



Ministry  
of Justice

# **Immigration & Asylum Appeals**

The Government's response to its  
consultation on proposals to expedite  
appeals by immigration detainees

April 2017







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## MINISTERIAL FOREWORD



This Government wants a justice system that works for everyone. That means creating a system that is accessible, fair, quick and efficient.

It is important that people have the opportunity to appeal immigration and asylum decisions but it is also vital that those with no right to be in the country are removed as quickly as possible. This is even more important when appellants are held in detention. It is in everybody's interests that this experience is not prolonged.

That is why fast track rules were first introduced. Under these rules, people whose asylum claim had been refused and who were detained in specific Immigration Removal Centres had their appeal expedited. The Court of Appeal quashed the rules that were in place in 2015 but it is worth highlighting that it did not disagree with the principle of dealing quickly with appeals from those held in detention.

Following a public consultation on a new process, and having paid proper attention to the judgment of the Court, we are now proposing to cut the length of time immigration and asylum appellants spend in detention. Specifically, our proposal is that the time between the Home Office's decision and determination of the appeal by the First-tier Tribunal (FtT) should be set at between 25 and 28 working days, with an additional 20 working days for determination of permission to appeal to the Upper Tribunal (UT). This will provide greater certainty to all parties and ultimately save the taxpayer money.

We further propose that the expedited process should be extended to all detained appellants, including foreign criminals.

In the consultation document we explained the role of the independent Tribunal Procedure Committee (TPC) in making rules. Essentially, policy is a matter for government, but we are clear that the drafting of rules is for the TPC. Therefore we will now invite the TPC to consider making new rules that will deliver the policy set out in this document.

## 1. Introduction

1. This document sets out the Government's response to its consultation on proposals to expedite appeals by immigration detainees which ran from 12 October 2016 to 22 November 2016.
2. The consultation sought views on policy proposals to introduce an expedited appeals process, regulated by specific new rules, for those detained in an Immigration Removal Centre (IRC), or in a prison, who are appealing an immigration decision in the Immigration and Asylum Chamber (IAC) in the FtT, or seeking permission to appeal to the UT.
3. The consultation made proposals on the overall length of time an expedited process should take (specifically proposing 25 working days for the FtT appeal, and a further 20 working days for the determination of an application for permission to appeal to the UT), who should be subject to that process, and the safeguards required to ensure such a process is fair and lawful<sup>1</sup>.
4. While recognising that it is for the independent TPC to decide on the detailed content of rules needed to achieve the Government's policy objectives, the consultation sought views on whether any new rules should specify time periods for each stage within an overall timescale. It also asked whether some detainees should continue to pay a fee to lodge an appeal within this expedited process.
5. The Government is grateful to the organisations and individuals who took the time to respond to the consultation. This document summarises their views in relation to the twelve questions we asked, and sets out the Government's response and policy decisions in light of those views.

### Summary

6. In the consultation document the Government made clear that it recognised the need to balance the need for proceedings to be handled quickly and efficiently with the need to

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<sup>1</sup> In particular taking into account the provisions of s22(4) Tribunals, Courts and Enforcement Act 2007

ensure that the tribunal system is accessible and fair. The Court of Appeal held in 2015<sup>2</sup> that the 2014 fast track rules failed to achieve that balance: they provided too little time for the process overall, and the safeguards were insufficient. In the recent case of TN & US<sup>3</sup>, the High Court found that similar deficiencies applied to the 2005 fast track rules. Importantly however, the courts did not find the principle of an expedited process in itself unlawful, provided there was a proper balance between speed and efficiency and fairness and justice. These judgments have been taken fully into account when formulating these new policy proposals.

7. The Government's view following consultation remains that there is a need for specific rules in respect of appellants in detention. As set out in the consultation, it is the Government's view that the policy objective of a guaranteed maximum timeframe for determination of detained appeals is unlikely to be achievable without introducing specific rules for detained cases.
8. Further, it is the Government's view that an overall time frame for an expedited process of around the 25 working days on which it consulted is appropriate. But we recognise that there is some concern regarding the 25 working day period and consider that an overall time period not exceeding 28 working days for the determination of an appeal in the FtT would be acceptable together with other safeguards, such as an appropriate case management review (CMR) and discretion afforded to the judiciary as to a case's suitability for an expedited process. This would ensure clarity on expected timeframes and an efficient but fair process for those in detention. We are satisfied that the safeguards we have proposed would be sufficient to provide access to justice and protect vulnerable appellants.
9. How the overall 25 to 28 working day timeframe is best used is a decision for the TPC, but the Government would suggest that the largest proportion of the overall time is allocated to the prehearing stages, allowing maximum time for parties and their legal representatives to prepare their cases and for any CMR to be completed in good time.

