

The Immorality and Illegality of Fast-Track Public Services

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I. Introduction

The UK Government and Home Office cannot be blamed for being sensible, fair, considerate or efficient with regard to creating and applying UK immigration policy. The Home Office has been rightly criticized for numerous wrongdoings, including, for example, the shockingly poor treatment of asylum seekers' applications;¹ the disgraceful Windrush scandal; charging outrageously high application fees;² having ridiculously long waiting periods (The Home Office takes pride in the fact that 90% of applications for permanent residency are decided within 6 months);³ and generally – implementing the notorious 'hostile environment' policy.

Here, however, we wish to focus on a neglected aspect of UK immigration policy: offering 'fast-track lanes' for certain applications - for extra fees. We argue that this policy is morally indefensible – and possibly illegal. We will focus on the specific case of an application for Indefinite Leave to Remain (ILR – or permanent residency), yet our arguments apply to similar cases as well and, in fact, go beyond the immigration and the UK context. The specific discussion here should be read within the broader context of appraising the morality and legality of creating fast-track public services. What is offered here is merely a starting point for further research on this unexplored issue.

Within the context of UK immigration policy, the application fee for permanent residency in the UK for non-EU citizens is £2,389 per applicant, regardless of their age (so a family of three, for example, would pay £7,167). This family will have to wait for up to 6 months until a decision is made in their case. During these 6 months the applicants are not allowed to leave the UK. Should this family wishes to expedite the process, they could pay a bit extra, as decided by Her Majesty's Home Office: for only extra £500 per applicant, a decision would be made within 5 days and for as little as £800 extra per applicant, the happy family will get a decision within a day.⁴

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¹ Amelia Hill, 'Home Office chaos and incompetence lead to unlawful detentions, claim whistle blowers' (*The Guardian* 28 April 2019) <<https://www.theguardian.com/uk-news/2019/apr/28/home-office-chaos-and-incompetence-leads-to-unlawful-detentions-claim-whistleblowers>> accessed 20/07/2020.

² Jamie Grierson and Sarah Marsh, 'Slash 'obscene' Home Office fees, say MPs and campaigners' (*The Guardian* 24 June 2018).
<<https://www.theguardian.com/uk-news/2018/jun/24/reduce-home-office-fees-say-mps-campaigners>> accessed 20/07/2020.

³ UK Visa and Immigration, About our Services <<https://www.gov.uk/government/organisations/uk-visas-and-immigration/about-our-services>> accessed 06/09/2020.

⁴ UK Visas and Immigration, 'Get a faster decision on your Visa or Settlement Application' <<https://www.gov.uk/faster-decision-visa-settlement>> accessed 15/08/2020. Due to the impact of COVID-19, this service is currently unavailable, but based on the rest of the information available, it is reasonable that the latest information on the fees would be unchanged.

The waiting time for getting a service is part of the general quality of the service. All other things being equal, a faster service is normally a better one. The moral and legal question here is therefore whether administrative authorities should provide better services only to those who can afford paying for them. We submit that fast-track public services that are offered for extra-fees are always suspicious and only rarely justified. This is so for two reasons. First, offering fast-track services normally comes at the expense of those who cannot afford paying for them – and that alone makes them morally indefensible. Second, many fast-track state services are morally indefensible, precisely because they are *state services*, and regardless of whether they directly come at the expense of those who cannot afford them. Yet the distinction between the two cases – those where the fast-track service comes at the expense of others as it allows the well-off to ‘cut in line’, and those where that is not the case – still has moral and legal implications.

II. Cases where Fast-Track Services Do Not Result in ‘Cutting in Line’

If offering fast-track state services does not come at the expense of those who cannot afford paying for them, then they may be justified. That would depend on various considerations: the nature of the service; the normal waiting time; the purpose of offering the expedited, more expensive service; and the cost of the expedited service. To take one example: issuing a new British passport costs £75.50 and the process normally takes up to 3 weeks. If a new passport is needed as a matter of urgency, it is possible to pay £177 for a premium, expedited service and to be issued a passport within 24 hours. This case does not raise any moral or legal difficulties. The normal waiting time is quite reasonable; the purpose of the expedited service is legitimate – answering cases of emergency; the cost of the expedited service is reasonable; the fast-track service probably does not come at the expense of those who do not need it or cannot afford it; and the nature of the service does not give rise to special problems.

