

**Title:** Immigration and asylum appeals. Proposals to expedite appeals by immigration detainees.

**IA No:** MoJ027/2016

**RPC Reference No:** N/A

**Lead department or agency:** Ministry of Justice

**Other departments or agencies:** Home Office

## Impact Assessment (IA)

**Date:** 28/09/2016

**Stage:** Consultation

**Source of intervention:** Domestic

**Type of measure:**

**Contact for enquiries:** Paula Waldron

## Summary: Intervention and Options

**RPC Opinion:** N/A

### Cost of Preferred (or more likely) Option

Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
£18.04m	N/A	N/A	N/A	N/A

### What is the problem under consideration? Why is government intervention necessary?

The Fast Track Rules 2014 allowed for an accelerated appeals procedure for asylum appeals brought by persons detained under immigration powers. These Rules were quashed by the High Court following a Court of Appeal decision that they were unlawful due to the speed of the process and lack of safeguards for appellants. Since then there has been no fast track appeals procedure which has led to appeals being determined in slower timeframes and appellants potentially being in immigration detention for longer periods. This consultation aims to look at what an expedited appeal process for detained appellants could look like in order to help inform the Tribunal Procedure Committee (TPC)'s decision as to whether to make revised rules and the form of such rules.

### What are the policy objectives and the intended effects?

The policy objective is to provide for a new expedited appeals process for detained cases that ensures that cases are determined with speed and efficiency, balanced against the need for fairness and justice. New rules should address the concerns identified by the Court of Appeal and have clear time frames in which appeals should be determined while making sure there are sufficient safeguards to allow appellants sufficient time to prepare their cases. The aim is to reduce the time some appellants spend in detention while their appeal is being determined.

### What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

To meet the policy objective, two options are assessed in this Impact Assessment:

- Option 0: Status quo. Appeals from detained appellants would continue to be brought under the Principal Rules which apply to all cases but do not have time frames for expediting appeals. This is not desirable as it can lead to longer and more varied time frames for appeals to be determined and appellants held in immigration detention for longer periods.
- Option 1: Invite the TPC to consider the evidence for making revised rules with a new expedited appeals process for detained cases that apply to all appellants detained either in Immigration Removal Centres or in prisons who appeal a Home Office immigration decision. These rules would have clear time frames while having safeguards to ensure fairness is not compromised.

Option 1 is our preferred option as revised rules will assist in ensuring that those detained and appealing an immigration decision have their cases determined with speed and efficiency with appellants detained for the shortest period necessary, without compromising access to a fair and effective appeals process.

### Will the policy be reviewed? It will not be reviewed. If applicable, set review date: Month/Year

Does implementation go beyond minimum EU requirements?

No

Are any of these organisations in scope?

Micro  
No

Small  
No

Medium  
No

Large  
No

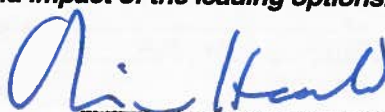
What is the CO<sub>2</sub> equivalent change in greenhouse gas emissions?  
(Million tonnes CO<sub>2</sub> equivalent)

Traded:  
N/A

Non-traded:  
N/A

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister:



Date:

3/10/16

# Summary: Analysis & Evidence

Policy Option 1

**Description:** Introduce an expedited appeals process for detainees

## FULL ECONOMIC ASSESSMENT

Price Base Year 2016	PV Base Year 2016	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: £18.04m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£-	N/A	£-	£-
High	£-		£-	£-
Best Estimate	£0.0m		£0.6m	£5.4m

### Description and scale of key monetised costs by 'main affected groups'

Depending on the result of the consultation, the main costs to HMCTS would arise from potential lost fee income should the eligibility for paying fees change. Remissions and exemptions are common among detained appellants but not universal. A general fee exemption for expedited appellants would incur costs to Government of £380k per annum. The judicial costs to HMCTS of increased volumes of case management reviews (CMRs) triggered by immigration and asylum appeals are expected to be up to £270k p.a. NOMS may face costs up to £61k p.a. for escorting Foreign National Offender (FNO) prisoners

### Other key non-monetised costs by 'main affected groups'

We have not monetised the costs of transferring appellants detained in Immigration Removal Centres (IRC) around the IRC estate or to the hearing centres. While we have monetised the costs of escorting FNO prisoner appellants to secure courts for CMRs (£61k), there may be further transfers of FNOs to prisons located near appropriate hearing facilities, which we have not monetised. The legal and administrative costs of the expedited appeals to the Home Office may increase modestly due to the increased use of CMRs. We do not currently have data to confidently monetise costs to the Legal Aid Agency.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	£-	N/A	£-	£-
High	£-		£-	£-
Best Estimate	£0.0m		£2.8m	£23.4m

### Description and scale of key monetised benefits by 'main affected groups'

Most of the benefits arise from early removal of FNO prisoner appellants. FNO prisoners are expected to complete their appeals earlier than under the current scheme, allowing, where possible, prompt removal. As an absolute upper bound, this could save up to £2.7m p.a. to NOMS, but only assuming the appeal is currently delaying removal of all FNO prisoner appellants. This sum may not be immediately cashable. Additionally, a greater proportion of IRC appellants will complete their expedited appeal in detention, therefore saving up to around £50k p.a. (probably less) to the Home Office in Asylum Support payments. A general fee exemption for expedited appellants would save appellants £380k per annum.

### Other key non-monetised benefits by 'main affected groups'

A faster outcome under the expedited appeals process would mean no appellant waits an unreasonably long time in detention (whether in an IRC or, in some cases, in prison pending possible removal) and would reduce uncertainty appellants currently experience waiting for their appeal to be determined. Keeping the appellants in detention until the end of the appeals process is expected to reduce the prevalence of abscondment. Savings due to fewer expected bail hearings are also not monetised.