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<sup>2</sup> Court of Appeal judgment [2015] EWCA Civ 840 upholding the High Court judgment in R(Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber), Upper Tribunal (Immigration and Asylum Chamber), Lord Chancellor & Secretary of State for the Home Department [2015] EWHC 1689 (Admin)

<sup>3</sup> R (TN (Vietnam) & US (Pakistan)) v Secretary of State for the Home Department [2017] EWHC 59 (Admin)

10. In the hearing centres co-located with the Immigration Removal Centres (at Harmondsworth, Yarl's Wood and Colnbrook) to which it is intended that the majority of detainees subject to the new detained expedited rules will be transferred for their appeal, HMCTS are already seeing success in improving clearance times for detained cases. We expect that by the end of April 2017 these hearing centres will be processing cases within an average of around seven weeks from receipt of the appeal to judgment being given by the FtT. However, it would be wrong to see this – as some respondents to the consultation have argued – as evidence that the Principal Rules are sufficient. Rather, a new detained expedited process supported by rules would serve to give solidity to these operational arrangements and provide certainty to all parties.
11. The consultation included a question on whether those subject to new expedited rules should be required to pay a fee but no preferred Government position was given in respect of this. The Government has concluded that the current fee remissions, exemptions and waivers policy provides sufficient protection for people bringing immigration and asylum appeals, and that there is therefore no need for a specific fee waiver or exemption for those subject to the new expedited rules.
12. The Government has announced that it is reviewing the fees charged for immigration and asylum appeals, alongside the fees charged in other tribunals, and taking into account the wider context of funding for the system overall. This will help us to balance the interests of all tribunal users and the taxpayer. We will continue to consider the position of appellants subject to the expedited rules in the light of the outcome of that review.
13. The Government considers that it is right to pursue the objective of reducing the time spent by appellants in detention and the consequent cost to the public purse. We have given considerable thought to how to address the issues that led to the quashing of the 2014 detained fast track rules and believe our proposals would provide a just and fair process in an accelerated and clear timeframe.
14. As set out above, the Government wants to ensure that all appeals from those in detention are determined within 25 to 28 working days unless an immigration judge has decided that, based on all the circumstances of the case, that timescale is not

reasonable, in which case the judge should set out a timetable which resolves the case as quickly as is reasonable.

15. It will now be for the independent TPC to consider what further rules are required to achieve this outcome. As paragraph 10 makes clear, other than the Government setting the overall time limit of between 25 and 28 working days (plus an additional 20 working days for the determination of onward permission to appeal) the detail of future detained fast track rules is for the TPC.

## **Conclusions**

16. Having taken into account all of the consultation responses, the outcome which the Government wishes to achieve is as follows:

- i) New rules should be introduced to provide for an expedited appeals process for detained appellants.
- ii) These rules should cover all detained immigration appellants.
- iii) The rules should provide for a maximum time period (subject to appropriate safeguards) of between 25 and 28 working days from the Home Office decision to judgment being given by the FtT, and a further 20 working days for the determination of onward permission to appeal to the UT. It is for the TPC to determine how to allocate the twenty working days for determination of UT permission, but we would suggest that an appellant has five working days to apply for permission to appeal to the FtT and five working days for the tribunal to allow or refuse the application. If refused, the appellant would then have a further five working days to renew their permission to appeal application to the UT, who would have five working days to allow or refuse it.
- iv) It is for the TPC to decide whether the rules should specify time periods for each stage of the FtT appeal, or whether this should be a matter of judicial discretion.
- v) There will need to be sufficient safeguards in the rules to ensure the proper balance between speed and efficiency and fairness and justice and enable a different timetable to be set while still ensuring expedition.
- vi) The Government considers that a CMR on the papers in all expedited appeals, with discretion for the Tribunal to hold an oral hearing, would provide such a safeguard. However it is for the TPC to consider the exact nature of the process.
- vii) We are not proposing at this point to implement a specific fee exemption for appellants in the expedited process.

- viii) Any further consideration of timescales for adjournments would be for the TPC to consider; however, the outcome should be to ensure all detained appeals are dealt with expeditiously.

## **2. Responses to the consultation and the Government's conclusions**

17. We received 21 responses to the consultation. The respondents included third sector organisations which represent immigration detainees and foreign national offenders (FNOs), various professional bodies, and members of the public. A list of the organisations which responded is attached at Annex A.

18. The twelve questions asked in the consultation are set out below (some are grouped) followed by a summary of responses and then by the Government's conclusions.

**Question 1: Do you agree that specific rules are the best way to ensure an expedited appeals process for all detained appellants which is fair and just? If not, why not?**

**Question 2: Do you think that an expedited immigration appeals process should apply to all those who are detained? If not, why not?**

**Question 3: Do you have any other proposals for alternative criteria to select groups who would benefit from an expedited immigration appeal process?**

19. We received a total of nineteen responses to question 1, with sixteen respondents disagreeing that specific rules were the best way to ensure an expedited process while three respondents agreed. The majority of respondents argued that there was insufficient evidence to demonstrate that the general rules of procedure applying in the FtT IAC (the "Principal Rules"<sup>4</sup>) are deficient, such that new fast track rules are needed.

20. Twenty responses were received to question 2, with sixteen respondents disagreeing that an expedited process should apply to all detainees. Respondents argued that for the Government to propose a new expedited process for detained appellants, when the previous detained fast track appeal process had been found to be unlawful by the Court of Appeal, was not in keeping with the Lord Chancellor's statutory duty to maintain the independence of the TPC. Some respondents argued that before a fast track appeal process could be properly designed, the Home Office should develop a new detained fast track policy for asylum cases with specific criteria for detention, which would then

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<sup>4</sup> The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

assist the TPC in devising rules that regulate/support an expedited process if they (the TPC) felt there were sufficient grounds for doing so.

