Bail for Immigration Detainees
1b Finsbury Park Road, London N4 2LA
Tel: 020 7456 9762, Fax: 020 7226 0392
Email: rudy@biduk.org

**Briefing - Clause 26 of the Nationality and Borders Bill**

***Clause 26 will introduce a system of Accelerated Detained Appeals. This represents a return of the unlawful 'Detained Fast Track', only this time it would also apply to a greater variety and number of cases. Very similar proposals were emphatically rejected by the Tribunal Procedure Committee in 2019[1]. This clause should be deleted.***

Accelerated Detained Appeals

Clause 26 provides for the Secretary of State to certify a decision if she considers that an appeal would be disposed of expeditiously. It requires the Tribunal Procedure Committee to introduce the following time limits:

a. a notice of appeal must be lodged not later than 5 working days after the decision was received
b. the tribunal must make a decision not later than 25 days after the appeal date
c. an application for permission to appeal to the Upper Tribunal must be determined by the First-tier Tribunal not later than 20 working days after the applicant was given notice of the Tribunal's decision

Changes to clause 26:

Clause 26 on accelerated detained appeals has replaced clause 24 and has been amended by the government in two significant ways. Firstly, the clause now specifies that the decision on certification taken by the Secretary of State will be made according to regulations that she has made. Secondly, the government has raised the threshold that a case must meet before a judge can remove it from the fast track – where before a judge could remove a case from this process where "it is satisfied that it is in the interests of justice to do so", this has now been changed to "if it is satisfied that this is the only way to secure that justice is done".

BID considers that these changes would deny access to justice:

- Five days is insufficient for an appellant to prepare an appeal against a negative decision, particularly where the individual is detained, where access to legal advice is poor[2].
- The situation is even worse for those detained in prisons, where the lack of legal aid immigration advice for people held under immigration powers was recently declared unlawful by the High Court[3].
- Immigration detainees also face numerous practical obstacles to preparing their case.
- Clause 26 would apply to a greater number of cases and people than the Detained Fast Track, including people facing deportation, and those detained in prisons as well as IRCs.

Home Office decision-making is frequently incorrect or unlawful. For instance, half of all appeals against immigration decisions were successful in the year leading up to June 2019[4]. It is vital that people are able to effectively challenge this through the courts.

---

[1] Tribunal Procedure Committee https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807891/dft-consultation-response.pdf

[2] BID has carried out 6-monthly surveys of legal advice in immigration detention, available on our website. Our most recent survey is available here https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/890/190523_legal_advice_survey_spring_2019.pdf and our 10-year review of legal advice surveys, published in 2020, is available here https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1293/10_Years_of_Legal_Advice_Survey.pdf

[3] SM v Lord Chancellor [2021] EWHC 418 (Admin)

[4] For instance,

Bail for Immigration Detainees
1b Finsbury Park Road, London N4 2LA
Tel: 020 7456 9762, Fax: 020 7226 0392
Email: rudy@biduk.org

Return of the Detained Fast-Track:

These proposals effectively represent a return of the Detained Fast Track. At one point in 2013, almost one in five asylum-seekers had their claims heard through a fast-track process with a 99% rejection rate[5].

In July 2015 the Court of Appeal[6] declared that the Detained Fast Track system was structurally unfair, and unlawful. As Lord Dyson states in his judgment, "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" (45).

Clause 24 seeks to put the same unlawful system on a statutory footing, thereby insulating it against future legal challenges without remedying the inherent unfairness of the system itself.

Tribunal Procedure Committee

In 2019 the government attempted to introduce new accelerated procedure rules for appeal made by detained appellants. This was rejected by the Tribunal Procedure Committee (TPC), who found that any such accelerated process would require significant safeguards to prevent procedural unfairness and protect vulnerable appellants, and that "If a set of rules were devised so as to operate fairly, they would not lead to the increased speed and certainty desired."

The Committee found that "*in order to ensure that such a system would deal with cases fairly, it would need to include rigorous procedural safeguards to ensure that unsuitable cases were not included within the fast track system".* Such procedural safeguards, such as an additional case management hearing, might improve fairness but "*would absorb a substantial amount of judicial and administrative resource",* create satellite litigation and therefore "*there was no certainty that the government's proposals would lead to faster conclusion of appeals".* BID agrees with the TPC's position.

The TPC cited a number of important points made by respondents to the consultation which clearly have a bearing on the government's current attempts to revive the Detained Fast-Track.

- Appeals may need to be adjourned, may be converted into a case management hearing, may go part heard, or subsequent substantive hearings may be required.
- The appeals that might be subject to any detained fast track rules involved fundamental rights, such as the right not to be subjected to torture or to inhuman or degrading treatment or punishment and the right to respect for private and family life. The stakes for individuals in such cases were extremely high. It was therefore especially important that there be a fair process that ensured access to justice.
- That a detained fast track system would be likely to have a disproportionate impact on vulnerable appellants.
- Evidence is difficult to obtain in detention
- There are obstacles to obtaining legal representation and many people are unrepresented
- The time taken for the Home Office to respond to subject access requests is incompatible with an accelerated procedure
- The time needed to obtain medico-legal and other reports or expert evidence
- Although vulnerable people could be taken out of it, there may be pressure on judges to consider the detained fast track as the default position.
- Delays accessing legal aid – particularly if there are non-asylum cases or non-asylum aspects of a claim that would require exceptional case funding
- The lack of evidence presented that people abscond once released from detention

[5] Detention Action https://detentionaction.org.uk/dft-legal-challenge/
[6] [2015] EWHC 1689 (Admin) Case No: CO/588/2015

Bail for Immigration Detainees
1b Finsbury Park Road, London N4 2LA
Tel: 020 7456 9762, Fax: 020 7226 0392
Email: rudy@biduk.org

- Judges need time to reach properly considered decisions and abridging time would create injustice.

The government should cease trying to resuscitate the detained fast track system, their arguments having been rejected by the Court of Appeal and the Tribunal Procedure Committee.