Key assumptions/sensitivities/risks	Discount rate	3.5%
We do not know the effects of the proposed scheme on the volumes of appeals, which may cause fluctuations in the net benefit. Furthermore, we do not know what proportion of cases might drop out of the expedited appeals process at the CMR stage. These risks have not been monetised at this stage.		

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: N/A	Benefits: N/A	Net: N/A	
			N/A

## **Evidence Base**

### **A. Background**

1. From 2000 to 2015 the UK operated a Detained Fast Track (DFT) policy for asylum cases that could be decided quickly. Tribunal Rules, the 'Principal Rules' establish the procedure for dealing with appeals from immigration and asylum decisions. Within the Principal Rules, a schedule provided for 'Fast Track Rules' which set out an accelerated appeals procedure for appeals brought by persons detained under immigration powers in Colnbrook, Harmondsworth and Yarl's Wood Immigration Removal Centres (IRCs).
2. In July 2015, the Court of Appeal upheld a decision of the High Court that the Fast Track Rules 2014 ('FTR 2014'), were unlawful due to the speed of the overall process and the lack of sufficient safeguards for appellants. As a result of this, the FTR 2014 were quashed by the High Court.
3. The Court of Appeal was concerned that the FTR 2014 did not strike the correct balance between speed and efficiency on the one hand and fairness and justice on the other. Specifically, it thought that the time limits set were too short to allow for a fair hearing. The Court of Appeal also raised concerns that there was no real opportunity for appellants to have their case removed from the fast track before a substantive hearing.
4. Since the quashing of the FTR 2014, all appeals have been dealt with under the Principal Rules. This has resulted in an increase in the timescales in which detained appeals have been determined and uncertainty for both the appellant and the state. In turn, the time some appellants spend in immigration detention has increased while other appellants, who may not have been released under the FTR 2014 process, are now released pending their appeal.
5. The Government wants to ensure that the appeals process for detained cases is both quick and efficient and, therefore, wants to introduce revised rules allowing for an expedited appeals process for detained cases. Responsibility for making revised rules lies with the Tribunal Procedure Committee (TPC). This consultation aims to invite views on what the policy behind these new rules should be in order to help inform the TPC's decision as to whether to make rules (and the form of such rules) giving effect to a revised expedited appeals process for detained cases, while ensuring fairness and justice are maintained.

### **B. Policy Rationale and Objectives**

6. The conventional economic rationale for Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates ("market failures") or if it would like to correct existing institutional distortions ("government failures"). Government also intervenes for equity ("fairness") reasons.
7. The primary rationale for this policy is equity: the procedure rules for a tribunal must ensure that the system is accessible and fair and that proceedings are handled quickly and efficiently. Where an appellant in an immigration appeal is detained, the case for accelerating that appeal is based on the

need to ensure that detention is for the shortest period necessary without compromising access to a fair and effective appeals process.

8. The associated policy objective is to provide for a new expedited appeal process for detained cases that ensures that cases are determined with speed and efficiency balanced against the need for fairness and justice. The revised rules should address the concerns identified by the Court of Appeal.

## **C. Affected Stakeholder Groups, Organisations and Sectors**

9. The main stakeholder groups, organisations and sectors affected by the policy are:
  - Appellants detained in an immigration removal centre (IRC) or in prison
  - The Home Office
  - The National Offender Management Service (NOMS)
  - The judiciary and Her Majesty's Courts and Tribunals Service (HMCTS)
  - The Legal Aid Agency (LAA)
10. The appellants affected by the policy are those with an in-country right of appeal and comprise two groups: those who are detained in an IRC by the Home Office; and Foreign National Offenders (FNOs) who are in prison at the time they lodge their appeal and are the responsibility of NOMS<sup>1</sup>.
11. In addition to the above groups, other parties who have an involvement with appellants include legal service providers and public bodies not listed above. The impacts on these groups are not considered in detail in this Impact Assessment (IA) for the reasons given below.
12. Under an expedited appeals process, it has been assumed that legal service providers would cover the same number of cases overall with the same level of work. Any extra time devoted to fast track cases, when open, would be counterbalanced by the fact that these cases would overlap less. As noted below for both HMCTS and NOMS, any extra work to legal service providers related to additional case management reviews (CMRs) may be counterbalanced to a degree by a reduction in bail hearings owing to the shorter standard time frame for appeals under the expedited process. This would also mean that any transition costs would be negligible as it is assumed the same work would be conducted, only with a shift in daily prioritisation. This group would, therefore, be largely unaffected by the policy and current costs and impacts have not been examined in detail.
13. Other government departments and public bodies such as the NHS are involved with immigration and asylum claimants independently of the claimants' detention. Again, as outcomes are assumed to be the same under the expedited appeals process, any costs to these parties, post-appeal, would not change. These parties would benefit only insofar as some appellants would be removed sooner and, therefore, demand fewer services overall. As the nature of these services are diverse, it would not be proportionate to examine the relevant costs and savings further.
14. Impacts on government departments and public bodies are also impacts on the taxpayer. We also assume it is beneficial to wider society to minimise the number of individuals living with uncertainty,

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<sup>1</sup> A Foreign National Offender (FNO) is defined as an individual with a criminal case on the Home Office's Case Information Database (CID) and may include individuals with asylum cases. Not all FNOs are in prison. For example, some may have completed their sentence and be in the community. In this document, FNOs are discussed only with regard to FNOs in prison appealing a Home Office immigration and asylum decision.



possibly not contributing productively to society. Because these benefits are diverse, not easily monetised and subjective they are not examined further.

