R (Detention Action) v Secretary of State for the Home Department (EW
Case note relating to judgment handed down on 16 December 2014

This is a summary of 4th judgment in Detention Action's case handed down by the Court of Appeal on 16 December 2014.

The first three judgments can be found here (9 July 2014), here (25 July 2014) and here (9 October 2014). The latest judgment can be found here.

Detention Action argued that the Secretary of State's practice of detaining all asylum claimants pending their appeals in the DFT rather than only those who meet the general detention criteria is unlawful.

Ouseley J refused to rule on this aspect of the challenge in his judgment handed down on 9 July. Detention Action appealed. The Court of Appeal allowed its appeal in a judgment handed down on 16 December 2014. It found that the Secretary of State's policy on detaining asylum claimants after her decision to refuse asylum but pending appeal is unlawful because it does not meet the requirements of clarity and transparency. It also stated that if it had been necessary to decide the point, it would have found that the policy cannot at present be said to be justified.

The Court of Appeal considered four questions:

1 Whether Ouseley J was right to decide that the DFT policy changed in 2008 and before then the general detention criteria (i.e. abscond risk) applied to the appeal stage;
2 Whether Ouseley J was correct that since 2008 it was the Secretary of State's policy contained in the "Detained Fast Track Processes" guidance is that the 'administrative convenience" criteria apply to the appeal stage;
3 Since 2008, whether or not the practice of detaining for administrative convenience pending appeal was a breach of the Secretary of State's policy, does the policy meet the *Lumba* requirements of clarity and transparency? And
4 Is there a lawful justification for the policy or practice of detaining asylum seekers for the Secretary of State's administrative convenience pending their appeal against the refusal of asylum?

The background

In March 2003, the then Minister for Citizenship and Immigration in a written statement said in relation to detention pending appeal in the DFT:

> "…If the claim is refused …..a decision about further detention will be made in accordance with existing detention criteria. Detention in this category of cases will therefore normally be where it has become apparent that the person would be likely to fail to keep in contact with the Immigration Service or to effect removal." (Emphasis added)

In evidence to the Home Affairs Select Committee on 10 November 20013, Beverley Hughes MP described the fast-track procedure as "taking the claimant from arrival to decision through appeal…"

On 16 September 2004, further statements regarding the DFT were made in identical terms by Baroness Scotland and Desmond Browne MP. They said in relation to detention for the purpose of the appeal that:

> "We may also detain claimants after we have made and served a decision in accordance with our general detention criteria."

Between 2003 and 2008, the policy on the DFT process was in Chapter 38 of the Home Office "Operational Enforcement Manual" (OEM). In 2008 the OEM was renamed "Enforcement Instructions and Guidance" (EIG) and Chapter 55 of the EIG deals with detention and temporary release including the general detention criteria.

The September 2005 edition of the OEM referred to the Ministerial statements made on 16 September 2004.

It was common ground that before 2008, the EIG did not refer to detention pending appeal.

The 2008 and 2009 versions of the DFT policy (then known as DFT & DNSA – Intake Selection (AIU Instruction) , in section 5, under the heading "Travel Documentation for Removal" stated, inter alia, that:

> "Once a decision has been made however, detention policy requires that removal be imminent. The decision may be regarded as including the time during which an individual has extant appeal rights…"

The guidance which has applied since 11 June 2013 (shortly after Detention Action's claim for judicial review was issued) at section 5.2.1 under the heading "Travel Documentation for Removal" states, inter alia "it is not necessary for removal to be imminent or for there to be an absconding risk to detain for DFT…" and in a further sub-paragraph that if "an asylum claim is unsuccessful (a DFT case becoming appeal rights exhausted….", detention may continue "under the general detention policy".

The 2008 Best Practice Guide on the DFT produced by the Immigration Law Practitioners' Association (ILPA) states that "an appeal will only take place in fast-track if your client meets the general detention criteria."

In response to European Commission's concerns regarding the DFT expressed in meetings and in correspondence, Mr Rob Jones then the Head of Asylum Policy at the Home Office Director of the National Asylum Command at the UK Border Agency wrote on 18 June 2013 to the relevant Director at the Commission. The relevant part of the letter stated:

> "The indicative timescales in the policy only relate to the time of entry into the process until the time of [sic] the decision is served on the applicant. We want to clarify this more in the policy, because it is not entirely clear that the DFT process includes a fast-track appeals process. This means that the overall timescales of the whole process is longer when you take the appeals in to account, but is still much shorter than the normal timescales in the non-detained process." (Emphasis added).

