IMMIGRATION DETENTION AND THE RULE OF LAW

NATIONAL REPORT: UNITED KINGDOM

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List of Abbreviations

Association of Visitors to Immigration Detainees (AVID)
Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (AI 2004)
Asylum and Immigration Tribunal (AIT)
Asylum Screening Unit (ASU)
Bail for Immigration Detainees (BiD)
Borders, Citizenship and Immigration Act 2009 (BCIA 2009)
Chief Immigration Officer (CIO)
Criminal Casework Directorate (CCD)
Detainee Escorting and Population Management Unit (DEPMU)
Detained Non-Suspense Appeal (DNSA)
Detained Fast Track (DFT)
Detention Centre Rules 2001 (DCR 2001)
Detainee Escorting and Population Management Unit (DEPMU)
Detention Review Unit (DRU)
Early Removal Scheme (ERS)
Equality and Human Rights Commission (EHRC)
European Convention of Human Rights (ECHR)
European Court of Human Rights (ECtHR)
(Non)Foreign National Offenders (FNOs)
Foreign National Prisoners (FNPs)
Higher Executive Officer (HEO)
Her Majesty’s Chief Inspector of Prisons (HMIP)
Home Office (HO)
Immigration Law Practitioners’ Association (ILPA)
Immigration Act 1971 (IA 1971)
Immigration and Asylum Act 1999 (IAA 1999)
Immigration, Asylum and Nationality Act 2006 (IANA 2006)
Immigration and Asylum Chamber (IAC)
Immigration Law Practitioners’ Association (ILPA)
Immigration Removal Centre (IRC)
Immigration Officer (IO)
Independent Chief Inspector of Borders and Immigration (ICIBI)
Independent Monitoring Board (IMB)
Jesuit Refugee Service (JRS)
Joint Committee on Human Rights (JCHR)
Legal Service Commission (LSC)
London Borough Council (LBC)
London Detainee Support Group (LDSG)
Member State (MS)
Mental Health Act 1983 (MHA 1983)
Ministry of Justice (MoJ)
National Health Service (NHS)
Nationality, Immigration and Asylum Act 2002 (NIAA 2002)
In March 2013, the Home Secretary Theresa May announced that the UKBA would be abolished and re-established within the Home Office. She announced that the Agency would be split into two – an immigration and visa service and a separate law enforcement command – with both falling under the direct control of ministers.
PART I: Substantive Criteria

Immigration Detention Statistics

The statistics provided below are drawn from either the Home Office official data or the Migration Observatory’s summary of Home Office data. Most of the commentary in this section comes from the 2012 Migration Observatory report. Updated figures for the first quarter of 2013 were published by the Home Office in May this year and are included in this report.  

A few issues exist regarding official immigration detention statistics. According to the Migration Observatory, there are gaps and limitations affecting, in particular, data on: the ethnic origins of the detainees; the individual trajectories of detention, release and re-detention (often each step is presented as a separate occurrence); and the number of FNPs in prison.  

The number of people in detention:

According to the Migration Observatory, the UK immigration detention estate is one of the largest in Europe.  

- During 2011, approximately 27,000 people entered detention (representing a decrease of around 1,000 on 2010);  
- During 2012, 28,909 people entered detention, an increase of 7% compared with 2011.  
- During 2012 there was an increase of 5% in those leaving detention. Of those leaving detention, 60% were removed from the UK.  
- At the end of March 2013, 2,853 people were in detention.  

The type of people in detention:

According to the Migration Observatory, the most common category of immigration detainees is failed asylum seekers:  

- In 2011, asylum detainees accounted for over 50% of the total immigration detainee population. (This high number is probably representative of the Government’s announcement in 2005 to process 30% of new asylum applicants through the DFT system).  

The immigration detention population also includes Foreign National Prisoners (FNPs):  

- FNPs who are down for removal and who remain in prison under immigration powers are not counted in official detention statistics. The only way of finding out how many FNPs are being detained in prison is by looking at individual charts.  

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Please note that all weblinks were last active in May 2013. Also, to ensure that any information lifted from this document is correctly cited, the full reference has been given on each occasion.