## **D. Description of options considered**

15. This IA identifies both monetised and non-monetised impacts for understanding what the net social impact might be from implementing the following options:

- **Option 0: Do nothing.**
- **Option 1: Introduce an expedited appeals process for detainees.**

16. In the rest of this section, each of these options is described in more detail. The costs and benefits associated with these options are then presented in section E.

### **Option 0: Do nothing**

17. Under this option appeals from detained appellants would continue to be brought under the Principal Rules which do not have time frames for dealing with an appeal. This would result in continued variation in the timeframes in which appeals from detainees are resolved: some appellants would be detained for long periods in IRCs or in prison while others, who would otherwise be detained while on appeal, would be released sooner than is desirable. This is unsatisfactory for all the affected parties identified above, particularly appellants, the Home Office and NOMS.

#### **Appellants**

##### **IRC appellants**

18. The principal costs of detention for the IRC appellant relate to the loss of liberty and uncertainty about one's future. Such costs are not easily monetised and are not considered further in this IA. However, we note that the time spent in IRC detention by some appellants pending appeal can be substantial. For example, in the twelve months to June 2016, the Home Office record that 70 asylum appellants launching their appeal while held in an IRC spent a mean time of 61 days waiting for their appeals to be determined and 102 days in detention overall. Maximum time in detention for this group was 169 days. It is unsatisfactory that such appellants suffer such extended loss of liberty and are unable to focus on their future while their status is uncertain for so long.

##### **FNO prisoner appellants**

19. While much detention for this group will relate to their prison sentences, a protracted appeals process may delay their removal from a UK prison. Furthermore, time to determination for some FNO prisoners can be considerable with associated consequences for uncertainty.

#### **Home Office**

20. For the Home Office, a protracted and variable appeals process for detained appellants is unsatisfactory because it leads to an inefficient use of detention facilities and can frustrate removal, where determined. Individuals who are detained in an IRC until their appeal is determined take up bed space that could be used by others. Equally, some of those who are released from an IRC at the lodgement of an appeal may abscond. Other detainees who are released from an IRC pending appeal, who are eligible for Asylum Support must be supported by the Home Office until their asylum appeal is resolved.

#### **NOMS**

21. Similar arguments apply to NOMS as to the Home Office. Some FNO prisoners may be removed from the UK following an unsuccessful appeal, either by being transferred to a foreign prison under a

Prisoner Transfer Agreement (PTA)<sup>2</sup> or by being deported under the Early Removal Scheme (ERS)<sup>3</sup>. Any delays to removal represent an unsatisfactory additional demand on prison resources.

### Option 1: Introduce an expedited appeals process for detainees

22. Under this option a new expedited appeals process would apply to any person appealing from detention, whether from an IRC or from prison. The expedited appeals process would reduce the time to obtain an appeal decision for all appeals launched from detention and standardise the time spent in detention by appellants detained in IRCs, so avoiding the variation in detention times that currently exists for this group.
23. Under this option, the TPC would be invited to consider making rules for the new appeals process. It is expected that the TPC would be invited to make revised rules with the following key aspects:
- a. **The new appeals process would apply to all appellants detained either in prisons (under immigration or criminal powers) or in IRCs who appeal a Home Office immigration or asylum decision against them.** This would include decisions in both asylum and non-asylum cases such as where individuals have overstayed their leave or immigration decisions made in relation to FNOs;
  - b. **Revised timescales for the appeal would apply (timescales to be decided).** Two alternatives are considered in the consultation which would expedite detained appeals: i) retain set timescales for each stage although these would be longer than those in FTR 2014; ii) introduce an overall longstop timescale of 25 working days to determine the appeal in the First Tier Tribunal, Immigration and Asylum Chamber (FtT). In addition, 20 working days would be provided for any First Tier Permission Applications (FTPA) and Upper Tribunal Permission Applications (UTPA) to be promulgated;
  - c. **CMRs, already common in non-detained asylum and detained deportation appeals, would be introduced into the appeal process for all detained appellants.** This would allow for judicial oversight of all cases which are subject to the expedited appeal process for detained cases including potentially an application to transfer the appeal out of the expedited process. This could be on the papers or an oral hearing but our current preference is for a paper review with the potential for the Tribunal to order an oral hearing, if necessary;
  - d. **A fee may or may not be charged to the appellant for bringing the appeal.** From 10 October the fees charged for appeals in the First Tier Tribunal (FtT) will be set at full cost recovery levels (£490 for a determination on the papers and £800 for an oral hearing) for those who are required to pay them<sup>4</sup>. In this IA, the impacts of exempting all detainees from tribunal fees is considered for illustration only.
24. Table 1 indicates the numbers of appellants involved. Currently a total of around 1,500 individuals appeal from IRCs per annum and around 400 FNOs per annum appeal from prisons. Note both of these figures are small fractions of the tens of thousands of immigration and asylum appeals received by the FtT each year.

<sup>2</sup> Prisoner Transfer Agreements (PTA) allow for the transfer of foreign national prisoners to a prison in their home country, to continue to serve their sentence.

<sup>3</sup> The Early Removal Scheme (ERS) allows for removal of foreign national prisoners to their home country as a free person up to 270 days before the end of the custodial part of the sentence, subject to a minimum of a quarter of the sentence being served.

<sup>4</sup> Ministry of Justice, 15 September 2016. Tribunal Fees. The Government Response to consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber).

