

## Helen Bamber Foundation statement on the Supreme Court's judgment in *R (TN (Vietnam)) v Secretary of State for the Home Department* [2021] UKSC 41

22 September 2021

*The Supreme Court found that negative asylum appeals under the structurally unfair 2005 Detained Fast Track rules should not be automatically set aside. Although automatically setting aside determinations would have in particular helped survivors of human trafficking and torture, this judgment need not deter people who have ongoing asylum claims from applying to have an unfair Detained Fast Track decision set aside. The Court acknowledged that a significant number of appeals will have been unfairly heard. The fairness of each appeal decision must be considered to see if the structural unfairness of the Rules led to unfairness in individual cases.*

### Background

In this case the Supreme Court looked at the status of asylum appeals decided by the First-tier Tribunal under the 2005 detained fast track ('DFT') rules under which appellants had only six working days between a decision refusing asylum and their appeal hearing. The 2005 DFT rules, like the 2014 DFT rules, have been found unfair and unlawful by the courts.<sup>1</sup>

After the 2014 DFT rules were found unlawful, the First-tier Tribunal put in place a process to allow people to challenge unfair decisions. However, the cases decided under the 2005 rules have been subject to litigation for several years now.

The Supreme Court was asked to decide whether these cases should automatically be set aside because they were decided under a structurally unfair system or whether this should be assessed on a case-by-case basis. The Supreme Court upheld the Court of Appeal's decision that cases would need to be considered individually.

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<sup>1</sup> The 2014 rules in *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840 and the 2005 rules in this claimant's case in the High Court – *TN v Secretary of State for the Home Department* [2017] EWHC 59 (Admin).

## The Helen Bamber Foundation Intervention

The Helen Bamber Foundation ('HBF') intervened jointly with Detention Action. The Supreme Court welcomed the intervention and submissions (paragraph 27). HBF intervened in order to set out the specifically harsh unfairness of the accelerated DFT decision-making and appeals process for Survivors of Modern Slavery and Human Trafficking.

Trafficking, by its very definition, involves the use of means of deception and the exertion of physical and psychological coercion and control by traffickers for the purpose of exploitation. Even when the victim is ostensibly out of the traffickers' physical control, the traffickers may nonetheless continue to exercise control over their victims, including, in our experience, those who are in detention settings and who may also be vulnerable to re-trafficking. This may cause victims to be reluctant to identify themselves as such to the authorities, or to provide partial, inaccurate accounts of their experiences. Trafficking claims cannot be reliably established without potentially corroborative medical or other evidence external to the victim, and are therefore inherently unsuitable for accelerated processes which prevent access to this material.

This is why the state owes a special proactive duty under Article 4 ECHR to investigate situations of trafficking, which does not depend on a complaint being made by the victim: once the matter has come to the attention of the authorities they must act of their own initiative. The DFT prevented this duty being complied with. Survivors will often also require a therapeutic, recovery-focussed environment in which their history can be gradually disclosed and understood by professionals who specialise in working with survivors. A detention setting cannot provide this.

## What the TN judgment means

Back in 2017 the 2005 DFT rules were found to be procedurally unfair. In many of these DFT cases, people will have experienced a lack of opportunity to fairly present their cases. They will therefore be able to request that the Tribunal sets aside previous unfair decisions made under that process. This may be relevant to people still seeking legal protection in the United Kingdom and may also be relevant to people who were removed from the United Kingdom under an unfair process.

Even where a person is not able to show unfairness in the original DFT appeal, that does not mean that there is no way for them to bring their claim. In the case of TN, who was the appellant in these proceedings, the Supreme Court emphasised that the part of her asylum case based on human trafficking had been found to amount to a fresh claim (applying the

fresh claims test at paragraph 353 of the immigration rules (para 22-23 of the judgment). Since the trafficking aspect of her claim had not been considered before in the DFT (para 64 of the judgment), it would now need to receive a new fair appeal decision. That would provide an opportunity for any defect in the original handling of her trafficking claim to be remedied (para 71 of the judgment).

Importantly, the Supreme Court has recognised the fundamental significance of a procedurally fair asylum process (paras 64-65 of the judgment). Nothing in this judgment prevents people seeking asylum who were prejudiced by the DFT from bringing a claim to challenge the decision-making process or the appeal determination. Principles of fairness still apply where there are previous adverse credibility findings which were made under the DFT. In particular, for Survivors of Human Trafficking and Modern Slavery, the nature and complexity of their cases needs to be taken into account when considering if a Survivor's case has been dealt with fairly. The accelerated timeline in the DFT had a particularly severe impact on Survivors of Modern Slavery and Human Trafficking.

## **Thanks**

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