Fast Track Rules Judicial Review

Legal: MW 369

Rules regulating the hearing of appeals by the First Tier Tribunal (Immigration and Asylum Chamber) were made under section 22 of the Tribunals, Courts and Enforcement Act 2007 in October 2014. They include the Fast Track Rules (FTR) which regulate the procedure for the conduct of certain appeals against refusal of asylum applications by the Home Secretary. By FTR rule 2(1) the FTR apply to any appeal where the appellant:

i. was detained under the Immigration Acts at Colnbrook House, Harmondswsorth or Yarl's Wood Removal Centre at the time of notice of the decision against which the appellant is appealing, this decision being either the original refusal of the Home Secretary or the adverse decision of the First Tier Tribunal against which the appellant is appealing to the Upper Tier Tribunal: and
ii. has been continuously thus detained since the notice was served.

2. The FTR provide strict time limits for the hearing and disposal of appeals. Notice of appeal must be given not later than 2 working days after the day on which notice of the decision is given. The respondent, the Home Office, must provide various documents to the Tribunal within 2 working days after receiving the notice of appeal. The tribunal must fix a date for the hearing of the appeal which is not later than 3 working days after the day on which the respondent provides these documents, or failing that, as soon as practicable and must conclude the hearing on that date. The Tribunal may adjourn or postpone a hearing or take a case out of the FTR regime only if it is satisfied that the appeal could not be justly decided if the hearing were to be concluded on the date fixed for it. The Principal Rules provide for time limits in some cases, but these are much more generous than the FTR provide.

3. An organisation called Detention Aid, representing the interests of asylum seekers, brought a claim for judicial review of the FTR against the Lord Chancellor (Michael Gove), the rule making authority, claiming that the FTR are *ultra vires* the statutory powers under which they are made. Section 22(4) of the 2007 Act provides that the power to make rules must be exercised with a view to securing *inter alia* that justice is done, that the tribunal system is accessible and fair and that proceedings before the Tribunal are handled quickly and efficiently. In June 2015 the High Court, Nichol J. accepted that the FTR with their tight time limits were unfair and unjust and ruled that they were therefore *ultra vires*. The rules summarised in paragraph 2 allow just 7 working days from notice of appeal to actual hearing though the tribunal may fix an actual hearing date at a date "as soon as practicable" if it is unable to do so within the prescribed time limit. An appeal by the Lord Chancellor against this decision, with the Home Secretary

joined as an interested party, was dismissed by the Court of Appeal on 20 July. (*The Lord Chancellor v. Detention Action [2015] EWCA Civ.84*)

4. The basis of decisions by both the High Court and the Court of Appeal was that it was unfair and unjust to require asylum seekers to prepare and support appeals within 7 days of the decision which they sought to challenge. Account had to be taken of (1) the complex and difficult nature of issues of fact and sometimes of law raised in asylum appeals, (2) the problems faced by legal representatives in taking instructions from clients in detention and (3) the number of tasks which had to be performed by legal representatives in the very limited time allowed. To quote the Master of the Rolls, Lord Dyson, "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".

5. The Court of Appeal considered whether the provisions of Rules 12 and 14 gave adequate protection. These are the Rules mentioned in paragraph 2 which allow the Tribunal to adjourn beyond the time limits or to move a particular case outside the FTR if this is thought necessary in the interests of justice. The Court ruled, in paragraphs 39-43 of its judgment, that the Rules did not give adequate protection, because the possibilities of adjourning or moving arose only at the actual hearing, thus putting the appellant and his representative at a serious disadvantage. In particular the representative might have to concede in support of an application for an adjournment or transfer that the evidence which he was able to lead was insufficient and he would have to identify its shortcomings. In a normal case those possibilities would arise before as well as during the hearing and there are well established preliminary procedures for what are known as Case Management Review Hearings.

6. In paragraph 45 of his judgment the Master of the Rolls states that there is a need for some relaxation of the time limits and that any scheme for revising the FTR must take into account the factors on which his judgment is based, whilst at the same time "giving effect to the entirely proper aim of processing asylum appeals as quickly as possible consistently with fairness and justice". The Lord Chancellor has sought leave to appeal to the Supreme Court.

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