*Table 1. Appeals lodged in the First Tier Tribunal, Immigration and Asylum Chamber, in the twelve months to June 2016, inclusive, with special consideration of those in detention.*

Type of appeal		Annual total number of cases lodged by location at lodgement	Annual total number of cases lodged as a percentage of all appeals lodged
All Appeals <sup>5</sup>	Asylum	15,517	22%
	Non-asylum	55,663	78%
...of which detained in...			
Immigration Removal Centre <sup>6,7</sup>	All	1,465	2.1%
Prison <sup>8</sup>	All	380	0.5%

### IRC appellants

25. Under the expedited appeals process, the volume of appeals launched from those in IRC detention may go up or down, depending on how the new process affects the time appellants held in IRCs remain in detention. This is because the existing beds in IRCs would continue to be fully occupied:
- Those individuals who currently spend a long time in IRC detention pending their appeal would spend much less time under the expedited appeals process. The beds they free could be back-filled by other individuals, some of whom could also appeal. This would increase detained appeal volumes.
  - On the other hand, not all IRC detainees currently spend the duration of their whole appeal in detention. Given the need to make best use of the available detention resource and the current expectation that the appeal process will take a long time, many are released before the appeal is determined, often a short time after lodgement. For a substantial proportion of these individuals, it is expected that a substantially faster appeal process would justify detention until their appeal is determined, possibly increasing the average time such individuals spend in detention. This may decrease the number of beds available for other potential detainees across the year and, therefore, decrease the number of potential appellants.
26. In summary, it is not clear how the expedited process would affect mean detention time for IRC detained appellants, the number of detainees passing through IRCs per year and the total number of appeals from detention. IRC detention decisions are taken on the individual circumstances of each case and more detailed modelling would be required to quantify any changes. Therefore, in the following sections, we have applied a cautious assumption that the average time all IRC appellants spend in detention and the volume of appeals from IRCs is the same under Option 1 as under Option 0. Benefits from the expedited process for IRC appellants principally relate to receiving an expedited outcome in a fixed timeframe while the benefits to the Home Office principally relate to better use of detention resources and savings on Asylum Support payments for released appellants.

<sup>5</sup> Ministry of Justice, 8 September 2016. Tribunals and gender recognition certificate statistics quarterly: April to June 2016, Table FIA.1. [Asylum volume is the sum of volumes labelled 'Asylum', 'Protection' and 'Revocation of Protection'.]

<sup>6</sup> Here and throughout, Home Office figures quoted have been derived from management information and are therefore provisional and subject to change. This information has not been quality assured under National Statistics protocols. .

<sup>7</sup> Appeals data are based on appeals lodged between 1 July 2015 and 30 June 2016 by individuals with a detention restriction of "Detention – Custodial" or "Detention – Remand" at the time of appeal

<sup>8</sup> Ibid

## FNO prisoner appellants

27. The number of appeals from prison are assumed to be constant but swift determination of appeals may allow some prisoners to be removed from the UK sooner, saving detention time and the associated costs.

## E. Costs and Benefits Analysis

### Option 0. Do nothing

28. Option 0 represents the 'do nothing' option. Under this option, detained appellants would continue to experience wide variations in the time spent in detention, with some spending months in detention before their appeals are determined.
29. Because it is the option against which the impacts of the expedited appeals process are assessed, the costs and benefits of Option 0 are necessarily zero (with respect to itself), as is its Net Present Value (NPV).

### Option 1. Introduction of an expedited appeals process for detainees

#### Costs of Option 1

##### Appellants

##### *Monetised costs*

30. Under this option, appellant's eligibility for Tribunal fee exemptions may change. As this would have an impact on the income received by HMCTS, these impacts are considered in the relevant section below.

##### *Non-monetised costs*

31. It has been assumed that the outcomes (final decisions) for claimants would be unaffected by the introduction of an expedited appeals process. Therefore, any costs and benefits for appellants would largely derive from any changes to the time spent waiting for a decision.

##### IRC appellants

32. While some IRC appellants under the expedited appeals process would spend less time in detention than they do now owing to a swifter determination, the number of beds in IRCs would remain the same. This constancy implies that any time freed for the sorts of appellants currently detained would be back-filled by other claimants (either brought into detention or held in detention for longer).
33. Detaining some individuals for longer is justified on grounds of facilitating desirable outcomes (i.e. removal, where appropriate). Nevertheless, loss of liberty represents a cost to those affected. We do not monetise this cost, owing to difficulties valuing time at liberty. Instead we simply note that, while some would be detained for longer under an expedited process, the cost to these people is likely to be outweighed by the benefits to other IRC detainees who can spend months in detention on appeal. The argument for an expedited process from the appellant's perspective is principally one of fairness.

## FNO prisoner appellants

34. The impacts of Option 1 on FNO prisoner appellants are likely to be principally beneficial. Please see below for further details.

##### Home Office

##### *Non-monetised costs*

35. *Transfers*: The Home Office run an estate of nine IRCs and two separate short term holding facilities. Currently, detainees are transferred throughout the estate according to the availability of bed space and hearing venue. For the six months from April 2015 to September 2015, there were 24,740 In-Country Escorted (ICE) moves at a cost to the Home Office of £4m<sup>9</sup>. It is not possible to say how many of these trips involved appellants. However, given that the number of appeals from IRCs was 1,500 in the twelve months to June 2016 (Table 1) and 31,596 people entered IRC detention over

<sup>9</sup> Derived from management information and therefore provisional and subject to change. This information has not been quality assured under National Statistics protocols



the same period<sup>10</sup>, if appellants and non-appellants are moved on average the same number of times then the cost of transporting affected appellants may be in the region of £370k per annum.