In the immigration context, another example that may demonstrate the distinction between a potentially justifiable and an unjust expediting of services, is the new Health and Care visa. This would create a fast-track visa route for eligible health and care professionals in order to enable the steady, continued flow of overseas talent into the UK to work in the NHS, for NHS commissioned service providers, and in eligible occupations in the social care sector.⁵ As well as reduced visa application fees and an exemption from the Immigration Health Surcharge, applicants would be able to expect a decision on whether they can work in the UK within just three weeks, following biometric enrolment. Thus, not only is the process easier and quicker, which is usual for a fast-track service, it is also cheaper, distinguishing this from our ILR example. But more importantly, the legitimacy of this proposal may be argued more strongly due to the purpose of offering the expedited service, that is, securing the best health and care professionals for the NHS as opposed to offering a different and better service based solely on the ability of the applicant to pay for it. As we shall see below, the case of most immigration applications is closer to the latter.

III. Cases Where Fast-Track Services Do Result in ‘Cutting in Line’

If offering fast-track services does come at the expense of those who cannot afford paying for them; if fast-track services increase waiting times of those who cannot afford paying for them; if those who pay for fast-track services in fact ‘cut in line’, then that should be a sufficient reason for public authorities to not offer them. Within the immigration applications context,

⁵ Department of Health and Social Care and Home Office, ‘Government launches Health and Care Visa to ensure UK health and care services have access to the best global talent’ (14 July 2020) <<https://www.gov.uk/government/news/government-launches-health-and-care-visa-to-ensure-uk-health-and-care-services-have-access-to-the-best-global-talent>> accessed 15/08/2020.

there is no evidence – and no reason to believe – that the Home Office uses the fast-track service fees to employ dedicated staff who will deal with these applications only. This is so because of the general fee policy that is applied by the home office. The fee for a non-expedited application for an ILR is £2,389, whereas the cost to the Home Office of processing an ILR application is only £243.⁶ The waiting period is up to 6 months. The Home Office does not use the normal application fee to employ officers who will provide the service in a reasonable period of time. There is therefore no reason to believe that the extra £500-800 paid for the expedited process are being used for covering the expenses of such a process – which in any event cannot exceed £243 – the cost of processing an ILR application. If this fast-track service is offered at the expense of those who cannot afford it, allowing wealthy applicants to cut in line, it has no moral-political legitimacy.

From a moral-political perspective, and as per the social-contract device employed by Rawls,⁷ i.e. the ‘original position’, it is morally indefensible to allow wealth-based discrimination such as that which exists in the present case. In the Rawlsian original position, people are placed behind the ‘veil of ignorance’ and asked to design the governing rules of society under fair and impartial conditions. Behind the veil of ignorance, they are free, rational and equal persons, with no knowledge of their external features, such as race, socioeconomic status, gender etc., that may otherwise affect rational judgment. The defining characteristics of these persons are rationality and selfishness – while being ignorant regarding the external factors described above.

The subsequently arising Rawlsian conception of ‘justice as fairness’ may be applied here, and it can be argued that behind the hypothetical veil of ignorance, rational persons would never choose a policy whereby the state provides fast-track services based entirely on wealth, at the expense of those who cannot afford paying for the expedited service, purely because it is entirely possible for them to be the ones who are economically disadvantaged in that society. Thus, the rational and therefore moral decision would be for the state to provide this service without discrimination on the ground of wealth, that is, without the option of fast lanes. Even if a social contract theory were applied in the limited sense - only as an argument for political legitimacy,⁸ it seems reasonable to conclude that this legitimacy may come under question with the introduction of such unfair policies that specifically disadvantage certain members of society.