21. A view expressed by several of the respondents was that vulnerable appellants may not be able to adequately prepare or present their case in an expedited system. Some respondents referenced the Home Office's recently published Adults at Risk in Immigration Detention policy (see para 66) which will usually ensure that vulnerable applicants are not detained to the point of appeal except in limited circumstances.
22. Respondents flagged that many detainees, particularly those in prison, would not be eligible for legal aid, which currently applies only to asylum cases, where the applicant is detained under the authority of an Immigration officer; detained under Schedule 3 of the Immigration Act 1997; detained under section 62 of the Nationality, Immigration and Asylum Act 2002; detained under section 36 of the UK Borders Act 2007, or victims of trafficking and domestic violence. Respondents also raised the difficulty of obtaining legal aid and the time it can take to apply for exceptional case funding (ECF), which some felt was likely to take longer than the expedited process itself. One respondent was concerned that while ECF applications had a target of five working days to be assessed, under our proposals appellants would only have five days to decide whether to appeal the Home Office decision, though we anticipate that detained appellants will be advised to lodge an appeal whilst their ECF application is being considered. They expressed the view that without legal representation, any appellants in an expedited process, either in prison or an IRC, would be at a significant disadvantage. The Bingham Centre cited research by Bail for Immigration Detainees, which estimated that only 54% of detainees were legally represented.
23. A number of respondents challenged the Government's use of detention as a criterion for placing appellants in an expedited process. One argued that detention did not of itself demonstrate that the case was straightforward or that it could be determined in an expedited timescale. They thought that a lack of a sufficient screening process or additional criteria, in deciding whether or not to include some cases in the expedited appeal process, would lead to a perception by the FtT that these appeals lack merit, potentially disadvantaging all cases in the expedited process.
24. One respondent questioned the merit of including FNOs detained in prison in an expedited process, when they would continue to be detained following the determination

of their appeal. Another respondent proposed that the Home Office should do more to determine the initial immigration application earlier in a prisoner's sentence, rather than expediting any subsequent appeal. They also flagged the additional challenges attached to legal representatives providing advice, to a prescribed timescale, to serving prisoners who may be held anywhere in the country.

25. Most respondents felt that there was no benefit in having an expedited process, with set timescales, as opposed to having an appeal determined under the existing Principal Rules where timescales could be agreed or varied by a judge with reference to the individual circumstances of the case. One respondent felt that appeals should only be expedited at the request of the appellant.

26. Another respondent said that appellants would prefer to have sufficient time to prepare a stronger case, as opposed to spending a shorter time in detention. However, they expressed the view that given the length of time it is currently taking to determine permission to appeal applications between the FtT and the UT, this may lead to longer detention overall.

27. A number of respondents expressed the view that although the Government's policy is intended to see detained appeals determined more quickly, the Impact Assessment recognised that the Home Office may be less likely to release appellants before their expedited appeal is determined. Some respondents felt that appellants may be at risk of spending longer in detention as a result. Some respondents argued this runs counter to published Home Office Ministerial policy to reduce the overall time people are detained.

28. Another respondent felt that rather than specify alternative criteria, there should be a presumption of vulnerability for all detained appellants, and only where this was disproved should people be subject to an expedited process. They felt that detention should be a last resort.

### ***Government Response to Questions 1, 2 and 3***

29. The Government notes that the majority of respondents considered that the effectiveness of arrangements under the Principal Rules is such that there is no need for an expedited process for detained cases. The Government's view, however, is that although there has been some improvement in average timescales for detained cases

heard under the Principal Rules, those rules do not enable appeals to be conducted with the requisite speed and certainty as to meet the timescales that both the Government and detainees require.

30. Management information for the period July 2015 to September 2016 for detained cases managed by the Home Office Detained Asylum Casework (DAC) team shows that under the Principle Rules, even though detained cases are prioritised under existing judicial guidance, there is considerable variation in the overall time taken between detained appeals being lodged and receiving a final determination. In particular, as identified in the consultation, applications for permission to appeal are taking an average of seventeen weeks in the FtT and a further four weeks to determine a permission application in the UT. The variation gives rise to uncertainty for both detainees and for the Home Office, affecting the Home Office's ability to manage the detained estate as efficiently as possible. The Government is satisfied that an expedited appeals process embodied in rules is necessary to achieve speed and certainty for all parties.
31. Some respondents considered that detention is not a sufficient criterion alone to determine entering an expedited appeals process. The Government's view is that given the significance attached to exercising its powers to detain an individual, detention does indeed provide a clear and compelling criterion for inclusion in an expedited appeal process. Whilst we agree that the fact of detention does not, of itself, demonstrate that a case is straightforward we are satisfied that any complex cases that are not suited to an expedited timescale can be identified through a CMR.
32. Some respondents suggested that the Home Office should review the design of its initial immigration decision process, the DAC, before an expedited appeal process is devised to complement it. The way in which the decision-making process will operate is important to how the Government's end-to-end asylum and appeal process will work. However, the details of this process will not change the primary rationale for new expedited appeal procedure rules which is to ensure that appeals of those in detention should be determined as quickly as possible, consistent with the need for fairness and access to justice. Whatever the detail of the initial decision making process, the Government is committed to ensuring a fair, robust, and (where possible) speedy appeals process for those in detention.
33. The Government acknowledges the risk that appellants may be disadvantaged by inclusion in an expedited appeals process and we accept that any new expedited appeal

process for detained appellants must be designed and implemented with sufficient safeguards to ensure fairness, and to identify those appeals that require longer timeframes. We suggest this can be achieved by judicial discretion to extend the timeframes or transfer the appeal out of the expedited process completely.

