules". The Schedule contains the FTR.

4. FTR rule 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."

5. The places specified in rule 2(3) are Colnbrook House and Harmondsworth Immigration Removal Centres, both of which accommodate men, and Yarl's Wood Immigration Removal Centre, which accommodates women.

6. Rule 5(1) provides that the notice of appeal must be given not later than 2 working days after the day on which notice of the refusal decision is given. Paragraph (2) provides that where a notice of appeal is provided outside the time limit in paragraph (1), the tribunal must not extend the time for appealing unless it considers that it is in the interests of justice to do so.

7. Rule 7 provides that the respondent must, not later than 2 working days after the day on which the tribunal provides the respondent with the notice of appeal, provide various documents to the tribunal.

8. Rule 8 provides that the tribunal must fix a date for the hearing of the appeal which is (a) not later than 3 working days after the day on which the respondent provides the documents under rule 7 or (b) if the tribunal is unable to arrange a hearing within that time, as soon as practicable.

9. Rule 9(1) provides that the tribunal must conclude the hearing of the appeal on the date fixed under the FTR. Paragraph (2) provides inter alia that, where the tribunal postpones or adjourns the hearing under rule 12 or 14(2)(a), the requirement referred to in paragraph (1) ceases.

10. Rule 12 provides:

> "**Adjournment**

Unless the Tribunal makes an order under rule 14, the Tribunal may postpone or adjourn the hearing of the appeal only where the Tribunal is satisfied that—

(a) the appeal could not justly be decided if the hearing were to be concluded on the date fixed under the Fast Track Rules; and

(b) there is an identifiable future date, not more than 10 working days after the date so fixed, upon which the Tribunal can conclude the hearing and justly decide the appeal within the timescales provided for in the Fast Track Rules."

11. Rule 14 provides:

"**Transfer out of fast track**

(1) Where the Fast Track Rules apply to an appeal or application, the Tribunal must order that the Fast Track Rules shall cease to apply—

(a) if all the parties consent; or

(b) if the Tribunal is satisfied that the case cannot justly be decided within the timescales provided for in the Fast Track Rules.

(2) When making an order under paragraph (1), the Tribunal may, notwithstanding rule 1(5) or (6) of the Fast Track Rules or the application of the Principal Rules—

(a) postpone or adjourn any hearing of the appeal or application; and

(b) give directions in relation to the conduct of the proceedings."

12. The material differences between the FTR and the Principal Rules including those differences between the Fast Track and ordinary provisions of the Tribunal Procedure (Upper Tribunal) Rules 2008 can be tabulated as follows:

Stage	**Fast-track Rules**	**Principal Rules**
Notice of Appeal	Two working days from notice of decision (Schedule, Rule 5)	14 days from notice of decision (2014 Rules, Rule 19)
Service of Respondent's Bundle on FTT	Two working days from service of notice of appeal	28 days from receipt of notice of appeal (2014 Rules, Rule 24)

	(Schedule, Rule 7)	
Hearing of appeal by FTT	Three working days after service of Respondent's Bundle on FTT (Schedule, Rule 8)	No fixed time limits
Adjournments	Maximum of 10 working days permitted (Schedule, Rule 12)	No fixed time limits (2014 Rules, Rule 4(3)(h))
Service of Determination by FTT	Two working days after hearing (Schedule, Rule 10)	No fixed time limits (2014 Rules, Rule 29)
Application to FTT for Permission to appeal to UT	Three working days from service of determination (Schedule, Rule 11)	14 days after service of the determination (2014 Rules, Rule 33)
Renewed application to UT for PTA	Four working days after FTT sends notice of refusal of leave (UT Rules, Rule 21(3)(a)(ii))	14 days after FTT sends notice of refusal of leave (UT Rules, Rule 21(3)(a)(i))
Hearing of appeal by Upper Tribunal	Two working days after permission granted if decision granting permission sent electronically or delivered personally, otherwise five working days. (UT Rules 36A)	No time limits.
Notice of appeal	One day's notice of hearing date. (UT Rules, Rule 36(2)(aa))	At least 14 days notice of hearing date required. (UT Rules, Rule 36(2))