IV. The Immorality of Fast-Track *State* Services

Fast-track services of state services are always morally indefensible if they come at the expense of those who cannot afford them. Yet they may be morally indefensible even if we assume that offering them does not come at the expense of the service provided to those who cannot afford them. In our case, fast-track services within the context of immigration applications are indefensible even if it is assumed that the fees charged from those who pay for them are being used for hiring public officials who will handle these requests – and to pay for other special expenses - if there are any. This is so because, and subject to rare exceptions, the state, as a matter of principle, should not provide quicker and indeed better public services only to those who can afford them. Doing so would be institutional-state discrimination on the ground of wealth, which, regardless of its legality – is morally impermissible.

⁶ UK Visas and Immigration, ‘Visa Fees Transparency Data’ (4th August 2020) <<https://www.gov.uk/government/publications/visa-fees-transparency-data>> accessed 15/08/2020.

⁷ John Rawls, *A Theory of Justice* (Revised edn, Harvard University Press 1971) 17.

⁸ Samuel Freeman, ‘Original Position’ *The Stanford Encyclopedia of Philosophy* (Summer edn, 2019) <<https://plato.stanford.edu/archives/sum2019/entries/original-position/>> accessed 06/09/2020.

The moral argument made here is rooted in the idea of the fundamental obligations that the state owes to its subjects, including the moral duty that requires the state to treat all its subjects, including residents and potential permanent citizens - equally, regardless of their wealth or socio-economic status. In the present case, for instance, if the state were to use the 'premium fee' to provide a better service, and to employ public officials dedicated solely to the task of catering to those who paid the premium fee, it would effectively amount to the state perpetuating a system of social inequality and accepting that those who can afford it would be treated in an entirely different and in fact superior manner. They would be placed in a separate class of people, not subject to the same rules as other members of society. As such, this practice of state discrimination runs counter to morality and justice, and arguably paves the way for further policies that will do the same. Due to the 'implicit connection between the concept of the state and the idea of equality'⁹ in a democratic state, the only morally and politically sound policy is one that treats all citizens equally as far as public services are concerned. If we accept basic egalitarianism as a substantive value in modern political philosophy,¹⁰ it would require that the 'government treat its citizens with equal consideration'.¹¹

A few examples can clarify the argument regarding the moral impermissibility of institutional state discrimination of the ground of wealth. Assume that the state creates fast-track services that allow those who pay higher court-fees to have their case heard quicker; or fast-track services that expedite the process of getting permits from the authorities; or an option to pay a significant sum of money for an upgraded, en-suite, private prison cell. These examples seem far-fetched and unthinkable (or so we hope) but they are not significantly different from the case of having immigration applications fast-track lanes. If we accept the moral legitimacy of fast-track lanes within the immigration context, accepting such lanes in the examples given above does not seem to require an exponential logical leap.

It is a truism that wealthy people can generally exercise their rights more efficiently and that they have more valuable opportunities from which they can choose. It is also a truism that inequality in wealth distribution results from and results in numerous social injustices. The state may or may not tackle these social problems in a satisfactory way, but there is something uniquely troubling in creating fast-track public services for the wealthy. This is a clear, direct and explicit statement that is conveyed by the state, according to which 'we will provide better public services – but only to those who are able to pay for them'. This is where the state openly admits that it does not treat its citizens as equal members of society.

In Rawlsian terms, people might have 'equal liberty' but this is distinguishable from 'worth of liberty', which refers to the capacity of individuals to exercise their liberties: those who have greater authority and wealth have greater means to achieve their aims – also by exercising the rights more effectively.¹² As an example, freedom of expression might be a liberty equally applicable to all; however, the more resources one has, the more effectively they might be able to exercise this freedom and to ensure their views are heard. Hence, one might have the right to apply for an expedited ILR application, but due to a lack of means, the worth of the right or the ability to exercise it, is constrained. It can then be argued, as some persuasively do,¹³ that the distinction between 'liberty' and 'worth of liberty' is arbitrary

⁹ Larry Siedentop, *Democracy in Europe* (2000) 83.