34. The Government recognises that it is for the TPC to consider what safeguards are required in the detained fast track rules, to ensure a quick and efficient process which is also fair and just. An individual's suitability for detention is however distinct from their suitability for an expedited appeal process. In certain cases, subject to policy considerations and bail rights, the Home Office may determine that an appellant should continue to be detained even if their appeal has been removed from an expedited process.
35. We note views from respondents about access to legal advice, both before a person chooses to appeal and later as the appeal proceeds. A number of respondents flagged the increased difficulty of accessing legal advice while in detention either in an IRC or, in the case of FNOs, in prison. For asylum cases the Home Office ensures that claimants have sufficient time to instruct legal representatives prior to any asylum interview. Unless a claimant expressly requests otherwise, asylum interviews will not be booked any earlier than five working days from the date when a legal representative is appointed.
36. We are unable to verify the figures cited by the Bingham Centre which suggested that 54% of detainees are legally represented. However, we note that their source refers to detainees in general, not appellants in particular. Data on this topic is difficult to obtain, but what data we have indicates that representation among detained *appellants* is higher than 54%. In February and April 2016, the MoJ responded to two Freedom of Information Act requests regarding Detained Asylum Case claimants who had appealed a Home Office decision at the FtT. The responses used data on appeals in Harmondsworth and Yarl's Wood between August 2015 and December 2015, revealing that, of the 126 appeals decided in that period, 79% of appellants were legally represented.
37. The Home Office have indicated that the majority of detained cases in IRCs will continue to be listed and heard at the hearing centres co-located with Harmondsworth, Colnbrook and Yarl's Wood IRCs. These IRCs have well established arrangements for appellants to have access to legal representatives for advice and to prepare their appeal, including access to an onsite legal surgery, where any detainee can see a legal aid lawyer for 30

minutes without any assessment as to their eligibility for funding. There are also private meeting rooms available.

38. Civil legal services for asylum applications and appeals are funded under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), subject to an applicant passing a test of means and merits of their case. This would include funding for representation for a person attending an interview which is conducted on behalf of the Secretary of State for the Home Department with a view to reaching a decision on their asylum application, provided they are detained at a location where their application may be subject to the expedited process and the interview is not a preliminary 'screening' interview. Legal aid for representation at interviews would also be available for those who lack the capacity to conduct litigation at the appeal stage.
39. Immigration (non-asylum) matters are not usually covered by legal aid, other than where listed in Part 1 Schedule 1 of LASPO, which includes detention where the requirements set out in Paragraph 25 of Part 1 Schedule1 are met. Funding may also be available through the Exceptional Case Funding (ECF) scheme subject to there being the risk of a breach of the applicant's ECHR rights or enforceable EU rights if funding is not made available. Neither detention nor an expedited process would of itself be determinative of a grant of legal aid funding as any application for ECF is assessed on a case by case basis. We note views about the length of time it may take to apply for ECF and will explore with the Legal Aid Agency whether such applications can be expedited. However we would point out that our proposals for a new expedited appeal process for detained appellants significantly extend the timescales for lodging and preparing an appeal, including obtaining legal aid and legal representation, particularly when compared with the 2014 Fast Track Rules.
40. Work undertaken within the IRC estate by legal aid providers is exclusive to particular civil legal aid contract holders. If a provider takes a case which is an asylum related matter they will be able to represent the client at their appeal wherever it is listed. This includes the hearing centres co-located with the Home Office IRC locations at Yarl's Wood, Colnbrook and Harmondsworth. A clause is being added to the exclusive provision which will say that any provider can represent their own client in the exclusive location if they are appealing from detention.

41. If a legal aid provider takes a case which is out of scope for legal aid, for example an immigration case, we would expect the provider to consider ECF. If they are granted ECF they can represent that client at the appeal.

**Question 4. Do you think the introduction of an overall timeframe is preferable to specific time limits for each stage?**

**Question 5: Do you think 25 working days is sufficient time to dispose of an appeal in the First-tier Tribunal, and a further 20 working days sufficient time to determine whether an appellant has permission to appeal to the Upper Tribunal?**

42. We received fourteen responses to question 4. Ten respondents disagreed with the proposal and four agreed. Of thirteen responses received to question 5, two respondents agreed with the proposal and eleven respondents disagreed.

43. One respondent expressed the view that complying with an overall time limit could potentially increase pressure on the Tribunal, but another felt that an overall timeframe would be helpful to all parties in setting out a clear timeframe which they would have to comply with. Another respondent felt that the existing time limits in the Principal Rules were sufficient but proposed that the FtT could consider setting shorter time limits for the Home Office to respond or the Tribunal itself could process cases more quickly to achieve a shorter overall timescale for detained appeals.

44. Another respondent felt that any overall time limit should be informed by specific time limits for each stage of the appeal, which would provide certainty for appellants and legal representatives, but stressed the need for a review at each stage to ensure the case could continue in the expedited process or be removed from it completely.

45. The majority of respondents felt that, given the difference between cases, it was not possible to set a single time limit to dispose of an appeal, and that this should instead be a matter for judicial discretion. Several respondents thought it should be up to a judge to determine the length of time required for an appeal to be determined, and that any future rules should ensure that this responsibility remains with judges. They suggested that, given the resources available to the Home Office as a major government department,

there may be a case for truncating the time limits allowed for the Home Office to comply, and that any failure to do so should favour the appellant's removal from the expedited process and/or release from detention.