The grounds of appeal

13. By his grounds of appeal, the Lord Chancellor (Supported by the SSHD) contends that the decision of Nicol J was wrong in (i) holding that the SSHD's role in allocating cases to the FTR created an unacceptable risk of unfairness or

made an otherwise fair process unfair; (ii) holding that (a) any unfairness was sufficiently serious to be characterised as "structural" and (b) the FTR provisions allowing for adjournments and requiring transfer out of the FTR were not capable of ensuring fairness or sufficiently reducing any risk of unfairness; (iii) failing to consider whether the FTR provisions allowing for adjournments and requiring transfer out of the FTR sufficiently mitigated any perceived disadvantage or unfairness arising out of the SSHD's role in allocating cases to the FTR; and (iv) departing from the decision of Ouseley J in *R (Detention Action) v SSHD* [2014] EWHC 2245 (Admin) ("*DA 1*").

14. In his oral submissions, Mr Eadie QC contended for the reasons which I set out in more detail below that the judge was wrong to conclude that the FTR are "structurally unfair" as a result of 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 [SHHD]" (para 60 of the judgment). This is a distillation of the first three grounds of appeal. Mr Eadie did not pursue the fourth ground of appeal.

Background

15. The Detained Fast Track System (DFT) is a system for the quick processing of asylum claims. Individuals are kept in detention pending the determination by the SSHD of their claims and the determination by the FTT or the UT of appeals. It is well established that the prompt and effective determination of asylum claims is in the public interest and to a legitimate government policy objective: see *R (L) v SSHD* [2003] EWCA Civ 25, [2003] 1 WLR 1230 at paras 48 to 53 and *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481, [2005] 1 WLR 2219 at paras 6 to 8 and 20 to 25.

16. The claimant has previously challenged the DFT. It has challenged the entire fast track process and the detention regime. In his judgment in *DA1*, Ouseley J accepted that the manner in which the DFT was being operated created an unacceptable risk of unfair determinations for vulnerable or potentially vulnerable applicants who did not have access to lawyers sufficiently early in the process. But he did not accept the broad attack that was made by the claimant on the FTR *appeals* process. At para 184 of his judgment, he said that he did not consider that the appeals process was *ultra vires* or that the FTR, in their 2005 form created an unacceptable risk of unfairness.

17. The observations of Ouseley J about the appeals process are not binding on this court. That is why Mr Eadie did not pursue his fourth ground of appeal. Ms Lieven QC sought to derive some support for her case from the decisions on these earlier challenges. But in my view, the outcome of the appeal before this court depends on the specific submissions that were addressed to us on the FTR themselves. I propose to say no more about the earlier challenges.

The judgment of Nicol J

18. The kernel of the judge's reasoning is to be found in the following paragraphs of his judgment :

> "57. In my judgment the FTR do incorporate structural unfairness. They put the Appellant at a serious procedural disadvantage…..
>
> …….
>
> 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."

Some introductory points

19. An asylum appeal involves a full adversarial hearing in which the FTT can and does hear oral evidence from the SSHD and the appellant on all issues before it. It can consider evidence that was not put before the decision-maker, including evidence about matters arising after the decision is taken and it makes fresh findings of fact. As Ms Lieven points out, many refusals of asylum turn on the SSHD making adverse findings on the appellant's credibility. In practice, it is likely that the only way to displace such findings on appeal is for the appellant to produce some corroborative evidence to support his account, whether it is specific to the individual or relating to the country of origin to which he will be returned if his appeal fails. The combination of a highly expedited timetable and the fact that the appellant is in detention makes this task very difficult.

20. In her second witness statement, the claimant's solicitor Ms Ghelani lists the tasks which a legal representative must perform in connection with an appeal. The judge assumed that appellants would be legally represented, although there was some doubt as to the extent to which this would be the case. I shall make the same assumption. The tasks include:

> (i) Checking whether the general detention criteria have been properly applied. These are the sole justification for detention post-decision and pending an appeal.
>
> (ii) Making representations, where appropriate, that the appellant is unlawfully detained.
>
> (iii) Applying for bail if the representations are rejected. These involve 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.
>
> (v) Preparing the appellant's statement, checking it with the appellant and having it signed. The statement will include the appellant's response to the refusal letter which any expert will need to take into account.

(vi) Arranging for the translation of any documents produced by the appellant which an expert needs to consider.

(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.