¹⁰ Nicholas Smith, *Basic Equality and Discrimination: Reconciling Theory and Law* (Ashgate Publishing 2011) 2.

¹¹ Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (OUP 1990) 4.

¹² J Rawls (n 7) 179.

¹³ Norman Daniels, 'On Liberty and Inequality in Rawls' (1974) 3(2) *Social Theory and Practice* 149.

and unsuccessful in reconciling liberty and equality. This is so because not being able to exercise a right that one has, is arguably the same as not having the right to begin with.

A possible counterargument could be that within the context of immigration applications, creating fast-track lanes allows those who are in desperate need for a quicker service – to actually get it. This argument cannot survive scrutiny. First, it is the responsibility of the authorities to accommodate the extenuating circumstances of those who need a quicker public service. If the general policy is that applications are being decided within 6 months – the administrative authority is under a general duty to consider cases that may justify making a quicker decision. This duty must not depend on the ability of the applicant to pay for the expedited service. A reasonable accommodation of an urgent need may be illustrated by, for example, the introduction of fast-track applications to register children’s homes that are needed urgently to provide placements for children as a direct result of COVID-19,¹⁴ or fast-track DBS checks as a result of the same (which, in some cases, are free of charge due to their emergency nature).¹⁵

Secondly, and as was noted above – the application fee for an ILR is a staggering £2,389. The cost to the Home Office of processing an ILR application is £243. The moral illegitimacy of this extortionate fee aside, minimum decency and a shred of moral integrity would have led the authorities to use the nearly £2,000 profit they make out of each application in order to employ sufficient number of civil servants who would decide applications within a reasonable time-frame thus eliminating the need for a fast-track lane to begin with. Instead, the state wrongs non-wealthy applicants in no less than three different ways. Once, by charging the extortionate application fee (or shall we say – regressive ‘immigration tax’) of £2,389; twice, by not using these funds to decide applications within a reasonable time-frame; and third, by creating fast-track lanes only for those who can afford them. When we consider a host of other fast-track public services offered as a result of various reasons or needs, for example, expedited trials,¹⁶ fast track patent applications (PCT(UK) Fast Track),¹⁷ and SSSI advice,¹⁸ it becomes increasingly evident that there are expedited services that do not involve a direct impact of wealth on the provision of the service when there is no merit involved. This indicates not only the blatant immorality of fast-track lanes for immigration applications, but also points toward a lack of transparency by the state, as immigration-related policy decisions seem to be driven by some undisclosed reasons, unrelated to the service itself.

V. The Illegality of Fast-Track State Services

The ILR application fast-track lane is therefore morally indefensible. But is it also illegal? Within the UK context, if the ILR fast-track lane were decided by primary legislation, it would not have been easy to challenge its compatibility with the European Convention on Human Rights (ECHR). It is hard to see how a statutory fast-track lane, however morally indefensible, is also incompatible with the ECHR or EU law. However, the ILR fast-track lane was created

¹⁴ Ofsted, ‘Registering children’s homes in an emergency as a direct result of COVID-19 pandemic: fast-track applications’ (11th May 2020) <<https://www.gov.uk/guidance/registering-childrens-homes-in-an-emergency-as-a-direct-result-of-covid-19-pandemic-fast-track-applications>> accessed 15/08/2020.

¹⁵ Disclosure and Barring Service, ‘Free-of-charge DBS applications and fast-track Barred List check service’ (27th March 2020) <<https://www.gov.uk/government/publications/covid-19-free-of-charge-dbs-applications-and-fast-track-barred-list-check-service>> accessed 15/08/2020.

¹⁶ *Warner-Lambert Company LLC v Teva UK Ltd and others* [2011] EWHC 2018 (Ch) [12]

¹⁷ Intellectual Property Office, ‘Patents: accelerated processing’ (13th June 2014) <<https://www.gov.uk/guidance/patents-accelerated-processing>> accessed 06/09/2020.