46. Several respondents detailed the tasks associated with preparing an appeal, including the steps required to obtain and corroborate any evidence, arguing that this can be more difficult when the appellant is in detention.

47. One respondent argued the need for a relatively extensive review of each stage of the appeal process where appellants have a mental health problem. Another cited their own experience in producing medical reports for asylum appeals, namely that it could take them between a week and a month to obtain healthcare records from those in detention and longer than 25 working days to produce a final medico-legal report.

48. One respondent felt that setting a 25 working day time limit would simply cause confusion, arguing that the Tribunal's discretion to extend time limits in individual cases would likely be required in many cases, thereby creating overall uncertainty.

49. Another respondent agreed that 25 working days was sufficient, provided that the appellant had all the evidence they needed, that they had legal representation, that their representative was familiar with the appeals process, and that where the case did not meet the criteria for an expedited process it would be dealt with outside the proposed new expedited process.

50. Some respondents queried the evidence base for proposing 25 working days as opposed to a different time scale.

51. In relation to the period of 20 working days for the determination of onward permission to appeal, one respondent made a specific comment that this period "appears generous". Other than this, there were no specific comments on this period.

#### ***Government Response to Question 4 and 5***

52. In the Government's view the 25 working day limit can be justified. It is significantly longer than the previous detained fast track rules allowed - so appellants would have

longer to prepare their appeal - but not so long that it undermines the purpose of an expedited process. In addition HMCTS, working with the judiciary and stakeholders, are working towards an average clearance time of seven weeks for determining detained appeals in the FtT from appellants held in IRCs in England and Wales where they have a right of appeal within the UK. Given this is operationally achievable, we feel that there is further potential to reduce the overall time period, without disadvantaging appellants, to 25 working days from the Home Office decision to a final judgment in the FtT and with an additional 20 working days for determination of a subsequent application for permission to appeal to the UT, where appropriate.

53. We recognise however that there is some concern regarding the 25 working day period and we are therefore proposing that an overall time period not exceeding 28 working days from the Home Office decision to judgment in the FtT would meet the Government's policy objective of ensuring that detained appeals are dealt with expeditiously.

54. We note that one respondent highlighted that it could take between a week and a month to obtain mental health reports. However, the Government considers that the appeals process should not be seen as the beginning of the evidence gathering process. A detainee might already have provided this information to the Home Office in support of their asylum or immigration claim or to inform their suitability for ongoing detention. Home Office policy is clear that if a Medico Legal Report is required to support the asylum claim, the decision making process can be placed on hold to enable this report to be produced. This will also inform decisions about an individual's suitability for detention in accordance with the Government's Adults at Risk policy. The Home Office is committed to taking the right decision first time but this requires claimants to provide any supporting evidence prior to that decision being made rather than at the appeal. If however the appellant needs additional time to provide further medical or other evidence in support of their appeal they would, under our policy proposals, be able to alert the Tribunal either at the case management hearing or at the substantive hearing and request an adjournment.

**Question 6: Do you think every appeal should have a case management review (CMR) on the papers, with discretion for a judge to hold an oral case management review?**

**Question 7: Do you think the options the Tribunal has for adjourning cases at the case management review are right? If not, what options should the Tribunal have?**

55. There were eighteen responses to question 6. While twelve respondents supported the explicit inclusion of a CMR in the appeal process, most wished to see an oral hearing rather than a paper review, which would provide an opportunity for appellants to challenge their inclusion in the expedited appeal process for detained appellants and provide a safeguard against vulnerable appellants being prejudiced by their inclusion in the process. One respondent suggested that this should occur within 24 hours of the appeal being lodged.
56. We received fourteen responses to question 7. Two respondents agreed that the proposed options available for the Tribunal to adjourn cases were sufficient, while several respondents felt that the Tribunal already had sufficient flexibility within the Principal Rules, in particular at Rule 4. Another respondent felt that the Tribunal should have complete discretion on when in the future to relist a case for hearing and that, in addition, the Tribunal should not proceed with a full hearing on the day, unless both parties confirmed they wished to proceed.
57. One respondent mentioned existing judicial guidance on the factors that should be considered by the Tribunal in deciding whether to adjourn a non-detained case and suggested additional criteria should include the personal circumstances of the appellant (including vulnerability), the complexity of the case and the policy on access to legal advice in the specific detention centre.
58. A number of respondents felt any decision to hold a CMR should rest with the judge, who should retain discretion to do so at any time in the proceedings. Some respondents were concerned that there was a risk of the case management hearing becoming a substantive hearing by default. One respondent stressed the need for 'active judicial oversight' where appellants are unrepresented.
59. One respondent welcomed the proposal but expressed the view that parties would have to apply for a CMR to be considered on the papers. They also expressed the view that vulnerable appellants (particularly those without legal representation) may fail to provide the relevant information which would highlight to the judge that their case was unsuitable for the expedited process. They also expressed the same view as other respondents

that, despite a CMR stage, judges would consider the fast track rules as a default position and be reluctant to diverge from those timescales in the majority of cases.

60. One respondent referenced the existing judicial guidance on using the CMR to check that any future hearing can proceed, whilst ensuring minimal exposure to further trauma for vulnerable witnesses and appellants. The need for standard direction was also mentioned, to identify vulnerable appellants in the first instance, and take steps to remove them from the expedited process where necessary.