• In February 2007, approximately 1,300 FNP s were detained under immigration powers. By January 2011 this had increased to 1,667. Of these, 907 FNPs were detained in IRCs, and the remaining 760 were detained in prisons.\textsuperscript{11}

• During the financial year 2011/2012, 4,501 FNPs were removed from the UK (this is a decrease of approximately 800 on the number in 2010/2011).\textsuperscript{12}

• With the Q4 2012 Home Office statistics, the Home Office also published a paper on the detention of FNPs.\textsuperscript{13} The figures detailed cover FNOs leaving detention in the period from April to September 2012 or for those in detention on 30 September 2012. They relate solely to those detained under IA 1971 powers, at IRCs, STHFs and pre-departure accommodation only. The statistics exclude those held in prisons under IA 1971 powers. According to the statistics, of the 14,214 people leaving detention in the six months between 1 April and 30 September 2012, 2,044 were FNOs of which 76\% were removed and 15\% were bailed.\textsuperscript{14}

Another key group of the immigration detention population is children:

• In 2009, over 1,000 children were detained with their families for the purpose of immigration control. In 2010, this number declined to just over 400, and further still to about 100 in 2011.\textsuperscript{15}

• However, it has since increased quarter on quarter.\textsuperscript{16}
  
  ▪ In the first quarter of 2012, 53 children entered detention.\textsuperscript{17} All 53 left detention during the first quarter of 2012.\textsuperscript{18}
  
  ▪ In the second quarter of 2012, 60 children entered detention.\textsuperscript{19} Of the 60 children leaving detention, three children were detained for longer than 15 days.\textsuperscript{20}
  
  ▪ In the third quarter of 2012, 48 children entered detention. Of those leaving detention, seven had been detained for more than three days.\textsuperscript{21}
  
  ▪ In the fourth quarter of 2012, 61 children entered detention. Of those leaving detention, five had been detained for more than three days, all between four and seven days.\textsuperscript{22}

• Although in the first quarter of 2013, only 37 children entered detention, this fall coincides with the closure of Tinsley House from 18 January to 20 March 2013 to new entrants due to an infectious illness.\textsuperscript{23}

\begin{footnotesize}
\begin{enumerate}
\item Please note that these statistics should be taken in isolation from previous quarterly data, since they tend not to add up correctly (see, for example, bullet no. 1). Also, between collecting these statistics and finishing the report, the Home Office statistics have moved to Gov.UK. When moved, some of the data (in particular the data that was previously inconsistent) has been removed.
\item Figures for occurrences in detention are Official Statistics and have not been designated as National Statistics. For details about the quality of the data relating to these figures please see the User Guide.
\end{enumerate}
\end{footnotesize}
• The rise in quarterly figures since the first quarter of 2011 reflects the greater use of Cedars pre-
departure accommodation (which opened in August 2011) in conjunction with a new process to manage
the removal of families that began in March 2011.24

The average duration of detention:
• In 2011, over half (60%) of immigration detainees were held for less than two months and fewer than
10% of detainees had been held for more than one year.25

Statistics for the duration of detention in all four quarters of 201226 and the first quarter of 201327

<table>
<thead>
<tr>
<th></th>
<th>Total number leaving detention</th>
<th>Total detained for less than 29 days</th>
<th>Total detained between 29 days and two months</th>
<th>Total detained between two and four months</th>
<th>Total detained between one and two years</th>
<th>Total detained for two years or longer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1 2012</td>
<td>6870</td>
<td>4648</td>
<td>1071</td>
<td>772</td>
<td>52</td>
<td>16</td>
</tr>
<tr>
<td>Q2 2012</td>
<td>7028</td>
<td>4503</td>
<td>1264</td>
<td>820</td>
<td>52</td>
<td>24</td>
</tr>
<tr>
<td>Q3 2012</td>
<td>7186</td>
<td>4796</td>
<td>1185</td>
<td>731</td>
<td>72</td>
<td>15</td>
</tr>
<tr>
<td>Q4 2012</td>
<td>7454</td>
<td>4857</td>
<td>1262</td>
<td>723</td>
<td>79</td>
<td>12</td>
</tr>
<tr>
<td>Q1 2013</td>
<td>7093</td>
<td>4420</td>
<td>1209</td>
<td>912</td>
<td>56</td>
<td>18</td>
</tr>
</tbody>
</table>

Statistics for the duration of detention of FNOs in the first three quarters of 2012