36. Under the expedited appeals process, it is intended that all detainees launching an appeal from an IRC would be transferred to the IRCs most conveniently located for swift presentation at tribunal, when needed, with minimal transport cost. While this practice would appropriately prioritise detained appellants, these appellants would displace other detainees who would have otherwise been held at the relevant IRCs. We, therefore, nominally register the practice as a cost. However, there are efficiencies to be realised in transporting detained appellants to the same locations in bulk. Bearing this in mind and the complex movements already in place across the whole IRC estate, in practice it is anticipated that the Home Office would maintain its current contract at no extra cost.
37. *CMRs*: The principal extra legal costs for the Home Office under the proposed expedited appeals process are related to the introduction of the case management review (CMR) for all cases, including costs for presenting officers and administration. Currently, CMRs arise mainly in asylum and deportation appeals and, overall, only occur in around one quarter of appeals decided at hearing in the FtT<sup>11</sup>. Under an expedited process, appellants would have a higher need for a CMR, particularly to determine whether the case might more suitably be handled outside the expedited process. However, while there may be more CMRs, there will be less need to consider release pending determination and fewer bail hearings<sup>12</sup>. The MoJ's preference is that CMRs should be conducted on the papers in all expedited appeals by default, with discretion for the Tribunal to direct a case management hearing. It is imagined the CMR hearing would take around 30 minutes.
38. Home Office legal costs relating specifically to detained appeals are not separately recorded but the expedited appeals process is presently expected to impose only modest extra costs. In terms of Home Office preparation and hearing time, a CMR on the papers is not unlike a decision to release, while the CMR hearing is not unlike a bail hearing: in the twelve months to June 2016, the mean duration of immigration bail hearings was 34 minutes per hearing<sup>13</sup>.
39. *Estates*: As noted above, under this option the Home Office would maintain the same number of occupied beds in its IRC estate as under Option 0. The expedited appeals process would not, therefore, create any cost (or benefit) on IRC operations related to the costs of detention.

#### HMCTS

##### *Monetised costs*

40. *CMRs*: HMCTS may incur modest additional costs related to CMRs. In relative terms, the impact on HMCTS costs is likely to be slightly greater than the impact on the Home Office for, while the Home Office would provide presenting officers for oral CMRs, a judge would conduct all CMRs, both paper and oral, including those for prisoners. Assuming all in-scope appellants have one CMR implies that HMCTS would handle around 1,800 CMRs per annum under this option (Table 1).
41. HMCTS estimate that the hourly judicial cost of a CMR is approximately £291 based on judicial fees, pension and NI contributions, and travel and subsistence and after making allowance for writing up time<sup>14</sup>. If we assume each CMR lasts 30 minutes, the total cost of CMRs would be approximately £270k p.a. In practice, the cost would be less than this because many CMRs would be conducted on the papers, which would be expected to take less time than a hearing. Note, however, it is proposed

<sup>10</sup> Home Office, 25 August 2016. Immigration statistics, April to June 2016. Detention data tables immigration statistics April to June 2016, Table dt\_01\_q.

<sup>11</sup> HMCTS management information, September 2016. Figures based on a comparison of CMR volumes with appeals decided at hearing in 2015/16.

<sup>12</sup> It is anticipated that bail applications submitted shortly following detention, such as by individuals wishing to be reunited with family, would continue at levels similar to now. The number of applications by individuals who feel they have been detained too long should fall.

<sup>13</sup> HMCTS management information, August 2016. Mean duration recorded for the period 1 July 2015 to 30 June 2016.

<sup>14</sup> HMCTS management information, August 2016.

there be discretion for the Tribunal to order an oral hearing so it would be possible for both a paper and oral CMR to occur. It is also possible that a second paper review might occur in some instances.

42. We do not include estates or administrative costs in our calculations for CMRs because these costs are essentially fixed: the volumes of appeals are so small compared with total workload (Table 1), the expedited appeals process would not mandate a change in estate or in administrative staff numbers.
43. *Fee exemptions:* Under the expedited appeals process, appellants may or may not be exempt from tribunal fees, depending on the final policy. Assuming exemptions are extended, HMCTS would face a loss of income and the maximum amount would be equal to the existing income from detained appellants.
44. As of 10 October 2016, the fee for FtT paper appeals is £490 and the fee for FtT oral appeals is £800. In addition, the Government has announced that during 2017 it will be introducing fees for First Tier Permission Applications (FPA) (to appeal at the Upper Tribunal), Upper Tribunal Permission Applications (UTPA) and Upper Tribunal, Immigration and Asylum Chamber (UTAC) appeals at £455, £350 and £510, respectively<sup>15</sup>. HMCTS does not collate figures for payment/remission/exemption and oral/paper levels for detainees as a discrete client group. HMCTS management information allows us to estimate, however, the proportion of appellants, by case type, who would pay the new fees. Based on these estimates, the volumes in Table 1 and adjusting for the case mix of detained appellants, the maximum value to HMCTS of total fee exemption for detained appellants under the expedited process, would be around £610k per annum, equivalent to £380k per annum to Government as a whole<sup>16</sup>.

## NOMS

### *Monetised costs*

45. Under an expedited appeals process, NOMS would be likely to incur costs related to escorting FNO prisoners to CMRs. Data for the twelve months to September 2014, indicate that the individual escort cost in that year was £157 per prisoner per escort<sup>17</sup> or £160 in 2016/17 prices. These data would imply extra costs of up to £61k per annum if all 380 prisoner appellants (Table 1) were to attend a CMR under the expedited appeals process. In practice, the cost could be much less than this if the prisoner appears via video link or is not required to attend for this hearing. This estimate also ignores the CMRs already conducted for certain case types, particularly asylum appeals.