61. Another respondent considered that where a case was adjourned due to vulnerability (including evidence of mental health, torture or ill treatment issues), the tribunal should remove the case from the expedited process completely and consider granting bail.

#### ***Government Response to Questions 6 and 7***

62. A number of respondents commented on the proposals to introduce an explicit CMR process. Although there is existing provision in the Principal Rules which allows appellants to apply to the tribunal for a CMR hearing, and many cases proceed to a full hearing without a CMR, we are mindful of the Court of Appeal's specific views on this point in their July 2015 judgment, that without the opportunity of a CMR beforehand, the tribunal was less likely to be inclined to postpone or transfer an appeal out of an expedited process on the day of the hearing, when time has already been allocated for the full hearing of the appeal and the parties and witnesses have come to give their evidence and advance their submissions.

63. The proposed CMR process would provide an opportunity for judges to assess the suitability of a case for being expedited, taking into account the complexity of the case, the need for further evidence, and any evidence of material vulnerability. The Government considers that a specific CMR stage would provide independent judicial oversight and an important, additional safeguard in ensuring that cases which are unsuitable for expedition can be removed early in the process. However, it is for the TPC to consider the details of the proposal and how it is best incorporated into future procedural rules. The TPC is currently consulting on potential changes to the IAC procedural rules, as a result of new bail provisions in the Immigration Act 2016, and will

wish to consider how any changes will operate alongside the new expedited process for detained appellants.

64. Many respondents tended to focus their response to these particular questions on the most vulnerable and complex cases. While we understand these views, the Government does not accept that all cases are complex or all appellants are vulnerable, and many can and currently do proceed through the appeals process within a relatively short period, where the tribunal is satisfied that it can dispose of the cases fairly and justly.
65. However, the Government agrees with respondents that vulnerable groups, including those suffering from mental health issues, victims of trafficking and torture, and those suffering from the impacts of detention itself, must be identified as early as possible in the detained process and either provided with the necessary support to proceed with an expedited appeal or removed from the expedited appeal process.
66. Moreover, specific policy provisions are in place to safeguard those with vulnerabilities. Last year the Home Office published its *Adults at Risk in Immigration Detention* policy which applies to all detainees, including those with asylum claims. The policy came into force on 12 September 2016, accompanied by detailed caseworker guidance, following the laying of statutory guidance in Parliament. The intention is that vulnerable people will not usually be detained and that, where their detention is necessary, it will be for a shorter period of time. The policy strengthens the existing presumption against the detention of those who are particularly vulnerable to harm in detention and is properly balanced against other considerations, including the risk that the individual will abscond or commit criminal offences.
67. Vulnerable individuals will only be detained when those factors are deemed to outweigh the presumption against their detention. The policy contains a non-exhaustive list of persons who will normally be deemed to be vulnerable - for example victims of sexual or gender based violence (including female genital mutilation), pregnant women, torture victims, trafficking victims, and people with serious mental or physical health conditions.
68. While the considerations undertaken by the Home Office according to its '*Adults at Risk*' policy will usually ensure that vulnerable applicants are not detained to the point of appeal unless it is necessary, our proposals for new tribunal rules and in particular the use of a CMR will ensure that the appeals of those who are in detention are determined expeditiously. In addition, under existing immigration legislation, appellants will continue

to be able to apply for bail where they can demonstrate a change in circumstances which may justify a release from detention.

**Question 8. Should appellants subject to the proposed new detained fast track be required to pay a fee in order to bring their appeal to the Immigration and Asylum Chamber of the First-tier Tribunal?**

69. We received nineteen responses, with one respondent agreeing that appellants should be required to pay a fee, and eighteen respondents disagreeing. One respondent wished to see fees waived where appellants were deemed vulnerable. Another pointed to the Government's previous policy that, where the state is taking action against an individual, no fee is charged, and argued that this principle should extend to administrative removal decisions and deportation orders.
70. Several respondents highlighted the difficulty detainees would face in being able to access and produce documentation to support applications to have a fee waived, or to access their bank accounts while in detention and within an expedited timescale. Instead they supported an automatic fee exemption for those in detention.
71. Some respondents also referred to the significant increases in fees in the IAC, which applied at the time of the consultation and which they considered a significant barrier to detainees bringing appeals.

***Government Response to Question 8***

72. Since the publication of the consultation the MoJ has reversed the fee increases introduced in October 2016. It has committed to review immigration and asylum fees in order to balance the interests of all tribunal users and the taxpayer, and to look at them again alongside other tribunal fees in the wider context of funding for the system as a whole. This means that fees have reverted to their previous levels of £140 for an oral hearing and £80 for a determination on the papers.
73. The Government believes that the existing fee exemptions, particularly the exemption for those appellants in receipt of legal aid, when combined with the Lord Chancellor's power

to remit or reduce fees in exceptional circumstances, provide sufficient protection for vulnerable appellants who may be subject to the proposed expedited process for detained appellants. We will review the guidance on the Lord Chancellor's exceptional power to remit fees to ensure that it adequately considers the specific circumstances of appellants who are in detention and who are subject to an expedited appeal.

74. At this point in time, we are not persuaded that there should be a specific exemption in place to remove the requirement to pay a fee for all those subject to the expedited process. However, if, following the completion of our review, we were to bring forward new proposals for an alternative fees regime and/or an alternative exemption scheme in immigration and asylum proceedings, we would be open to reconsidering whether a specific exemption is necessary.

