

Webinar: Immigration bail & unlawful detention claims

Anthony Metzger QC & Pierre Georget

21 May 2020



**GOLDSMITH
CHAMBERS**

1. General principles: immigration detention powers and their use

Immigration detention: statutory powers

- Immigration Act 1971:
 - Sched. 2 (pending removal)
(also s.62 Nationality, Immigration and Asylum Act 2002)
 - Sched. 3 (pending deportation)
(also s.36 UK Borders Act 2007)

Use of detention powers pre-COVID-19: statistics for 2017

- 27,331 people entered detention
- 28,244 left detention
- 13,173 returned from the UK
- 12,321 total number of enforced returns from the UK (5,835 FNOS)



over half those detained released

Immigration statistics: people leaving detention by reason

Year	Total detainees	Returned from the UK	Granted leave	Granted TA/TR	Bailed	Other
2010	25,959	16,577	141	7,345	1,596	300
2011	27,181	16,836	175	8,088	1,820	262
2012	28,575	17,246	152	8,991	1,944	242
2013	30,030	16,933	214	10,931	1,707	245
2014	29,674	15,673	354	11,275	2,111	261
2015	33,226	15,106	180	14,330	3,210	400
2016	28,677	13,473	59	11,934	2,837	374
2017	28,244	13,173	169	10,563	3,980	359

Immigration statistics: top 5 nationalities in 2017

Nationality	Leaving detention	% Returned on leaving detention	% Granted TA/TR on leaving detention
Pakistan	2,465	30%	46%
Albania	2,288	73%	15%
India	2,252	31%	46%
Romania	1,879	94%	2%
Bangladesh	1,365	25%	52%

COVID-19: use of detention powers during the pandemic

- Reduction in numbers but no plans for wholesale systematic release
- On 1 Jan 2020: 1532 people detained
- On 21 Apr 2020: 708 people detained
- Of those 708, all but 21 are FNOS



people detained reduced by over half

COVID-19: removals during the pandemic

- As at the end of March, returns had been suspended to 49 countries
- In late April, HO confirmed there is no general policy to suspend removals
- HO referred to a flight to Poland and removal directions to other countries have been set since March
- BBC reports that 50 people have been returned during the pandemic

COVID-19: HO specific measures during the pandemic

- IRCs/prisons closed to visitors
- Plans for isolating people at risk in IRCs, along with guidance and cleaning materials given to detainees
- Guidance on handling symptomatic people in IRCs
- People from countries to which removal not possible to be released unless they pose a high risk of harm
- A short period to review all cases

2. Legal safeguards against detention

Legal safeguards against detention

- Art 5 ECHR (right to liberty, including speedy resolution before a judge)
- Arts 2/3 ECHR (basic standards of treatment for people detained)
- Art 8 ECHR (decision to detain must be proportionate if such rights engaged)
- JR: powers to detain can only lawfully be exercised where there is a prospect of removal within a reasonable period (*Hardial Singh* principles)
- Immigration bail

Lawful detention: general principles in the caselaw

- *Hardial Singh* (Woolf J), *Lumba* (Lord Dyson):
 - (i) The SSHD must intend to deport/remove the person and can only use the power to detain for that purpose;
 - (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
 - (iii) If, before the expiry of the reasonable period, it becomes apparent that the SSHD will not be able to effect deportation/removal within that reasonable period, he should not seek to exercise the power of detention;
 - (iv) The SSHD should act with reasonable diligence and expedition to effect removal.
- The SSHD must act and make decisions in accordance with applicable policy unless there is a good reason

Detention: applicable Home Office policy guidance

- ‘Detention and temporary release’ (29 May 2019) (formerly Chapter 55)
- ‘Adults at risk in immigration detention v5.0 (6 March 2019)
- ‘Judicial reviews and injunctions’ v20.0 (10 October 2019)

Excerpts from policy guidance

- *“there is a presumption in favour of immigration bail and, wherever possible, alternatives to detention are used.”* (Chapter 55.1.1)
- *“Detention must be used sparingly, and for the shortest period necessary.”* (Chapter 55.1.3)
- *“In order to be lawful, immigration detention must be for one of the statutory purposes for which the power is given and must accord with the limitations implied by domestic and ECHR case law. Detention must also be in accordance with stated policy on the use of detention.”* (Chapter 55.1.4)
- *“Detention can only lawfully be exercised under these provisions where there is a realistic prospect of removal within a reasonable period.”* (Chapter 55.2)

Detention of vulnerable people: adults at risk policy

- People who are suffering from a condition, or have experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if detained.
- Levels 1-3 based on strength of professional or medical evidence supporting the above (e.g. expert, rule 35 report).
- L1: mere assertion by person/rep. L2: evidence that “may”. L3: evidence that “is” and detention likely to cause harm.
- Stronger justification needed to maintain detention at higher levels, i.e. “*strong indicators of non-compliance*” (L2) or “*significant public protection concerns*” (L3).
- Victims of torture includes torture by non-state actors (previous policy found unlawful in *Medical Justice* case).