<table>
<thead>
<tr>
<th>Total number leaving detention</th>
<th>Total detained for less than 29 days</th>
<th>Total detained between 29 days and two months</th>
<th>Total detained between two and four months</th>
<th>Total detained between four and twelve months</th>
<th>Total detained for one year or longer</th>
</tr>
</thead>
<tbody>
<tr>
<td>2,044</td>
<td>1,377</td>
<td>145</td>
<td>159</td>
<td>223</td>
<td>140</td>
</tr>
</tbody>
</table>

24 UKBA, ‘Latest News and Updates – New family returns process begins’, (28 February 2011),
http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/march/03new-family-returns-process and Home Office, ‘Removals and
Voluntary Departures – Q3 2012’, (November 2012), http://www.homeoffice.gov.uk/publications/science-research-statistics/research-
statistics/immigration-asylum-research/immigration-q3-2012/removals-q3-2012
http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/immigration%20detention%20briefing.pdf
26 The location of these stats has now changed. Please note the gap in the stats between stats for two-four months and one-two years.
2013#detention-2
statistics/immigration-asylum-research/immigration-q1-2012/detention-q1-2012
statistics/immigration-asylum-research/immigration-q2-2012/detention-q2-2012
statistics/immigration-asylum-research/immigration-q3-2012/detention-q3-2012
2013#detention-2
The average daily cost of detention per person:

On 4 February 2010, the UK Government reported in Parliament that the average overall cost of one bed per day in the immigration detention estate is £120.\(^\text{32}\) In December 2012, the joint thematic review by HMIP and the ICIBI found that “each individual detained costs nearly £40,000 a year”.\(^\text{33}\) Furthermore, in the UKBA Annual Report 2011-2012, the UKBA stated that approximately £18 million was paid in compensation and legal costs in ‘special cases’ – a category which includes unlawful detention cases.\(^\text{34}\)

For more data on the cost of immigration detention see the Matrix study discussed in the sections on Alternatives to Detention and Right to Compensation.

Arbitrariness

Whether UK detention practices are arbitrary is something which has been widely discussed in commentary.\(^\text{35}\) Interestingly, the JCHR in its 17\(^{th}\) report found that in the DFT process

> “[t]he decision to detain an asylum seeker at the beginning of the process simply in order to consider his or her application may be arbitrary because it is based on assumptions about the safety or otherwise of the country from which the asylum seeker has come.”\(^\text{36}\)

However, in the government’s responses to this claim, it found that

> “The detained fast track process is not arbitrary [...] The Court of Appeal in the UK has said that it did not consider the system itself is inherently unfair and so long as it operates flexibility it can operate without an unacceptable risk of unfairness.”\(^\text{37}\)

The JCHR also raised concerns regarding the lack of a maximum limit for the duration of detention. In response, the Government claimed that

> “We do not accept that a statutory or other fixed time limit on detention would be appropriate or workable. Such a limit would inevitably be arbitrary and would take no account of the individual circumstances of cases. In addition, a fixed upper limit would simply encourage individuals to delay and frustrate immigration and asylum processes, including removal, in order to reach a point


PART I: Substantive Criteria

With the exception of Article 5 of the ECHR which has been transposed into UK law by the HRA 1998, there is no provision in national law governing administrative detention which explicitly states that detention must not be arbitrary. There is no mention of it in the IA 1971, the IAA 1999, the NIAA 2002, the IANA 2006, UKBA 2007 or the BCIA 2009. Likewise, there is no explicit requirement of non-arbitrariness in Chapter 55 of the UKBA EIG 2011.

With regard to relevant case law on the concept of arbitrariness, in *Muuse v SSHD* the Court of Appeal ruled in favour of a detainee stating that their detention by the SSHD “was not merely unconstitutional but was an outrageous and arbitrary exercise of executive power”. It also awarded exemplary damages. For more see case no.23 in Appendix 1: Case Table.

Reasons for Detention

Legislation

There is no exhaustive list of factors thought to justify the decision to detain. Those that are listed centre around four things (i) a chance that the person can be removed quickly; (ii) a risk that they will abscond; (iii) any risk that they would commit an offence or pose harm to the public; (iv) a need to verify certain personal information which can help determine a claim. Accordingly, certain vulnerable groups such as children, those with mental health problems, pregnant women and people with serious disabilities will not usually be detained (see Protection of Vulnerable People below). However, despite the different weighting given to different groups of people, there is no person for whom detention will never be permissible.

