

Immigration Detention – 16th March 2021



IMMIGRATION AND PUBLIC LAW

GOLDSMITH
CHAMBERS

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Legal Safeguards Against Detention

- No Time Limits on detention - DAC's Briefing

Challenge by way of:

- Immigration Bail,
- Judicial Review
- Civil Claims for false imprisonment

Basis of Challenge

- ▶ Article 5 ECHR (right to liberty, including speedy resolution before a judge)
- Articles 2 and 3 ECHR - detention of a mentally ill person amounted to inhuman and degrading treatment and false imprisonment - see §173 – 181 of *R (on the application of HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin)
- Article 8 ECHR - failure to take into account the best interests of the children under section 55 of the Borders citizenship and Immigration Act 2009. see § 36 – 45 *R(Abdollahi) v SSHD* [2013] EWCA Civ 366
- The Equality Act 2010, more particularly section 149 - see *R(ASK) v SSHD* [2019] EWCA Civ 1239 DMA, R, (on the application of) v SSHD (Rev 1) [2020] EWHC 3416 (Admin) (14 December 2020)
- ▶ Breach of EU Law (historical claims now only) – see *Hemmati v SSHD* [\[2019\] UKSC 56](#)
- **Hardial Singh Principles & Policy**

Hardial Singh Principles

- ▶ The '**Hardial Singh**' principles themselves can be summarised as outlined by Dyson LJ in ***I (Afghanistan)* [2002] EWCA Civ 888** [48] as follows:
 - i. The Secretary of State must intend to deport 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 Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
 - iv. The Secretary of State should act with reasonable diligence and expedition to effect removal.
- ▶ ***R (Lumba & Mighty) v Secretary of State for the Home Department [2011] UKSC 12*** & ***SK (Zimbabwe) v Secretary of State for the Home Department [2011] UKSC 23*** endorsed and refined the formulation of the '*Hardial Singh*' Principles.
- ▶ The SSHD must act and make decisions in accordance with **applicable policy** unless there is a good reason.

Hardial Singh Principles 2 & 3 - Reasonable Period

What is a “reasonable period” ? (Principles 2 and 3)

- ▶ Consider guidance of Lord Dyson in ***Lumba***, drawing on ***I (Afghanistan)*** [2002] EWCA Civ 888 **[46]**, as follows:
 - the length/condition of the period of detention;
 - the nature of the obstacles preventing deportation/removal;
 - the steps taken by the Home Office to overcome such obstacles;
 - condition the detainee is kept in;
 - the risk of absconding;
 - the risk of offending
 - the effect of detention on the detainee and his family
- ▶ **Non-exhaustive checklist; Not a ‘trump card’ §46**

Hardial Singh Principle 4 - Reasonable Diligence & Expedition

Due Diligence

- ▶ Unjustifiable delay in the actions of the Home Office.
- ▶ It is the Court's own assessment of the facts rather than the normal review of an executive decision that would be conducted on Wednesbury grounds. **See §48 of R(Muqutaar) v Home Secretary [2013] 1 WLR 649**
- ▶ **TEST:** Has the "dividing line between mere administrative failing and unreasonableness amounting to illegality" been crossed and as a result of the failure they were held longer than they ought to have been. **See §12 of R (Krasniqi) v SSHD [2011] EWCA Civ 1549**



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Immigration bail: principles and practice

16th March 2021

Pierre Georget

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Bail - Legal 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' v7.0 (15 January 2021)

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/re-offending/harm to public
 - Protection of the person/others
 - 'Such other matters'

Sch. 10, Immigration Act 2016 (cont.)

- 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 Unlawful Detention Claims

- 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 for bail & 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

Practice: general considerations for bail applications

- 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?

Practice: general considerations (cont.)

- Vulnerability: are there concerns that client is an adult at risk? Is the client at higher risk from infection/isolation?
- 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, criminal licence, OASYS, sealed JR, court notices etc
- Surety documents: recent bank statements, source of funds
- Address documents: owner's/landlord's/probation's consent

BiD Bail for Immigration Detainees

PRISONS vs IRCs

BAIL vs LIBERTY

Conditions of detention – Prisons vs IRCs

Idira [2014] EWHC 4299 (Admin)

‘[...] The Defendant has created a separate facility for immigration detainees precisely because she recognises that the paradigm case of immigration detention neither requires nor justifies incarceration. [...]’ (para 72)

Conditions in prisons

Idira [2014] EWHC 4299 (Admin) – BID's evidence summarised at para. 90:

- "• No automatic access to on-site immigration advice [unlike] in IRCs.
- The existence of financial disincentives to legal aid providers [...]
- Immigration detainees routinely held under serving prisoner regimes.
- Prison regimes and restrictions that [prevent normal communication/correspondence]
- Lack of internet access [for] legal research for unrepresented detainees [...]
- Home Office escorting failures resulting in failures to produce detainees at bail hearings.
- Time limited video link connections to prisons.
- Failure to fit electronic tags within the prescribed two working days resulting in extended detention in prison".