HO policy: judicial reviews & injunctions preventing removal

- A pending JR claim (without a stay/injunction) does not necessarily suspend removal
 - However, HO policy is that a sealed JR will suspend removal unless certain circumstances apply:
 - Less than 6 months since a previous JR or appeal was concluded on the same or similar issues
 - If the JR is brought by a person within a removal window, until the end of that window
 - Removal is by special arrangements (charter flight)
 - A court has directed that JR no bar to removal
- ... and the JR is not bound to fail (the merits test)

3. General principles: immigration bail

Immigration bail: framework post 15 Jan 2018

- Schedule 10, Immigration Act 2016
- Presidential Guidance Note No 1 of 2018 (guidance for FTT judges)
- Tribunal Procedure Rules 2014
- Home Office Guidance, 'Immigration bail' v5.0 (28 February 2020)

Sch. 10, Immigration Act 2016

- SSHD bail [1(1, 2)]; replaces TA/TR
- FTT bail [1(3)]
- Applies where SSHD uses powers to detain
- Bail: relevant matters [3(2)]
 - Risk of absconding
 - Risk of re-offending
 - Risk of harm to public
 - Protection of the person/others
 - ‘Such other matters’

Sch. 10, Immigration Act 2016

- Conditions of bail [4 – 8]
- ‘*Conditional*’ bail [3(8)]; ‘*bail in principle*’
- SSHD powers to enable a person to meet conditions of bail:
 - accommodation [9(2)]
 - travelling expenses [9(4)]
- but only if ‘*exceptional circumstances*’

Presidential Guidance Note No 1 of 2018 (FTT bail guidance)

- Bail: ‘reasonable alternative’ to detention [4]
- FTT ‘not deciding whether continued detention is lawful’ [6]
- But bail should be granted if detention ‘is no longer justified’ [30]
- Risk assessment [19]

FTT Bail Guidance (cont.)

- *“Liberty is a fundamental right of all people and can only be restricted if there is no reasonable alternative. This principle applies to all people in the UK...”*
- *“It is generally accepted that detention for three months would be considered a substantial period and six months a long period. Imperative considerations of public safety may be necessary to justify detention in excess of six months.”*
- *Order of events at a bail hearing (see para 23)*
- *“It is for the immigration authorities to show it is more likely than not that there is no reasonable alternative to detention. In all cases... the first reason for detention is to enable the immigration authorities to carry out their functions. Safeguarding is a secondary purpose of detention...”*

Bail in contrast to claims for unlawful detention

- Bail is risk assessment. ‘Safeguarding’.
- Lower threshold to engage, i.e. bail justified before expiry of ‘reasonable period’.
- Bail: consideration of removal framed in terms of being ‘imminent’.
- Risks can be met by suitable conditions:
 - absconding ~ FCS (surety); tag
 - re-offending/harm ~ curfew

Relevant considerations to both bail and unlawful detention

- Prospect of removal/deportation. 'Barriers':
 - Legal: pending application/appeal. (JR*).
 - Underlying merits/time-scales
 - Practical: travel documents/removal
 - Actions needed/time-scales
- Risk factors: abscond, reoffend, harm
- Effects on detainee: physical/mental health
- Effects on others: family, children

**4. Practice: considering bail
and unlawful detention
(general points and specific
issues raised by COVID-19)**

Practice: general considerations when applying for immigration bail

- How long has the client been detained and what is the current position regarding removal directions?
- What is the barrier preventing removal?
 - Legal: is there a pending claim/appeal/JR and timeframes?
 - Is there a further claim which could be made?
 - Is it a claim which, if unsuccessful, could lead to an IC appeal?
 - Starting point always overall merits of case
 - Practical: is removal currently possible to the country?
 - is an ETD available or likely?

(cont.)

- Vulnerability: are there concerns that client is an adult at risk? Is the client at higher risk from infection?
- Risk of absconding/harm: is there alleged non-compliance or criminality? What are client's instructions on compliance (reporting etc)? How could client re-offend during lockdown?
- Are there any other relevant considerations (e.g. licence conditions)?
- Supporters (surety): are there suitable people (family, friends etc)?
- Address: is there permission of the owner/landlord/probation?
- Can temporary accommodation be obtained from the SSHD?

Bail application: practical steps

- Position on substantive case
- Position on removal/previous bail apps
- Grounds for bail: relevant and concise
- HO application Form BAIL401
- FTT application Form B1
- Other relevant documents: e.g. medical evidence, sealed JR/court notices etc
- Surety documents: recent bank statements, source of funds
- Address documents: owner's/landlord's/probation's consent (letter, proof of title etc)

Bail applications during the pandemic

- Bail applications continue to be listed in the FTT and being heard remotely
- BID reports that since 23 March 95% of applications granted (of 55 hearings)
- HO even prompted to send open letter criticising FTT judges for being so ready to grant bail
- Any client currently detained under immigration powers (in IRCs or prisons) should consider the merits of applying for FTT bail
- Well-advised to address issues of risk to public and to challenge any assessments

Unlawful detention claims during the pandemic

- Claim brought in HC by Detention Action heard on 26 March.
 - Application for interim relief refused.
 - Court satisfied with HO evidence of measures implemented in response to pandemic.
 - Overall process not arguably unlawful.
 - HO entitled to a period of time to review detention in individual cases.
- Claims now likely to be stronger given time that has passed and limited prospects of any imminent changes to removals

Questions