21. The difficulty caused by the fact that appellants are in detention and will therefore have limited access to their legal representatives is explained in the witness statement of Mr Blakely, a solicitor who has extensive experience of dealing with asylum cases. He says at para 103 of his statement:

> "We usually instruct counsel to represent our clients. Therefore whether counsel can attend at the Detention Centre prior to the day of the hearing will depend on his or her availability and the need to give notice to the Detention Centre in order to book the rooms. Where it is necessary for counsel to see the client on the day of the hearing, the position is that there is no privacy in taking instructions, which must be done through a glass in a room in which other representatives and clients are present. In addition, clients are brought to court only about 45 minutes before the hearing, meaning there is not always enough time to complete the conference before the hearing begins."

The court's approach to the vires of the FTR

22. The legality of the FTR must be judged by reference to section 22(4) of the 2007 Act and whether the power to make the rules has been exercised "with a view to securing" the five objectives set out in subsection (4)(a) to (e). There might appear to be a tension between (a) and (b) on the one hand and (c) and (e) on the other. But in my view, the tension is more apparent than real: the rules must secure that the proceedings are handled quickly and efficiently, but in a way which ensures that justice is done in the particular proceedings and that the system is accessible and fair. Speed and efficiency do not trump justice and fairness. Justice and fairness are paramount. This reflects what Sedley LJ said in *Refugee Legal Centre* at para 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 of 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 *Thirukumar* [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."

23. See also *FP (Iran) v SSHD* [2007] EWCA Civ 13, [2007] INLR 224 at para 58.

24. It is common ground that the requirements of fairness and justice include that the appeal process in the DFT provides a fair opportunity for appellants to present their cases properly. The claimant says that the time limits are so tight that many asylum seekers are denied the opportunity to present their appeals effectively and the various safeguards on which the SSHD and the Lord Chancellor rely are insufficient to secure justice by means of a fair appeal process. The claimant also says that the unfairness is aggravated by the fact that the SSHD is the other party to the appeal, so that she is able to gain a major litigation advantage by being able to decide that the appeal is suitable to be placed in the FTR. The SSHD and the Lord Chancellor say that the safeguards contained in the FTR are sufficient to render the system fair and just.

25. The decisions of this court in *RLC* and *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827, [2014] 1 WLR 4620 indicate the general approach that the court should adopt when assessing whether a system for challenging adverse findings is unfair so as to be unlawful. In *RLC* the issue was whether the administrative decision-making stage of the detained fast track system which the SSHD had introduced was inherently unfair so as to be unlawful. The court said that the question was whether the system "considered in the round" carried "an unacceptable risk of unfairness to asylum seekers" (para 20).

26. The same approach was adopted in *Tabbakh.* Mr Eadie relies on para 49 of the judgment of Richards LJ in support of his submission that there must be a *high* risk of unlawful decisions inherent in the system before a court will declare a system to be unlawful:

> "That the court will be slow to find that a system is inherently unfair and therefore unlawful is illustrated by *Refugee Legal Centre* itself, where the court had evident concerns about potential rigidity in the system but concluded

> that so long as it operated flexibly it could operate without an unacceptable risk of unfairness."

27. I would accept Mr Eadie's summary of the general principles that can be derived from these authorities: (i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts. I would enter a note of caution in relation to (iv). I accept that in most contexts the threshold of showing inherent unfairness is a high one. But this should not be taken to dilute the importance of the principle that only the highest standards of fairness will suffice in the context of asylum appeals.

28. Mr Eadie points out that both *RLC* and *Tabbakh* involved challenges to policies of the executive. He submits that the court should be more circumspect about reaching conclusions as to the fairness of a scheme which has been the subject of wide consultation (including of the judiciary) and is the product of the deliberations of a Rule Committee and is contained in legislation (in our case subject to the negative resolution procedure). That is why he submits that the judge was right to say at para 56(viii): "the TPC is given responsibility for drawing up the Tribunal Procedural Rules by Parliament and I must give its judgment respect".

29. I agree with the judge that the court should have regard to and respect the views of the TPC as to the appropriate procedural rules. But this should not be taken too far. The material that we have been shown indicates that during the consultation process the TPC itself and most of the consultees expressed great concern about the potential unfairness of the proposed FTR. It should also be noted that the TPC decided to support the proposed rules after correspondence from the then Lord Chancellor in which he raised the possibility of his overruling the TPC's initial view and supporting the position of the SSHD. For this reason alone, the court should exercise caution about giving too much weight to the judgment of the TPC. In any event, the question is whether the FTR satisfy the requirements of justice and fairness stated in section 22(4) of the 2007 Act. The answer to this question does not call for expertise which the court does not possess. The court is well equipped to decide whether an appeal process is fair and just. I accept that the concepts of fairness and justice are not susceptible to hard-edged definition. That is why a margin of discretion should be accorded to the TPC, but it should be modest.

