

# RECOMMENDATIONS TO GOVERNMENT ON IMMIGRATION DETENTION

OCTOBER 2024



## RECOMMENDATION 1: A TIME LIMIT ON IMMIGRATION DETENTION

We recommend the introduction of a statutory time limit on the use of detention, allowing the Home Office to detain a person for a maximum of 28 days.

The time limit would reduce the number of people detained unnecessarily and unlawfully and help ensure that detention is used sparingly and only when removal is imminent and realistic. Other expert bodies have also recommended the introduction of a 28 day time limit, including the Brook House Inquiry, the Home Affairs Select Committee and the Joint Committee on Human Rights.

Parliament has previously decided that during the first 21 days of a person's detention a grant of immigration bail can be prevented by the Home Office, presumably on the basis that during that time the person's removal can be considered imminent.<sup>1</sup> The Home Office's current Detention: General Instructions guidance effectively defines 'a reasonable timeframe' as requiring a travel document to be ready and a flight and removal date to have been arranged or to be easy to arrange.<sup>2</sup>

To consider removal to be imminent, the First-tier Tribunal normally requires there to be evidence that removal action is actively being sought. This typically involves showing that a flight has been booked and a date for removal confirmed within 21 days of a hearing date.<sup>3</sup>

While any period of detention can be harmful and effective safeguards are essential, a 28 day time limit would help to ensure that people who are detained for immigration purposes are only held when their removal is imminent and likely to take place.

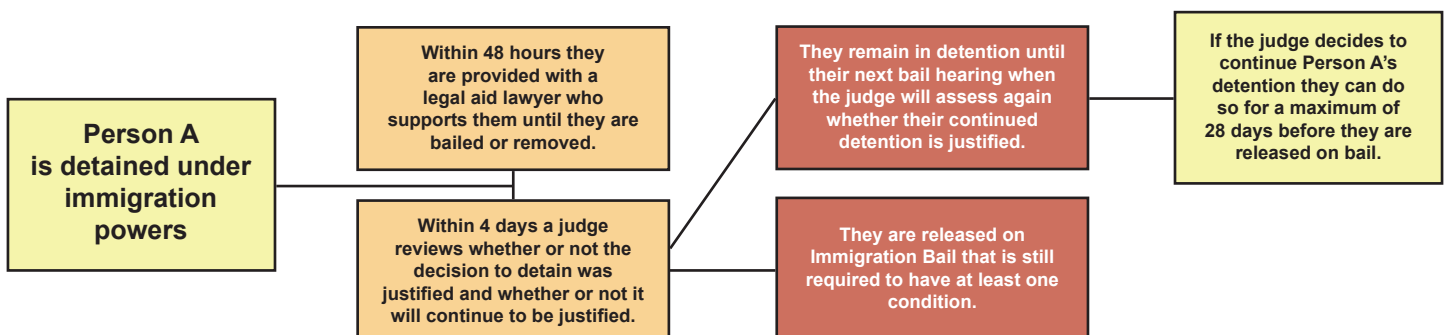
## RECOMMENDATION 2: JUDICIAL OVERSIGHT OF DECISIONS TO DETAIN

We recommend the introduction of independent judicial oversight of Home Office decisions to detain.

Currently, there is insufficient judicial oversight to prevent unlawful detention. In judicial reviews the courts often consider whether detention which has already occurred is or has become unlawful. While the immigration bail process operates on the assumption that the detention in question is lawful, an immigration judge may consider whether continued detention is 'justified'.

We recommend the introduction of a new process of oversight, in which a judge would assess:

- > Within four days of being detained, whether detention powers are being lawfully exercised and whether the person's detention is justified;
- > At regular intervals, whether the continued use of detention remains lawful and reasonable;
- > At regular intervals, whether to grant bail as an alternative to detention.



Ensuring this oversight is applied within four days of a person entering detention will help them ensure that they and their legal representative have adequate time to prepare for the hearing.

### RECOMMENDATION 3: AUTOMATIC ALLOCATION OF LEGAL AID

We recommend the automatic allocation of legal aid representation within the first 48 hours of a person being detained. This aid should continue until they are either released, removed or deported.

Given the seriousness with which the deprivation of liberty for administrative reasons should be treated, we recommend the removal of the merit test for legal aid and a review of the financial means test with a view to disapplying it completely for people held in detention.

To ensure that individuals and their families can access immigration advice whenever they need to, we recommend that all non-asylum immigration work, work relating to people who have been trafficked and citizenship applications should be brought back into the scope of legal aid.

Exceptional Case Funding (ECF) is a process whereby the Legal Aid Agency (LAA) can authorise funding for cases that fall outside of the ordinary scope of legal aid but are deemed to be 'exceptional'. Bringing these matters back into the scope of legal aid would eliminate the need for ECF applications and prevent additional delays to the provision of legal advice. The National Audit Office has found ECF applications to be more resource intensive for the LAA to process than a standard in-scope legal aid application.<sup>4</sup>

### RECOMMENDATION 4: RETURN RESPONSIBILITY TO THE COURTS

The previous Government has argued both in Parliament and before the European Court of Human Rights (ECtHR)<sup>5</sup> that the current judicial review procedure functions as a form of time limit, through which individuals can challenge the lawfulness of their continued detention before the administrative court.

However, Section 12 of the Illegal Migration Act (2023) transfers the primary responsibility for establishing the lawfulness of detention from the courts to the Home Secretary.

In effect, the Home Secretary retains the primary authority to decide whether the period of a person's detention is reasonable.

To ensure fairness and the vital, independent role of the courts, we recommend that the government repeal Section 12 of the Illegal Migration Act (2023).

### RECOMMENDATION 5: EFFECTIVE SAFEGUARDS AND HARM PREVENTION

The Brook House Inquiry issued 33 recommendations for change that reflect the interlinked nature of problems occurring in the immigration detention system. At the time of writing only one of those 33 recommendations has been implemented.

The evidence shows that the continued and expanded use of detention will result in more harm to people detained, including vulnerable individuals. This is why leading medical bodies such as the British Medical Association have called for the use of detention to be phased out.<sup>6</sup>

We recommend the urgent implementation of all 33 of the recommendations made by the Brook House Inquiry, in order to reduce the risk of further mistreatment, abuse or deaths in detention.

1. Section 3(4), Schedule 10, Immigration Act 2016, as amended by Section 46(8) of the Nationality and Borders Act 2022

2. Detention: General Instructions Version 3–28 September 2023): '...removal could be said to be likely to take place within a reasonable timeframe where a travel document exists, removal directions are set or could be set in the near future, where Page 18 of 65 Published for Home Office staff on 28 September 2023 there are no outstanding legal barriers or it is considered that legal barriers can be resolved expeditiously.'

3. Paragraph 114, Guidance on Immigration Bail for Judges of the First-tier Tribunal (Immigration and Asylum Chamber)

4. 'Government's management of legal aid' (National Audit Office, February 2024) para 3.7

5. Cases of J.N. v. The United Kingdom – Application No. 37289/12, 19 May 2016; and Arben Draga v the United Kingdom – Application No. 37289/12, 5 January 2015

6. British Medical Association (2017) Locked up, locked out: health and human rights in immigration detention, 4.