No Violation of Article 3 or 5 in Idira

” the Claimant's evidence is quite insufficient to show anything like the level of "undue harshness" [....] whether "unduly harsh" is to be understood as meaning "tantamount to a breach of Article 3", or something slightly less serious. These are absolute, not comparative, judgments.” (para 91)

“A finding, without more, that prisons are significantly harsher than IRCs does not avail the Claimant. For the reasons I have already given, binding authority precludes treating this as a freestanding basis for finding a breach of Article 5.[...]” Para 92

Idira in the Court of Appeal

Idira [2015] EWCA Civ 1187

The Court of Appeal held that there was no principle that immigration detention in prison per se breaches Article 5: [16] & [36], albeit (a) "detention in an IRC is generally more appropriate for immigrant detainees than detention in prison", and (b) "[f]or some vulnerable detainees, detention in prison may be seriously inappropriate and on that account arbitrary". Any claim on this basis would turn on its own facts, in particular "the vulnerability of the detainee and the nature of the prison conditions" .

The Court did not focus on access to legal advice in its judgment

Access to Legal Advice in Prisons

SM v Lord Chancellor [2021] EWHC 418 (Admin)

Para 28:

“[...] A briefing paper prepared by Ministry of Justice civil servants in 2008 in the context of a procurement exercise for the DDAS [in IRCs], explained that the scheme had been developed

“... in response to our concerns about the accessibility for legal advice for detainees. The context of detention adds complexity to the provision of public funded advice; while the vulnerability of detained clients is enhanced by lack of easy access to legal advice ...”.

Those observations apply regardless of whether the person detained is held in an IRC or in prison.”

No Need for Identical Treatment

SM v Lord Chancellor [2021] EWHC 418 (Admin)

Home Office argued detainees are spread around prisons in UK & impossible to provide same service as DDAS. But Home Office argument found to miss its ‘target’:

“the target is not the form the DDAS takes, but the function it provides: initial access to publicly-funded legal advice, in particular on the availability of bail and on any matter going to the legality of the person's detention. That function could be achieved in a range of ways none of which need mimic the particular arrangements of the DDAS.” (para 33)

Functional Equivalent

SM v Lord Chancellor [2021] EWHC 418 (Admin)

The Home Office needs to justify:

“the absence of a functional equivalent to the DDAS, i.e. an arrangement under which initial legal advice on matters such as entitlement to bail is available without charge and without reference to the financial or merits eligibility criteria. For now, the evidence available does not make good a justification of the present difference in treatment.”

Lord Chancellor's Review

SM v Lord Chancellor [2021] EWHC 418 (Admin)

The LCD's Review is underway and is

"[...] framed in terms of achieving equality of access not in terms of whether such equality of access is possible. This is a practical acceptance that there is a difference of treatment on a significant matter that needs to be addressed. I consider this practical acceptance also represents the position at law." (para 32)

For the moment:

"[...] the failure to afford immigration detainees held in prison access to publicly-funded legal advice to an extent equivalent to that available to immigration detainees held in IRCs under the DDAS, is in breach of Convention rights." (para 38)

Implications of SM

SM v Lord Chancellor [2021] EWHC 418 (Admin)

- A claim that a person in prison has been unable to access advice on their deportation, asylum or immigration matter is evidenced by SM
- You may still need to show that the failure to access legal advice has significantly disadvantaged a claimant (see *Walumba Lumba v SSHD* [2011] UKSC 12)
- The struggle over conditions in prisons vs IRCs continues – e.g. solitary confinement in prisons, challenge procedural failings re individual assessments of cases

The Power to Grant Bail

B (formerly known as B (Algeria)) [2018] UKSC 5:

” the notion that the power to grant bail presupposes the existence and the ability to exercise a power to detain lawfully is not necessarily a principle of universal application. While the clearest possible words would be required to achieve a contrary result, Parliament could do so. It would be a question of construction in each case whether that result had been achieved.”

Followed by para 1(5), Schedule 10 of the Immigration Act 2016:

‘A person may be granted and remain on immigration bail even if the person can no longer be detained’ if [liable to detention under para 1 or where facing deportation]

The Power to Grant Bail

Seth Kaitey v SSHD [2020] EWHC 1861 (Admin)

Applying *Khadir* [2006] 1 AC 207, Laing J disagreed with the claimant's position that "*liable to detention*" in Schedule 10, para 1(2) and para 1(5) meant "*liable to lawful detention*"

'it is absolutely clear that Parliament intended that immigration bail should replace temporary admission, temporary release and bail, and that immigration bail should be available when the underlying or background power of detention cannot lawfully be exercised.' (para 80)

'[...] immigration bail is not 'ordinary' bail, precisely because it is available, as was temporary admission, when a person is liable to detention (rather than being detained), and because it is available, as was temporary admission, when a person can no longer be detained (whether as a matter of law, or in practice), [...] Parliament intended to reverse the decision of the Court of Appeal in *B(Algeria)*.'

Indefinite Bail?

Seth Kaitey v SSHD [2020] EWHC 1861 (Admin)

‘I am not persuaded by BID’s alternative argument. [that] where the bail conditions are as they are in this case, there are any concerns about breaches of the principles in *Hardial Singh* [...]’
(para 84)

‘That makes it unnecessary for me to decide whether or not, if the Secretary of State did not have power to impose bail conditions on C, she would have been obliged to give him leave. [...]’

Blurring Detention, Bail and Liberty

- Barracks
- Unlocking doors in Tinsley House IRC
- Alternatives to Detention
- GPS Tagging & Article 8
- Applications for variation of bail conditions

The Hostile Environment, Bail and Detention

- Asylum Inadmissibility Rules
- Sovereign Borders Bill and automatic deportation for 6 month sentences
- Increasing numbers of people on indefinite bail

Contact Details

► Any Questions?

► THANK YOU

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