30. Mr Eadie drew our attention to *R v SSHD ex p Saleem* [2001] 1 WLR 443 and *FP (Iran)* as being examples of the kind of case where the court does *not* allow a margin of discretion to a rule-making body. In *Saleem*, the issue was whether rule 42(1)(a) of the Asylum Appeals (Procedure) Rules 1996 on deemed service

was *ultra vires* the enabling Act. It was held that it was *ultra vires* on the grounds that the rule involved a complete denial of access to the Immigration Appeal Tribunal, a fundamental right which could only be abrogated by an Act of Parliament either expressly or by necessary implication. *FP (Iran)* was an analogous case. These were striking and extreme cases. I do not consider that they shed light on the extent of the margin of discretion that should be allowed in a case such as the present. Ultimately, the question that arises in this case is whether there is systemic or structural unfairness inherent in the FTR such as to render them *ultra vires* section 22(4) of the 2007 Act. That is a question of law for the court to determine. It turns on whether the safeguards on which the SSHD and the Lord Chancellor rely render the system fair and just.

The safeguards relied on by the SSHD and the Lord Chancellor

31. Mr Eadie submits that there are five safeguards which are sufficient to overcome any systemic unfairness that would otherwise result from the tight time limits.

32. First, the appellate process is administered by independent and impartial judges.

33. Secondly, they are experts who are familiar with the factual, evidential, legal and procedural issues that can arise in immigration and asylum appeals. They are acutely aware of the consequences of success or failure for individual appellants and their families. They are, therefore, best placed to assess the requirements of justice and fairness in the particular facts and circumstances of each case. We should respect and take account of their expertise: see *AH (Sudan) v SSHD* [2007] UKHL 49, [2008] AC 678 per Baroness Hale at para 30. In short, we should trust them to get it right.

34. Thirdly, the judges have the tools necessary to enable them to ensure that appeals are conducted fairly. They are required by rule 2 of the Principal Rules to give effect to the "overriding objective" when they exercise any power under the rules including the FTR. The overriding objective is "to enable the Tribunal to deal with cases fairly and justly" and includes "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings" (rule 2(1)(c)) . Rule 5(2) permits an extension of the time for appealing if the tribunal considers that it is in the interests of justice to do so. Rule 14 is particularly important and (Mr Eadie submits) provides a complete answer to the complaint of unfairness. It obliges the tribunal to transfer an appeal out of the fast track if it is satisfied that the case "cannot justly be decided within the timescales provided for in the Fast Track Rules".

35. Fourthly, appellants are for the most part represented by lawyers.

36. Fifthly, an appeal to the FTT and beyond occurs after appellants have undergone a fast track decision-making process which has been held to be lawful.

Discussion

37. These asylum appeals are often factually complex and difficult. They sometimes raise difficult issues of law too. I am unpersuaded that the safeguards are sufficient to overcome the unfairness inherent in a system which

requires asylum seekers to prepare and present their appeals within 7 days of the decisions which they seek to challenge.

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.

39. The central question that arises on this appeal is whether this unfairness is overcome by rules 12 and 14. Rule 12 gives the Tribunal the power to postpone or adjourn the hearing of the appeal for no more than 10 days if it cannot be justly decided on the date fixed under the FTR (i.e. within 7 days from the date of the decision under appeal). I agree with the judge that the power to adjourn "has a very limited role because of the stipulation that the adjourned hearing must take place within 10 days" (para 62). That is why the main focus of the argument before us was on rule 14 which provides that, if the tribunal is satisfied that the case cannot justly be decided within the timescales provided for in the FTR, it must order the FTR to cease to apply. In that event, the Principal Rules apply. It is not in dispute that under the Principal Rules appellants have a fair opportunity to present their cases properly and have them decided justly. At first sight, the argument based on rule 14 seems to be formidable. If an appeal cannot be decided justly within the FTR time limits, it must be transferred out. Why is this not a complete answer to the claimant's challenge?

