

INTRODUCTION TO IMMIGRATION DETENTION IN THE UK

BRIEFING 2: ACCESS TO JUSTICE AND LEGAL SUPPORT IN DETENTION



Immigration detention is an administrative process that lacks the safeguards that should be present when depriving someone of their liberty. It allows the state to detain foreign nationals outside of any criminal process, before proceeding to either deport or administratively remove them.

Initial decisions to detain an individual are made by an immigration officer without oversight by a court. Any subsequent decisions to continue detaining someone are not automatically subject to independent judicial oversight. Moreover, unlike legal advice at police stations for those who have been arrested for criminal offences, there is no automatic entitlement to legal advice or allocation of legal representation for immigration detainees.

HOW ARE PEOPLE RELEASED FROM DETENTION?

There are currently four avenues through which an individual may seek to be released from detention:

BAIL BY THE HOME SECRETARY

The Home Secretary has the power to grant bail (previously called ‘temporary admission’) to individuals who are otherwise liable to immigration detention. Applications for bail can be made to the Home Office using form Bail 401, which requires the person to explain why they think they should be bailed and providing an address for release. Individuals often have difficulty completing this form, which is only in English, without legal assistance.

BAIL BY THE FIRST-TIER TRIBUNAL

People in detention who have been present in the UK for at least eight days are entitled to apply for immigration bail before the First-tier Tribunal. However, such hearings are for practical purposes intended to be procedurally short.

The bail process focuses upon whether a person will abscond if they are released. It does not consider the lawfulness of the decision to detain or to maintain detention. Further, many people in detention are left without any legal representation and must argue their applications for bail themselves.

Individuals are currently entitled to apply for bail every 28 days unless there is a change of circumstances that would allow an application to be made earlier. However, the Illegal Migration Act 2023 (IMA) includes provision at section 13 that, if brought into force, will prevent a person from applying for bail before the First-tier Tribunal for the first 28 days of their detention.

A person who is granted bail must be given at least one of the bail conditions listed in legislation: a reporting condition; prohibition on working or studying; a residence condition; an electronic monitoring condition; and any other condition that the person granting bail thinks fit.¹

JUDICIAL REVIEW

Judicial review is a process by which a judge examines the lawfulness of a decision made to detain someone (or a decision to continue holding them in detention).

This enables a person in detention to show that, for example, the initial decision to detain them followed from a mistake of fact or the law being incorrectly applied in their case.

The process provides valuable judicial oversight of detention but reviews are not undertaken automatically as they must be initiated by applicants. Without a good understanding of the law it may not be possible for applicants to understand at which point their detention may become unlawful, if at all. It is therefore essential for people to receive legal advice and representation (which an individual may struggle to access; see below). As with bail, section 13 of the Illegal Migration Act seeks to limit the ability of a person to apply for judicial review for the first 28 days of their detention.

HABEAS CORPUS

Habeas corpus allows a detained person to challenge the lawfulness of their detention on the basis that there is no lawful authority to detain them. This process is currently very rarely used for cases relating to immigration detention because habeas corpus has a very narrow application and proceedings are costly and complex. Given the way that case law has developed in respect of immigration detention, it is not clear if habeas corpus would allow a judge to consider all of the same legal issues that they would consider in a judicial review (i.e. it is not necessarily a substitute for judicial review).

HOW DO PEOPLE IN DETENTION ACCESS LEGAL ADVICE?

The Detained Duty Advice Scheme (DDAS) offers people in IRCs in England 30 minutes of free legal advice – in person or by phone. Since its introduction more than a decade ago, the DDAS has operated with persistent, fundamental problems, including people waiting days for an appointment with a solicitor, solicitors on the roster not actually having capacity to take on cases and interpreters not being used.

In addition, unlike for an individual who retains their legal aid lawyer throughout a criminal process, for legal aid to continue beyond the initial 30 minutes of advice, individuals need to pass a merits test. Cases are sometimes incorrectly assessed as not having merit – in one year, close to 90% of cases that BID assisted with were granted bail including cases having previously being assessed as having no merit.²

The failings in the DDAS and legal aid scheme leave individuals without adequate advice and representation and mean that any errors or oversights in deciding immigration status or to remove someone from the UK may be impossible to correct before someone is removed from the UK.

WHAT DICTATES HOW LONG A PERSON IS DETAINED?

There is no general statutory time limit on how long someone can be detained (see Briefing 1 for the limited exceptions to this). Home Office policy states that ‘detention must be used sparingly, and for the shortest period necessary’.³

To fill this gap, it is long established that courts can determine whether the length of time that someone has spent in immigration detention is reasonable. Courts assess this by reference to what are known as the Hardial Singh principles, which limit detention to a time that is reasonable in all the circumstances and require the Home Secretary to be acting expeditiously and diligently to remove the person concerned. Section 12 of the IMA, which is in force, seeks to remove this judicial oversight by allowing for detention for a period that is reasonably necessary in the opinion of the Secretary of State.⁴

The lack of a time limit, combined with the lack of opportunities for meaningful judicial scrutiny in the current system, can lead to unlawful periods of detention (see briefing five for the number of individuals found to be unlawfully detained each year). Such consequences are in addition to the serious harm which individuals who are held in immigration detention may suffer.

1. Paragraph 2(1), Schedule 10, Immigration Act 2016

2. During its reporting year of 1/8/22-31/7/23, of 377 cases that BID prepared: 334 were granted bail or bail in principle (e.g. pending the provision of bail accommodation); 43 were refused bail; and 26 were applications were withdrawn.

3. Home Office - Detention: General Instructions, Version 3

4. R (Hardial Singh) v Governor of Durham Prison [1983] EWCH 1 (QB)