The Secretary of State's position

The Secretary of State argued that:

1 Ouseley J was correct to hold that detention for administrative convenience pending appeal does not breach the policy and is not inherently unlawful;
2 No other meaning could be ascribed to the relevant sub paragraph of section 5.2.1 of the current "Detained Fast Track Processes" document so that the requirements of clarity and certainty stated in *Lumba* were satisfied; and
3 Detention during the appeal process has exactly the same justification as was accepted in *Saadi* because an accelerated process could not work if those who were subject to it were not readily available to participate in it.

The Court's judgment
The Court emphasised the fundamental nature of the right to personal liberty and freedom from arbitrary detention.

It held that the test for lawfulness of immigration detention at common law is "…substantially the same as that in Article 5."

The policy before 2008
The Court agreed with Ouseley J that until 2008, the Secretary of State's policy was to detain appellants within the DFT on general detention criteria i.e. that the person was at risk of absconding notwithstanding that s/he had an appeal pending.

The policy since 2008
The Court found that despite the "serious textual limitations" of the DFT processes document and the "elusive way in which this emerges", the policy enables the Secretary of State to detain, pending appeal, for her administrative convenience and even if the detainee does not pose an abscond risk. Such detention did not breach the Secretary of State's policy in the "Detained Fast Track Processes" guidance.

Clarity and transparency
The Court considered the statement by Rob Jones, the head of Asylum Policy, in his letter in June 2013 to the European Commission that "it is not entirely clear that the DFT process includes a fast-track appeal process" to be a "significant and troubling factor". At its lowest, the Court considered that "…the terms of the letter suggest an absence of clarity or confusion as to its content by those responsible for administering the policy."

Beatson LJ posed the question: "If in 2013 a senior official within the system considered that it was not entirely clear that the DFT process included a fast-track appeal process, how can it be said that this was clear to applicants outside the system and to those advising them?"

The Court found that "elusive" way in which the policy emerges, the fact that it can only be understood from the Detained Fast Track Process guidance dealing with "timescales" and "travel documentation for removal" together with the terms in which Rob Jones's letter to the European Commission was written means that the policy does not meet the required standards of clarity and transparency.

Justification
The Secretary of State relied upon the reasoning of Lord Slynn in the House of Lords in the case of *Saadi.*

As part of her defence in the Court of Appeal, she also relied on a further statement produced by Mr Anthony Simm. Mr Simm stated that the need to process around 2,000 appeals every year in the DFT meant that the reasoning in *Saadi* applies to the appeals stage. This was despite the reasoning in *Saadi* being linked to the need for on-the-spot availability for interviews and the fact that the period of detention was for a much shorter period of time. Mr Simm also stated that the difficulties with travel arrangements and arranging meetings meant that releasing people pending appeal would undermine the proper operation of the DFT process. He did not comment on the difficulties experienced by detainees in seeing lawyers and obtaining evidence. Nor did he explain why not detaining those who are not assessed to be at risk of absconding would reduce the overall number of appeals being determined through the DFT appeals process (para 86).

There was no evidence from the Tribunal that appellants need to be detained to enable the Tribunal to quickly determine their appeals nor was there any evidence from the Home

Office that it is not possible to place those released near Fast Track Appeals Centres, or to accommodate them in the detention centre but not under conditions of detention (para 87).

The Secretary of State also relied on evidence given by Beverly Hughes and representatives of NGOs to the Home Affairs Select Committee in November 2003 which the Court found to provide "only very limited assistance" (para 88).

She also relied on a statement from the current head of the DFT at the Home Office submitted the day after the hearing that if different work-shift patterns of staff allowed, where possible, a single officer would deal with the case from the stage of the substantive asylum interview until the case is appeal rights exhausted or the detainee is released from the DFT.

The Court found that had it been necessary to decide the question of justification, it would have found that the Secretary of State's evidence does not justify the policy at appeal stage.

Of the Secretary of State's reliance on the conclusion of the House of Lords in *Saadi* as justifying detention for administrative convenience pending appeal the Court stated that it 'did not consider that without further evidence it is possible to take a conclusion reached in a particular context and against a particular factual background and conclude that it applied in another context or at a different stage of the same process.' (para 93). The Court concluded that looked at in the round the Secretary of State's evidence 'does not provide the sort of substantial fact-based justification that the Supreme Court in *R(Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 indicated would be needed to justify an interference with a fundamental right." (para 96) As a result the court stated that it 'did not consider the evidence…suffices to show that the approach and reasoning in *Saadi*'s case means that, after the refusal of an application for asylum and pending an appeal against that decision, detention of a person who does not meet the general detention criteria…is justified and reasonable in the *Hardial Singh* sense.'(para 96)