40. Ms Lieven points out that the difficulty facing an appellant is that there is no provision in the FTR for a Case Management Review Hearing and no effective opportunity to deal with an application to transfer an appeal out of the fast track until the substantive hearing of the appeal itself. It follows that the appellant and his legal representative must always be ready to conduct the appeal in case the application to transfer is rejected.

41. The judge said at para 62: "The onus is on the appellant to demonstrate [that the appeal cannot justly be determined within the fast track timescales] and there is a real risk that 7 working days will simply be too short to assemble such an argument (and, at the same time, prepare for the full appeal in case the Tribunal decides to proceed)". I doubt whether there is much force in the argument that an appellant's representative will not have the time to prepare both for an application to transfer out of the fast track and for the appeal itself in case the application to transfer is dismissed. It seems to me that it will inevitably become clear during the course of the preparation for the appeal whether the appellant has grounds for making an application to transfer out of the fast track.

It is unlikely that significant additional time will be required to prepare for the making of the application.

42. I am, however, satisfied that rule 14 does not provide the complete answer to the claimant's case that at first sight it seems to offer. First, 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. As I have said, many refusals turn on adverse findings on the appellant's credibility. The focus of the preparation for an appeal will often, therefore, be on the search for evidence to corroborate the appellant's account in rebuttal of the adverse findings. The period of 7 days between the date of the refusal decision and the hearing of the appeal is bound to be insufficient in a significant number of cases. I have referred to the 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.

43. Secondly, the fact that the opportunity to seek a 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 short, 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. I accept the submission of Ms Lieven that this puts the appellant in an invidious position and is unfair and unjust.

44. Thirdly, it is likely (to put it no higher) that judges will consider the FTR time limits to be the default position. The rule 12 power and the rule 14 duty are mechanisms which are intended to ensure that the tight time limits imposed do not produce injustice in individual cases. But the expectation must be that the time limits will usually be applied. Otherwise the object of the 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. We were told that typically the FTT hears two or three asylum appeals per day. 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. I have little doubt that the judges of the FTT know that, if they were regularly to adjourn or transfer cases out of the fast track, this

would be inconsistent with section 22(4)(e) of the 2007 Act which requires that the rules, where appropriate, confer on members of the FTT "responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently". As Ms Lieven puts it, 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.

45. To summarise, in my view 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. 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.

The relevance of the role of the SSHD in the process

46. Ms Lieven submits that, in addition to the unfairness inherent in the rules themselves, there is also additional unfairness in the fact that the decision to place an appellant into the highly expedited FTR procedure is taken by the other party to the appeal, namely the SSHD (rather than the FTT itself): this amounts to a breach of natural justice. There is a fundamental unfairness in one party to litigation being able to impose a highly disadvantageous procedure on the other party in circumstances where the tribunal or court can only consider the matter at the hearing which is intended to be the full hearing.

47. In view of the conclusion that I have already reached on the unfairness of the procedural rules themselves, it is not necessary to deal with this additional argument. It seems to have found some favour with the judge as is apparent from his conclusion at para 60 of his judgment "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"* (emphasis added).

48. It is sufficient for me to say that, if (contrary to my view) the rules themselves are procedurally fair and enable an appellant to present his appeal fairly and justice to be achieved, then I do not consider that the fact that an appellant is in the fast track system as a result of the decision of the SSHD is relevant. *Ex hypothesi*, the decision of the SSHD has not impeded the ability of the appellant to present his case fairly and the FTT to decide the appeal justly.

Conclusion

49. For the reasons that I have given, the FTR are systemically unfair and unjust. The appeal must, therefore, be dismissed. The object of the SSHD in placing

asylum appeals in the fast track is the entirely laudable one of dealing with them quickly. This is not because she considers that they are all hopeless cases. Far from it. Although many of the appeals are dismissed, many succeed. They are placed in the fast track so that they can be handled quickly and efficiently. But the consequences for an asylum seeker of mistakes in the process are potentially disastrous. That is why section 22(4) of the 2007 Act recognises that justice and fairness should not be sacrificed on the altar of speed and efficiency. As I have explained, the FTR do not strike the correct balance between (i) speed and efficiency and (ii) fairness and justice. It is too heavily weighted in favour of the former and needs to be adjusted. Precisely how that is done is a matter for the TPC and Parliament.

Lord Justice Briggs:

50. I agree.

Lord Justice Bean:

51. I also agree.