In the case of FNPs, similar criteria are applied but with primacy being given to the risk of re-offending or harm to the public. For those who have finished serving time for violent, sexual or drug-related offences “release is likely only to be appropriate in exceptional cases”. Since April 2006, the UK Government has prioritised the removal of FNPs and, since the UKBA 2007 (more specifically section 32), all FNPs who have been sentenced to a period of imprisonment of 12 months or more are subject to automatic deportation from the UK unless they fall within one of the Act’s six exceptions as listed in section 33.

The powers to detain, therefore, can cover the following types of immigrants:

- Those arriving in the UK pending examination by an IO or the HO to establish whether they need or should be granted leave to enter. (IA 1971, Sch. 2, para. 16(1));
- Those who, on arrival in the UK with leave to enter, have had their leave suspended pending an examination and a decision on whether to cancel leave.
- Those refused leave to enter, and who present reasonable grounds for suspecting that they will be removed. (IA 1971 Sch. 2, paras. 8 and 16(2));
- Illegal entrants and those reasonably suspected of being illegal entrants, pending a decision on whether to issue removal directions and pending removal in pursuance of those directions. (IA 1971 Sch. 2, paras. 9 and 16(2));

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40 UKBA, ‘Enforcement Instructions and Guidance’, Chapter 55, Section 55.3.2.1.
• Those who, having limited leave to remain or enter, do not observe a condition attached to their leave to enter; remain beyond their leave; obtain their leave by deception; or are reasonably suspected of being such persons, pending a decision on removing them or pending removal. ([IAA 1999, s.10(1)(a) and (b) and s.10(7) as amended by the NIAA 2002 and the IANA 2006];
• “Members of a crew of ship or aircraft who remain beyond the leave granted to enable them to join their ship or aircraft or abscond having unlawfully entered without leave, or are reasonably suspected of having done so”. ([IA 1971 Sch. 2, paras. 12-14 and 16(2)];
• FNP, mainly those who are eligible for automatic deportation but, in some cases, those who are not. ([UKBA 2007, section 36]).

If someone is detained in circumstances where there is no statutory power to detain, the detention is unlawful. This is rare, possibly because the grounds for detention are so comprehensive. What is more common is where - at the outset - a power existed to detain the person, but the detention has become unlawful because it has continued longer than is reasonable for its statutory purpose.42

Detainees placed in administrative detention under one of the powers listed above must be provided with reasons for their detention. This was enshrined in a 1998 government White Paper entitled “Fairer, Faster, Firmer” which stated that

“written reasons for detention should be given in all cases at the time of detention and thereafter at monthly intervals, or at shorter intervals in the case of detained families. Taking into account that most people who are detained are held for just a few hours or days, initial reasons will be given by way of a checklist similar to that used for bail in a magistrates court.”43

This was later codified as a statutory requirement in Rule 9 of the DCR 2001:

“Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention, and thereafter monthly.”44

UKBA policy

Chapter 55 of the UKBA EIG 2011 provides details of the UKBA policy regarding the detention and temporary release of migrants (excluding DFT detainees (discussed further below) and CCD cases).

The Guidance states that there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention should be used (see section 55.20 and Chapter 57). Each case must be considered on its individual merits and special consideration must be given to family cases and those concerning unaccompanied children. According to the Guidance, detention is most usually appropriate: (i) to effect removal; (ii) to establish a person’s identity or basis of claim; or (iii) where there is reason to believe the person will abscond if released.45

Factors to be taken into account when considering the need for initial or continued detention include:

• The likelihood of the person being removed and the timescale for removal;
• Any evidence of previous absconding;
• Any evidence of a previous failure to comply with conditions of temporary release or bail;
• Any evidence that the subject has taken part in a determined attempt to breach immigration law;
• A previous history of complying with the requirements of immigration control;

• The person’s ties with the UK (e.g. the existence of close relatives (including dependants) who depend heavily on public welfare services for their daily care needs in lieu of support from the detainee, or evidence of a settled address/employment);
• The individual’s expectations about the outcome of the case (is there an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?)
• Any risk of offending or harm to the public;
• Whether the subject is aged under 18;
• Whether the subject has a history of torture;
• Whether the subject has a history of physical or mental ill health.

In CCD cases (relating to the detention of FNPs) the UKBA has the power to detain FNPs in IRCs or prisons once their custodial sentence has finished. The power may be used where the Agency has yet to decide whether the FNP should be deported or because, having made the decision to deport, it believes it is necessary to detain pending the deportation. Decisions to detain on this basis are made in accordance with case-law and may result in detention for some time.