**Question 9. Do you think it preferable for the Government to take a power in primary legislation to introduce and vary time limits for different types of appeals in the unified tribunal system?**

75. Of thirteen responses to question 9, twelve respondents disagreed with the idea of taking a power in primary legislation to set time limits for specific appeals in procedural rules. One respondent felt the need for transparency and accountability was best served by a public consultation carried out by the independent TPC. Another respondent felt that it was wrong in principle for the Government to impose time limits, on the basis that this should be an independent judicial function.

76. One respondent expressed the view that introducing set time limits for an appeal process in primary legislation would limit further challenges to the process by judicial review. They also queried the comparison, included in the consultation, of a time-limit of 26 weeks in the Children and Families Act (CFA) 2014 for disposing of proceedings, arguing that the CFA provided additional safeguards, not just by giving judges flexibility to vary the 26 week time limit, but crucially orders could be subsequently varied or discharged, whereas the majority of immigration appeals are finally determined in the FtT, with only limited grounds for further appeal on a point of law.

77. The respondent who supported a power in primary legislation to vary time limits nevertheless held the view that different time limits in primary and secondary legislation

for different cohorts may create an overly complex procedural landscape and lead to confusion for appellants and their representatives.

***Government Response to Question 9***

78. The Government does not agree that taking a proposed power in primary legislation would prevent challenge by means of judicial review, as we would anticipate that any such provision would still enable the Lord Chancellor to set time limits by means of secondary legislation to enable flexibility. We will continue to consider this policy and may bring forward further proposals in due course.

**Question Ten. Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please provide any empirical evidence relating to the proposals in this paper.**

79. Several respondents challenged the assumption that detainees would prefer a shorter time in detention, arguing that this would adversely affect detainees' ability to prepare the best possible case with a view to ensuring a fair and just hearing. They cited experience that appellants find fixed timescales stressful and confusing. One respondent suggested consideration of alternative methods to reduce the total time in detention, including reducing the time the Home Office takes to decide initial applications and the time taken after an appeal is finished to acquire travel documents.

80. One respondent criticised the Impact Assessment as incomplete and selective, arguing that the benefits (including financial ones) were unclear, particularly if the proposals would reduce or increase mean detention times. The same respondent also argued that, given detained appellants already had their cases listed as a priority in the FtT and their cases were being determined within 61 calendar days, it was unclear if they could be dealt with more quickly whilst also ensuring fairness and justice.

81. Several respondents felt it would be useful to monetise the costs of the proposals for the new expedited process for detained appellants, including the adverse impacts of detention on the mental health of detainees including the human and social costs.

82. Some respondents put forward the view that the impact of fees, the reduced availability of legal aid since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and the chances of obtaining exceptional case funding were not addressed, and that the calculations in the cost benefit summary were unclear. The view was also offered that the additional resource impacts on solicitors and wider contracting issues were not addressed. One respondent queried whether a potential increase in CMR hearings would be offset by a reduction in bail hearings, which they felt was unlikely.

83. Some felt the impact assessment failed to address the specific difficulties encountered by vulnerable detainees including those with mental health problems, trauma, cognitive impairments or who lack capacity. Several respondents cited in particular the Shaw Review's comments on vulnerable groups.

84. Another respondent queried why the impacts on legal service providers and legal firms put at risk from exceptional funding applications had not been included in the IA.

***Government Response to Question 10***

85. The Government accepts that not everyone may be suitable for an expedited appeals process, particularly those who are vulnerable due to, for example, mental health problems. We also note the findings of the Shaw Review, cited by a number of respondents, that detention itself can render some people vulnerable. The Shaw Review observes, however, that current uncertainty in the duration of detention pending appeal is a contributing factor to the vulnerability of detainees. This would suggest that the impact of a short, fixed time frame is complex and likely to depend on the individual. For some, an expedited appeals process will be welcome.

86. While the Home Office identifies individuals who may not be suitable for detention, there is also the need to screen individuals for suitability for the expedited appeals process. Following the Courts finding that the 2014 fast track rules did not have adequate safeguards for those unsuitable for the expedited process, the Government believes that the proposed CMR is an essential element of a successful expedited appeals process. This would be available to all appellants and would allow the court to assess whether the individual is unsuitable for the expedited process.

87. The revised impact assessment makes clear that the CMR is intended to protect the vulnerable to ensure that all appellants have access to a fair process. Where vulnerability is not an issue, an expedited appeal is advantageous to society at large. Minimising the timescales for detained appeals, whilst ensuring the appellant has access to relevant safeguards, is an important part of maintaining immigration control for individuals who may have previously demonstrated a failure to comply with immigration rules and who may be at risk of absconding.

88. Monetising all impacts (i.e. quantifying impacts in financial terms) is not always possible. For example, the impact assessment did not quantify the benefits to society of prompt conclusion of appeals because the benefits are wide-reaching and often intangible. For similar reasons, we have not monetised the impacts of detention on the mental health of detainees including the human and social costs, but point out that the proposed CMR would exist to mitigate such impacts. In this consultation we have only been concerned with the tribunal process. The time taken by the Home Office to make their original decision on the case (i.e. prior to the appeal stage) and to remove an individual following an unsuccessful appeal, are out of scope because they do not form part of the appeal process. However the Home Office will of course, like appellants, be obliged to comply with any time-limits set by the rules or by individual judges in respect of the appeals process itself.

