

Suggested checklist for those detainees/those representing detainees in the DFT in light of the Court of Appeal Judgment handed down on 16 December 2014

Detention Action's legal team suggests that detainees/those representing detainees in the DFT may wish to consider that:

1. All those detained in DFT before 16 December 2014 post-decision and pending appeal have been unlawfully detained under the unlawful policy. They can make immediate applications to the SSHD for release, and unless a new decision is made to detain them under general detention criteria within 48 hours they should urgently apply to the High Court for release by judicial review citing the judgment.
2. No substantive appeal should be heard under the Fast-Track Rules in the FTT or UT of anyone who is currently unlawfully detained under the unlawful policy. This is because the application of those Rules (see Rule 2 of the Schedule to the 2014 Rules) depends on a lawful decision to detain under a lawful policy. Individuals should make applications for transfer out or adjournment until a lawful detention decision has been made.
3. No substantive appeal should be heard under the Fast-Track Rules in the FTT or UT of those detained under general detention criteria for the reasons set out in Detention Action's letter to the FTT and UT of 16 December 2014.
4. No individual detained in DFT post-decision and pending appeal since 2008 should be removed until they have had a proper opportunity (at least 6 weeks) to seek legal advice on claiming damages for their unlawful detention and on the consequences of the judgment for their asylum claims. Injunctions should be sought from the duty judge/ Administrative Court of any such removals citing the submissions of Detention Action and the e-mail from Beatson LJ's clerk dated 16 December 2014.
5. Representatives and individuals should carefully scrutinise decisions to detain under general detention criteria to ensure that the SSHD is not applying those criteria differently in DFT cases. In particular representatives and individuals should recall that the fact of an outstanding appeal is a factor which counts against detention under Chapter 55 EIG, and that it is very unusual to detain individuals once a refusal letter is served if they have an outstanding right of appeal.
6. All those detained under the unlawful policy which has been in existence since 2008 have damages claims. There is no causation test (see *Lumba* [2012] 1 AC 245 at paras 66-68), so that they are entitled to bring claims even if they would have been detained anyway. Those who would have been detained anyway may only be entitled to nominal damages but the burden is on the SSHD to show that they would have been detained anyway, a burden which will be difficult to discharge except in the clearest of cases (see *EO* [2013] EWHC 1236 at paras 70-74).