According to the Guidance, cases concerning FNPs are subject to the general policy, namely a presumption in favour of temporary admission or release. It then goes on to say that

"special attention must be paid to their individual circumstances. In any case in which the criteria for considering deportation action (the “deportation criteria”) are met, the risk of reoffending and the particular risk of absconding should be weighed against the presumption in favour of temporary admission or temporary release [...] in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful."

Given that the power to detain exists in order for the UKBA to facilitate a person’s removal, detention will only be lawful while there is a ‘realistic prospect’ of the Agency removing them within a ‘reasonable timescale’, which will depend on the facts of the case. Therefore, according to the Guidance, in all cases caseworkers should consider on an individual basis whether removal is imminent. As a guide, removal could be said to be imminent where travel documents exist; where removal directions are set; where there are no outstanding legal barriers; and where removal is likely to take place in the next four weeks.

The Guidance also recognises the standards imposed by the ECHR when deciding whether detention is appropriate. It states that to comply with Article 5 ECHR, the following should be borne in mind:

• The relevant power to detain must only be used for the specific purpose for which it is authorised;
• The detention may only continue for a period that is reasonable in all the circumstances for the specific purpose;
• If, before the expiry of the reasonable period, it becomes apparent that the purpose of the power cannot be effected within that reasonable period, the power to detain should not be exercised; and

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The detaining authority (be it the IO or the SSHD), should act with reasonable diligence and expedition to effect removal.

In order to comply with Article 8 ECHR, Chapter 55 of the Guidance states that UKBA staff should be clear and careful when deciding that the decision to detain is proportionate to the legitimate aim pursued. This involves balancing the legitimate aim in Article 8(2) against the seriousness of the interference with the person’s right to respect for their family life. The assessment must also have regard to the need to safeguard and promote the welfare of children. Regular reviews of detention should consider proportionality with regard to each individual, including any new information that is obtained.\(^{51}\)

When a decision has been made to detain, the procedure is as follows. The IO must:

- obtain the appropriate authority to detain;
- issue IS98 and 98A (bail forms) and advise the person of his right to apply for bail;
- conduct 'risk assessment' procedures as detailed in paragraph 55.6.1 of the Guidance;
- complete IS91 in full for the detaining authority;
- complete and serve form IS91R on the person being detained, explaining its contents to the person (via an interpreter if necessary);
- confirm detention to DEPMU as soon as possible and they will allocate a reference number;
- complete IS93 for the port/local immigration team casework file;
- always attach a 'detained' flag, securely stapled, to the port/local immigration team casework file;
- review detention as appropriate.\(^{52}\)

If a detainee wins an appeal, but UKBA wishes to challenge the immigration judge’s decision, it is sometimes considered necessary to maintain detention (for the short-term) until the challenge is heard, especially if it is considered that there is a risk the person will abscond or cause harm to the public.\(^{53}\) In cases where a person is being detained because their removal is imminent, the lodging of a suspensive appeal or other legal proceedings that need to be resolved before removal can proceed will need to be taken into account when deciding whether continued detention is appropriate. An intimation that such an appeal or proceedings may or will be brought would not, of itself, call into question the appropriateness of continued detention.\(^{54}\)

With regard to the requirement to provide reasons, Chapter 55.6.3 of the UKBA EIG 2011 describes the procedure surrounding Form IS91R. This form provides the reasons for detention and must be served on every detained person at the time of their initial detention. The form must specify the power under which the decision to detain was made and a properly evidenced and fully justified explanation of the reasoning behind the decision to detain must be placed on file in all cases. Furthermore

> “[i]t is important that the detainee understands the contents of the IS91R. If he does not understand English, officers should ensure that the form’s contents are interpreted. Failure to do so could lead to successful challenge under the Human Rights Act (Article 5(2) of the ECHR refers).”