89. We have set out the Government's views on fees for detained appellants and legal aid provision under Question 8 and Question 3 respectively. This position is reflected in the revised impact assessment.

**Question 11. What do you consider to be the equalities impacts on individuals with protected characteristics of each of these proposals? Are there any mitigations the Government should consider? Please give data and reasons.**

**Question 12. What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider? Please give data and reasons.**

90. Some respondents expressed concern that mental health was not specifically considered as a protected characteristic whilst some respondents felt that a specific detailed assessment was required for each protected group who would be affected by the proposed expedited process. We acknowledge that the HMCTS survey data used in our Equalities Assessment does not address certain protected characteristics, such as sexual orientation and maternity. This means that a specific detailed assessment for each protected group is not possible. We recognise that the proposed expedited process may not be suitable for all appellants, for example those who are vulnerable due to a protected characteristic, but the proposed CMR would address this problem by allowing those unsuitable for an expedited process to be transferred out of the expedited appeals process.
91. Several respondents repeated earlier views that there were no screening criteria to remove vulnerable people or those with a protected characteristic from the new Home Office Detained Asylum Casework (DAC) process, which was one potential form of mitigation. Another respondent queried reliance on the Home Office's Adults at Risk policy which permits the detention of vulnerable adults with protected characteristics. Additionally, one respondent made the point that the guidance did not apply to adults with less serious learning difficulties, who might struggle in an expedited process.
92. One respondent put forward the view that the proposals would indirectly discriminate against appellants in the expedited process, if appeals could not be determined fairly within the proposed timescales. Another respondent also raised the particular evidential requirements and complexity of cases where an appellant's sexuality or gender forms the basis of their appeal, meaning that they could potentially be disadvantaged in an expedited process.
93. Several respondents considered that the data relied upon for the equality impact assessment was unrepresentative of the whole cohort, particularly with reference to the percentage of people with a disability. One group of respondents queried the ethnicity statistics, which did not match their data for male foreign national offenders (FNOs) and which they thought included British prisoners.
94. Another respondent acknowledged that while families with children would not be detained, there may be circumstances where families would be separated, which they said would have a negative impact on family relationships (particularly where appellants have previously served a prison sentence).

95. One respondent said that an expedited policy should not depart from general detention policy in relation to families and the individual Article 8 rights of family members, particularly the welfare of children. In general, respondents pointed to the difficulties for appellants in having sufficient time to gather evidence and attend hearings, while potentially caring for young children.

#### ***Government Response to Questions 11 and 12***

96. Regarding the quality of our diversity statistics, the data presented in the equalities assessment concerns appellants who have previously applied to the Home Office for asylum. Whilst this is the most representative data we have for IRC detained appellants, we are aware that race and gender statistics may vary between IRCs and prisons. In particular, IRC data presented in the consultation document suggested that IRC asylum appellants are mainly from Asian countries and that roughly half of appellants were female, whereas, as of 30 September 2016, around half of FNOs detained in prison were of European nationality and 96% were male<sup>5</sup>. It is reasonable to think that these statistics hold good for FNO prisoner *appellants*, although our statistics do not distinguish the immigration and asylum appeal status of FNO prisoners.

97. It is unfortunate that further prisoner characteristics were not available for our equalities assessment. We also acknowledge that the HMCTS survey data used in our equalities assessment does not address certain protected characteristics, including sexual orientation, gender-reassignment, and maternity. It is not possible, therefore, to assess quantitatively any disproportionalities in all protected characteristics for all groups of detained appellants. Several responses have highlighted how certain groups could be disadvantaged by an expedited appeals process, including those with mental health issues and learning difficulties, and those whose cases involve arguments too complex to be dealt with quickly (an example given was where sexual orientation is the ground of an asylum claim). For most, there is a clear advantage in having appeals determined more quickly, with more certainty as to timing. However, the Government recognises that

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<sup>5</sup> Offender management statistics quarterly: April June 2016. Prison population. 30 September 2016.

an expedited process may not be suitable for all appellants, particularly those who are vulnerable due to a protected characteristic, which may put them at a disadvantage in pursuing their appeal, which the proposed introduction of a CMR is intended to address. Available to all, the proposed CMR would allow those unsuitable for the expedited appeals process to be transferred out of the expedited process. The details of a CMR process are a matter for the TPC, and the consultation responses received on exclusion categories would help to inform these details.

### **3. Next Steps**

98. The Government is firmly of the view that there is a need for new rules in order to provide an expedited appeals process for detained immigration appellants. The operational requirements of a new expedited appeals process for detained immigration appellants are currently being explored. The Government will now invite the TPC to consider the conclusions set out in this document and decide how they wish to proceed.

## **Annex A: List of respondents**

The responding organisations were:

- Association of Visitors to Immigration Detainees
- Bail for Immigration Detainees
- Bingham Centre
- Detention Action
- Equality and Human Rights Commission
- HMP Huntercombe (Surveyed FNOs)
- Immigration Law Practitioners' Association
- Law Society
- Liberty
- Medical Justice
- Oromo Relief Organisation
- Public Law Project
- Refugee Council
- Rene Cassin
- The Royal College of Psychiatrists
- TRP Solicitors
- UNHCR
- Verne Visitors Group
- Women in Prison

We received a total of 21 responses to the consultation, including the organisations listed above.