### *Non-monetised costs*

46. Under an expedited process, NOMS might also need to transfer prisoners to prisons located near appropriate hearing facilities. The logistics of this exercise are complicated and we have not monetised these costs. Nevertheless, in 2015/16 there were 91,308 first receptions to prison<sup>18</sup>. Combined with the prisoner volume in Table 1, this figure indicates that FNO appellants may represent around 0.4% of total escort workload. The total Prisoner Escorts and Custody Service (PECS) contract is typically worth over £120m per annum<sup>19</sup> (the forecast for 2016/17 is similar). This indicates that total escorts for appellants is of the order of £500k p.a. While this figure represents all escorts for the individual, many of which are not necessarily related to immigration and asylum appeal, substantial movements of prisoner appellants may incur costs of similar order.

## LAA

### *Non-monetised costs*

47. Civil legal services for asylum appeals are funded under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 subject to an applicant passing a test of means and the merits of their case. Immigration (non-asylum) matters are not in scope, but funding may be available through the

<sup>15</sup> Ministry of Justice, 16 September 2016. Tribunal Fees. The Government Response to consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber).

<sup>16</sup> In practice, the Home Office reimburse fees for appellants who win their appeal. Adjusting for published success rates [Ministry of Justice, 9 June 2016. Tribunal and Gender Recognition Certificates Statistics Quarterly, January to March 2016, Tables 2.4a and 2.5a], indicates that the effective cost to Government as a whole would be £380k.

<sup>17</sup> HM Inspectorate of Prisons, December 2014. Transfers and escorts within the criminal justice system. A thematic review.

<sup>18</sup> Ministry of Justice, 28 July 2016. Offender management statistics quarterly: January to March 2016. Prison receptions: Q1 2016, Table 2.1.

<sup>19</sup> HM Inspectorate of Prisons, December 2014. Transfers and escorts within the criminal justice system. A thematic review.

Exceptional Case Funding (ECF) scheme subject to there being a breach or risk of a breach of the applicant's ECHR rights or enforceable EU rights if funding is not made available.

48. Option 1 would not widen the scope of civil legal aid. Asylum appeals would remain eligible for legal aid subject to means and merits tests, and immigration (non-asylum) matters would still be ineligible for funding unless they are granted funding through the ECF scheme. Detention is in itself not determinative for a grant of funding although that, coupled with a detainee being subjected to a faster process, may result in a greater number of immigration (non-asylum) applications for ECF and grants of funding. Due to data limitations, we have been unable to estimate all of the potential costs associated with this option. We will attempt to collect data on this during the consultation, to better assess the impact prior to implementation of the policy.

## Benefits of Option 1

### Appellants

#### *Monetised benefits*

49. Under this option, appellants (whether held in an IRC or in prison) may or may not be exempt from tribunal fees, depending on the final policy. The maximum benefit would be granted if all appellants (those held in IRCs or in prison) were exempted and would be equal to the equivalent cost identified for Government above, namely £380k per annum. This calculation ignores any adjustment to exemptions that may be due for those falling out of the expedited process.

#### *Non-monetised benefits*

### IRC appellants

50. As noted already, the costs of detention for appellants and, therefore, the benefits of any shortening of detention principally reflect the intrinsic value of liberty and certainty about one's future and are difficult to monetise. Furthermore, it is not clear whether mean time in detention will change for IRC detainees. We simply note again that some appellants in IRCs can spend many months in detention. A short, fixed time frame for appeal in these cases would be likely have a positive impact on a detainee's mental preparation for either settling in the UK or returning home.
51. In economic terms, time spent waiting for an appeal outcome is also an opportunity cost: delay means the appellant forgoes the opportunity to earn an income either in the UK, in the event that their appeal is eventually allowed, or in the country of origin, if removal is determined. In general, quantifying this cost, and therefore the benefit of timely appeal determination, is difficult owing to the diverse circumstances of appellants. We note, however, that the pure financial costs of detention for the appellant are likely to be modest. Appellants are detained in an IRC if they are likely to be removed in a reasonable time and are considered likely to abscond following an unsuccessful appeal. The earning potential of such individuals (including any benefits such as Asylum Support) at the time of the appeal is likely to be low once board and lodging costs are taken into account<sup>20</sup>.

### FNO prisoner appellants

52. The benefits to FNO prisoner appellants would be similar to those for IRC appellants, including benefits related to a change in detention status. Some FNOs could witness a reduction in detention if they are subject to the ERS or a PTA and would currently launch their appeal, respectively, either just before the ERS time window or at the moment the PTA transfer is triggered. Those subject to an ERS, could spend less time in detention under an expedited appeals process. Those subject to a PTA, may be transferred sooner to a foreign prison. We have not monetised the impacts of reduced detention time on FNOs.

### Home Office

#### *Monetised benefits*

53. *Asylum Support*: The Home Office pays Asylum Support to asylum seekers who meet the relevant eligibility criteria. Currently, Asylum Support is paid to some detained appellants upon their release from IRC detention pending appeal. Under the expedited appeals process, however, as a general assumption we assume that the Home Office could reasonably justify retaining detained appellants in

<sup>20</sup> One would normally discount impacts on earnings over the longer term as irrelevant to an individual's perceived costs, both because such impacts would represent a very small percentage of long term potential earnings and because individuals are assumed to value the present over the future.

IRCs until the appeal is determined unless other factors were persuasive towards release. Potentially, then, a considerable proportion of all Asylum Support payments currently paid to those released pending an appeal conclusion could be eliminated, benefitting the Home Office by an equal amount.