**Commentary**

There is quite a lot of commentary on the automatic (or mandatory) detention of FNPs. In his thematic report, the ICIH highlights the UKBA’s presumption in favour of the release of FNPs at the end of their sentence, subject to an assessment of the risk they pose to the public and the risk of absconding. However, he also finds that FNPs had remained in detention in 94 out of 97 cases. These findings tend to reflect the various inconsistencies in decision-making:


\(^{52}\) UKBA, ‘Enforcement Instructions and Guidance’, Chapter 55, Section 55.7.1., http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary


PART I: Substantive Criteria

- Release must be authorised at senior Board level, in contrast to a decision to detain, which can be taken by lower management. 55 These different levels of authority sit uneasily with the presumption to release at the end of a custodial sentence. “[C]onsistency of decision-making is equally, if not more important in decisions to detain foreign national prisoners, and this cannot justify a procedure that stands in such stark contrast to the published policy.” 56

- There was also a disparity between the number of people released from detention by the Agency and the number released on bail by the courts. 57

- Of the FNP cases sampled, many detainees had been convicted for fraud and forgery, offences that are not listed in the Agency’s policy as those where ‘particular weight’ or ‘particularly substantial weight’ should be given to the risk of further offending or harm to the public. Despite this, such cases were overwhelmingly likely to result in detention. 58

Lastly, the ICIBI found that there remains a culture in the UKBA that detention is ‘the norm’. 59

“In interviews with staff and managers, we encountered genuine fear and reluctance to release foreign national prisoners from detention in case they committed a further crime. This, together with the potential media and political scrutiny, is fuelling a culture where the default position is to identify factors that justify detention rather than considering each case in accordance with the published policy.” 60

In the light of his findings, the ICIBI recommended that the UKBA:

- Ensures that each individual decision to detain or release a FNP at the end of their sentence takes full account of the risk of reoffending in line with published policy;
- Changes the level of authorisation required to release FNPs at the end of their sentence in line with its policy, which presumes release. 61

Banks highlights that the ECtHR has held automatic or mandatory detention to be incompatible with the right to liberty in Article 5(3) ECHR. He also argues that whilst courts can consider a defendant’s links to the community when assessing their risk of absconding, they should not simply assume that FNOs are more likely to abscond than British defendants. Nevertheless, fears of dangerous FNPs absconding may mean that they are highly unlikely to be given home detention, released on temporary licence, or placed in a Category D prison. 62 Banks also argues that, despite detention being used to enable IOs to (among other things) monitor asylum seekers and refugees and prevent them from absconding, there is little evidence to indicate that the scale of noncompliance and the disappearance of asylum seekers warrants such a policy. He cites Bruegel and Natamba’s 2002 research into the risk of detainees absconding, which identified that 90% of

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released detainees originally classified as high-risk absconders complied with terms of bail and had been unnecessarily detained.\textsuperscript{63}

**Case law**

Relevant cases include:

- *R v. Governor Durham Prison, Ex parte, Hardial Singh* (Case no. 1 in Appendix 1: Case Table)
  
  The SSHD may only detain a person prior to deportation for a reasonably necessary period and he must act with reasonable expedition. If impossible, he should not exercise his power.

- *R v. SSHD ex parte Khadir (FC)* (Case no. 10 in Appendix 1: Case Table)
  
  The Court found that the word "pending" in Sch.2 paragraph 16(2) of the IA 1971 meant no more than "until". It did not mean "impending" or "imminent". So long as the SSHD remained intent upon removing the detainee and there was some prospect of achieving that, Sch.2 para.16 authorised detention.

- *R. (on the application of A) v. SSHD* (Case no. 15 in Appendix 1: Case Table)
  
  The risk of absconding/reoffending and a refusal to accept voluntary repatriation were bound to be important factors in determining the reasonableness of a person’s detention. However see *R. (on the application of AM (Iraq)) v SSHD* [2007] EWHC 867 (QB) where the Court found that there was no evidence that the SSHD had made an offer of voluntary repatriation and it could not be held against the detainee that he had failed to ask for voluntary return. (Case no. 13 in Appendix 1: Case Table).

  See also *R. (on the application of I) v SSHD* (Case no. 8 in Appendix 1: Case Table) and *R. (on the application of Nukajam) v SSHD* (Case no. 22 in Appendix 1: Case Table).

**Who has the Authority to Detain?**

**Legislation**

The power to detain is stipulated in paragraphs 16.1 & 2 of Schedule 2 of the IA 1971. It is a power that can be exercised in conjunction with any of three administrative acts: examination, removal or deportation. Paragraphs 16.1 & 2 state that:

"(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.

(1A) A person whose leave to enter has been suspended under paragraph 2A may be detained under the authority of an immigration officer pending—

(a) completion of his examination under that paragraph; and

(b) a decision on whether to cancel his leave to enter.

(1B) A person who has been required to submit to further examination under paragraph 3(1A) may be detained under the authority of an immigration officer, for a period not exceeding 12 hours, pending the completion of the examination.