¹⁸ Natural England, ‘Get fast-track advice for SSSI consent’ (8th April 2020) <<https://www.gov.uk/government/publications/get-fast-track-advice-for-sssi-consent>> accessed 06/09/2020.

by an administrative body. As a result, challenging its legality becomes easier. Within the immigration context, fast-track lanes (both their existence and the fees paid) were not created by primary legislation but by the Immigration and Nationality (Fees) Regulations¹⁹. As such, they are exposed to a legal challenge – if a suitable ground of judicial review is found.

Even though immigration applications fast-track lanes discriminate on the ground of wealth (or social status) - wealth or social status are not protected characteristics under the Equality Act 2010. Furthermore, in UK administrative law, there is no general duty to not discriminate or to act fairly. Equality law, therefore, cannot help much here. But reasonableness review can. The duty to act reasonably imposes a duty on administrative bodies to accord proper weight to the relevant considerations.²⁰ In our case, the Home Office should accord proper weight to the reasons for creating these fast-track lanes – and to the reasons against it – and to properly balance these reasons. It is hard to know what the reasons for having ILR fast-track lanes are. They are not meant to solve emergency-related problems – or to accommodate extenuating circumstances, because, unlike other expedited services where some justification is required, the only prerequisite for the provision of a faster service is payment of the premium amount. The fast-track service merely offers more convenience and a better service for wealthy applicants. It appears that the main purpose of these fast-track lanes is to create a source of income for the Home Office by offering a premium service to those who can afford it.

Even if the argument is made that the extortionate initial fees have a legitimate reason (achievement of self-funding for immigration services rather than taxpayers' contribution,²¹ which itself is questionable because of the significantly lower processing cost), there is no reason at all for creating the expedited service, except for creating a source of income for the state. It is highly doubtful whether this is a legitimate purpose the Home Office is allowed to pursue – but let us assume that it is. The reasons against having these fast-track lanes, especially when they come at the expense of those who cannot afford paying for them, were mentioned above and they outweigh the reasons for having them: fast-track lanes discriminate against those who cannot afford paying for them – treating them as non-equal members of society; they come at the expense of those who cannot afford them – as those who pay for the expedited process in fact 'cut in line'; they result in loss of trust in the state; and they violate the social contract between the state and its subjects.

It is not at all clear whether these reasons against offering the expedited service were considered by the Home Office. It might be the case that the administrative body in question has neglected to take into account these considerations – and that would be one possible ground of illegality. But even if these considerations were taken into account, it is evident that they were not accorded proper weight, leading to a decision that does not only reflect a distorted balance of the relevant considerations but also one that is 'outrageous in its defiance of...acceptable moral standards'²² as discussed above. The decision to have fast-track lanes

¹⁹ Immigration and Nationality (Fees) Regulations 2018, SI 2018/330.

²⁰ *Regina v Secretary of State for the Home Department, Ex parte Venables and Thompson* [1997] 3 WLR 23; Paul P Craig, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131; Yossi Nehushtan, 'The Non-Identical Twins in UK Public Law: Reasonableness and Proportionality' (2017) 50(1) Israel Law Review 69.

²¹ David Bolt, *An inspection of the policies and practices of the Home Office's Borders, Immigration and Citizenship Systems relating to charging and fees* (2019) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792682/An_inspection_of_the_policies_and_practices_of_the_Home_Office_s_Borders__Immigration_and_Citizenship_Systems_relating_to_charging_and_fees.pdf> accessed 29/08/20.

²² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 230.

for immigration applications is therefore unreasonable and possibly illegal. These fast-track lanes are not much less outrageous – or legally unreasonable – than fast-track lanes that would allow those who pay higher court-fees to have their case heard quicker – or offering the option to pay a significant sum of money for an upgraded, en-suite, private prison cell.

Introducing fast-track lanes is, by far, not the most troubling problem regarding UK immigration laws and policies. This is, however, a problem that is easy to fix. Failure to do so would be morally indefensible and potentially illegal.