54. Internal management information<sup>21</sup> indicates that 10 IRC detainees, who lodged an appeal between 1 July 2015 and 31 March 2016, were released from IRC detention before their appeals had been concluded and subsequently went onto asylum accommodation support. The cost of this support for these people at 19 September 2016 totalled around £18k, and 6 people were still in receipt of support. Although the final total support cost of those cases is difficult to estimate, if it is assumed that those still supported would, on average, spend less than an additional 6 months on Asylum Support, then the total cost would not be greater than £34k. Scaling up from a 9 month cohort indicates an annual Asylum Support cost for these cases of under £50k.
55. An expedited appeal timeframe would be expected to save a proportion of these costs on the basis that there would be fewer releases prior to conclusion of the appeal: the likely appeal timescale is a relevant factor to be considered when releasing IRC detainees and the new rules would provide the greater certainty of a considerably shorter timescale than now. However, the case by case nature of detention reviews and the range of factors considered means that it would not be realistic to assume that an expedited timeframe would result in no releases prior to appeal conclusion. Furthermore, in practice, some appellants would fall out of the expedited process at a CMR and some may gain bail so savings will be lower than indicated above.
56. *Legal costs:* Home Office legal costs are unavailable. However, as noted, the impact of the expedited appeals process is likely to be modest and probably a cost, on balance.

#### *Non-monetised benefits*

57. As noted, the Home Office would maintain the same number of occupied beds in its IRC estate under Option 1. The benefits of an expedited appeals process with respect to detention costs, therefore, relate to cost effectiveness rather than absolute savings *per se*. If some of those currently released pending appeal abscond, an expedited process in which such individuals are not released would guarantee removal, where determined. We have not monetised this benefit but simply note that as of August 2016, available capacity was around 3,300 beds, while the cost of a bed in an IRC is around £90 per day<sup>22</sup>, implying a total annual cost of over £100m.

#### HMCTS

##### *Non-monetised benefits*

58. Under the expedited appeals process, because no-one held in an IRC would be subject to long detention, there should be less need for bail hearings, leading to a saving in tribunal time. No information is available on the number of bail applications made specifically by appellants held in IRCs. Furthermore, the time spent in detention varies considerably between appellants and detainees, and the volume of bail hearings for appellants may not be estimated simply by pro-rating the total bail volume by the proportion of IRC detainees who are appellants. The savings due to fewer bail hearings have, therefore, not been monetised.
59. Note, however, that not all bail hearings will be eliminated because detained appellants can apply for bail at any time during their detention and unless there is no material change in circumstances the application must be determined at a hearing. Where there has been no material change in circumstances, it must be dismissed on the papers but the detainee would still retain the right to reapply and have a bail hearing after 28 days, which is shorter than the prescribed time frame for expedited appeals in the FtT.

#### NOMS

##### *Monetised benefits*

60. We do not have detailed information on the possible savings to NOMS related to FNOs detained in prisons. However, an absolute upper bound for the total savings can be estimated by way of

<sup>21</sup> Figures are derived from management information from the Home Office databases and are therefore provisional and subject to change. This information has not been quality assured under National Statistics protocols. The data used is based on the assumption that the NASS reference is recorded accurately in the Home Office Case Information Database, and the initial data provided (cases relating to the DAC appeal lodged dataset extracted in June 2016) is accurate

<sup>22</sup> UK Visas and Immigration, 26 May 2016. Immigration Enforcement data: May 2016. [Includes fixed costs.]

example, assuming the extreme case that all 380 prisoners from Table 1 lodge their appeals just before they become eligible for removal under the ERS or a PTA.

61. In the year up to June 2016, the clearance time for prisoner appeals at the FtT was 25 weeks from lodgement to determination, while clearance times from lodgement to First Tier Permission Application (FTPAs) and Upper Tier Permission Application (UTPA) promulgations were 38 weeks and 45 weeks respectively<sup>23</sup>. Under the proposed expedited appeals process, clearance times are specified as 25 working days (35 calendar days) for FtT appeals and a further 10 working days each (14 calendar days each) for FTPAs and UTPAs. Assuming no change in appeal volumes and assuming prisoners remain in prison throughout the appeal process, this would free up a total of around 42,000 days per annum in prison<sup>24</sup> and be associated with potential total savings of £2.7m per annum (in 2016/17 prices)<sup>25</sup>. Note, however, that most of these savings may not be cashable as some estate and staff costs are included and the expected reductions in occupancy would be too small on their own to allow substantive estate rationalisation. Furthermore, this figure assumes that, currently, all FNO prisoner appellants are appealing just before an ERS window or a PTA transfer. In practice, these assumptions will not hold for all FNO prisoner appellants and benefits to NOMS could be much less.

### Preferred Option

62. The government's preferred option is Option 1 as this would ensure that those detained under immigration powers or in prison and appealing an immigration decision have their cases determined with speed and efficiency with appellants only detained for the shortest period necessary, without compromising access to a fair and effective appeals process.

## F. Assumptions and risks

### Assumptions

63. The following assumptions have been made with respect to appeals under an expedited appeals process.
- Total appeal volume and case mix would remain the same as now. Any actual changes in these parameters are assumed to reflect factors unrelated to the expedited process.
  - The final decisions in appeals would be unaffected by the introduction of the expedited process. This is because time limits and case management reviews would offer sufficient time to prepare an appeal and safeguards to allow the case to fall out of the fast track, if necessary.
  - The capacity of IRCs would not change. This means the number of individuals detained per year would be sensitive to changes in the time frame for appeal. Currently, however, while some IRC appellants are detained until the appeal is determined, others are bailed or released before the appeal is determined for a number of reasons. We assume no change in the mean time in IRC detention or in IRC appeal volumes.
  - Purely for illustration, we assume that all FNO appellants are eligible for ERS or transfer under a PTA and they appeal at the moment just before the ERS window or transfer date. The saving in prison time due to the expedited process would then be the product of the number of appellants

<sup>23</sup> HMCTS management information, September 2016.

<sup>24</sup> Based on the further observation that, in the year to June 2016, roughly 40% of FtT appellants went on to lodge an FTPA and 27% of FtT appellants lodged a UTPA [HMCTS management information, September 2016]. We have further adjusted for the proportions of appellants who are successful, on the assumption that these would not be removed and would not contribute any savings to NOMS. 42,000 days is equivalent to 116 extra beds on any given day.

<sup>25</sup> Based on an annual cost of detaining a prisoner of £23k per annum [Ministry of Justice, 29 October 2015. Costs per place and costs per prisoner, National Offender Management Service Annual Report and Accounts 2014-15. Management Information Addendum]. We have used 'direct resource expenditure' (£23k), which is the sum of net expenditure managed and recorded at each prison, including some fixed costs. If we were to include net expenditure met at regional or national level, the figure would be £34k per person per year. However, this latter figure contains more fixed costs, which are not cashable.



(380) and the difference between the clearance time for an appeal under the present and proposed rules.

- For illustration only, we assume that all detained appellants would be exempted from fees under the expedited process. This implies savings for appellants and costs to Government.
- Under the expedited process, the extra costs of CMRs to the Home Office would be roughly counterbalanced by a reduction in bail hearings and decisions to release. Any impacts on Home Office legal costs are assumed to be modest.
- For the purposes of calculating HMCTS costs and benefits, we assume that estate and staff salary costs are fixed. This is because the expected changes in volumes under the expedited process would be too small to provoke estate consolidation or staff redundancy.
- Similarly, it is anticipated that the Home Office would maintain its current transfer contract at no extra cost.

## Risks

64. An expedited appeal process might provoke more onward appeals on the grounds that the procedure was too fast for the FtT to consider the case fairly. The CMR was introduced specifically to mitigate this risk. Furthermore, longer time limits than under the FTR 2014 would apply so the number of additional onward appeals is expected to be small. One might also expect the number of appeals against unlawful detention to fall under the expedited process.
65. The tribunal fee income is calculated with the proposed new HMCTS fees which are higher than the current fees. If the fee income is calculated with the current fees the potential loss of fee income for HMCTS under Option 1 would be lower, at only £98k per annum (instead of £610k).
66. The overall effects of the expedited appeals process on the total detention time for IRC appellants is unknown but it may influence detained appeal volumes. For example, a shorter appeal clearance time could result in more people passing through the IRC system per year and some of these individuals may appeal.
67. As noted, potential savings to NOMS due to earlier removal of prisoners have been estimated on the assumption that FNO prisoner appellants launch their appeals just before potential removal under an ERS or PTA. In reality, many may still be serving their sentence when the appeal is completed or may be in the community having served their sentence before the appeal is determined. Savings identified for NOMS with respect to FNO prisoner appellants may not, therefore, be as high as indicated, although we have been unable to estimate to what degree owing to data limitations.
68. We have made no assumptions with respect to the proportion of the cases that are likely to drop out of the expedited process at the CMR stage. As noted, removing cases from the fast track would slightly decrease the benefits of the expedited appeal scheme.
69. The current proposals could have significant operational (and potentially legal) impacts on the Legal Aid Agency. Fast track work is currently provided under exclusive arrangements with six firms which provide civil legal services at Harmondsworth, Colnbrook and Yarl's Wood. These are high value contracts and other legal aid providers not currently party to the exclusive arrangements may be keen to have the opportunity to undertake the work. If there were to be a significant change in the volume and/or type of work undertaken by the six existing providers under the new expedited process then other interested providers could seek to claim that the changes effectively amount to a new contract, which should then be subject to a new procurement exercise. Similarly, the six existing providers could resist a required change to their existing contracts which removes their exclusive right to provide all work in relation to appeals conducted at Harmondsworth, Colnbrook and Yarl's Wood. These issues would need to be carefully managed.
70. In contrast to the normal payment arrangements for civil legal aid pre-proceedings advice, this work is currently paid at hourly rates outside of the fixed fee regime to recognise that this work needs to be undertaken at short notice. It is also demand led rather than subject to the LAA administratively setting a limit as to the number of cases a provider can undertake. An increase in the number of ECF

applications would have an administrative impact on the LAA as each application is assessed by a caseworker.

## **G. Direct costs and benefits to business calculations**

71. The policy is not expected to have any direct monetisable impacts on business.

## **H. Wider impacts**

72. The consultation document considers the anticipated impact on individuals of different protected characteristics of implementing the proposals. Full details are set out in the consultation document.
73. Broadly we consider that there is potential for the proposals to have an indirect impact on persons with the characteristics of race and religion/belief due to these appeals being brought by non-UK and non-EU nationals. This is due to the nature of these proceedings. The proposals would apply to all cases equally and there is discretion and flexibility within the system to ensure fairness and justice in each case. We are seeking further information on potential equality impacts through the consultation and would welcome information and views on this to help us assess any potential impacts.
74. With regard to other wider impacts, it is expected that if FNO prisoner cases are dealt with quickly and promptly. This might lead to greater public confidence in the Criminal Justice System and improved victim satisfaction.
75. The proposal is not expected to have any impacts on small and medium enterprises (SMEs).

## **I. Description of implementation plan**

76. We will consider all responses received to the consultation in developing our proposals and our intention is to publish the Government response in the autumn. We will then ask the TPC to consider the evidence for consulting on new fast track rules. The TPC are likely to review the effect of any rules they choose to make.