(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10 or 12 to 14, that person may be detained under the authority of an immigration officer pending—

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions".\textsuperscript{63}

The **IAA 1999** both increased the powers of immigration officers to arrest and detain people and expanded the use of immigration detention. **Section 62 of the NIAA 2002** introduced a parallel, free-standing power for the SSHD (i.e. an official acting on the SSHD’s behalf) to authorise detention in cases where the SSHD has the power to set removal directions:

“(1) A person may be detained under the authority of the Secretary of State pending—

(a) a decision by the Secretary of State whether to give directions in respect of the person under paragraph 10, 10A or 14 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal), or

(b) removal of the person from the United Kingdom in pursuance of directions given by the Secretary of State under any of those paragraphs.

(2) Where the Secretary of State is empowered under section 3A of that Act (powers of Secretary of State) to examine a person or to give or refuse a person leave to enter the United Kingdom, the person may be detained under the authority of the Secretary of State pending—

(a) the person’s examination by the Secretary of State,

(b) the Secretary of State’s decision to give or refuse the person leave to enter,

(c) a decision by the Secretary of State whether to give directions in respect of the person under paragraph 8 or 9 of Schedule 2 to that Act (removal), or

(d) removal of the person in pursuance of directions given by the Secretary of State under either of those paragraphs.”

For FNPs liable to deportation, the powers to detain can only be exercised by the SSHD (with the exception of people stopped at the border), and not by the Immigration Service. There are four such possible scenarios provided for in legislation:

1. **Schedule 3, paragraph 2(1) of the IA 1971** (as amended) applies to cases where a criminal court has made a recommendation for deportation:

   “Where a recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in pursuance of the sentence or order of any court, he shall, unless the court by which the recommendation is made otherwise directs or a direction is given under sub-paragraph (1A) below, be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case or he is released on bail”.

2. **Schedule 3, paragraph 2(1) of the IA 1971** (as amended) applies to cases where a notice of intention to deport has been served:

   “Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.”

3. **Schedule 3, paragraph 2(3) of the IA 1971** (as amended) provides for cases where a deportation order has been signed:

   “Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise).”

4. **Section 36 of the UKBA 2007** provides for those who are being considered for automatic deportation (according to Article 32(5) of the same Act) or pending the making of a deportation order as required by the automatic deportation provisions:
“(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State—
(a) while the Secretary of State considers whether section 32(5) applies, and
(b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.
(2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c. 77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate.”

UKBA policy

Section 55.5 of the UKBA EIG 2011 states that:

“Although the power in law to detain an illegal entrant rests with the IO, or the relevant non-warranted immigration caseworker under the authority of the Secretary of State, in practice, an officer of at least CIO rank, or a HEO caseworker, must give authority.”

In the case of FNPs, where an offender - who has been recommended for deportation by a Court or who has been sentenced to at least 12 months imprisonment - is serving a period of imprisonment which is due to be completed, the decision on whether he should be detained under IA 1971 powers (on completion of his custodial sentence) pending deportation must be made at senior caseworker level in CCD in advance of the case being transferred to CCD.

Section 55.5.3 of the EIG lists the special cases where the authorisation to detain must be by an officer of a specific rank:

- Sensitive cases: Inspector/SEO or Assistant Director (for example, detention in cases which involve the splitting up of a family must be authorised by a Director),
- Unaccompanied young persons under 18: Initially an Inspector/SEO but as soon as possible by an Assistant Director. The decision to detain in such exceptional cases will be taken in accordance with the UKBA policy set out in paragraph 55.9.3.
- In CCD cases, an FNO under the age of 18 who has completed a custodial sentence may continue to be detained in the juvenile secure estate in exceptional circumstances where it can be shown that they pose a serious risk to the public and a decision to deport or remove has been taken. Such detention is subject to the advice of the Family Returns Panel and Ministerial authorisation;
- Families with minor children, in-country ensured returns and CCD cases – Inspector/SEO on the advice of the Family Returns Panel (see Chapter 45);
- Detention in police cells for longer than two nights: Inspector/SEO.

Commentary

See comment regarding the levels of authorisation for the detention and release of FNPs mentioned above.

Case law

In Re Hardial Singh (Case no. 1 in Appendix 1: Case Table) Woolf J said this:

"Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained pending his removal. It
cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention. In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

In *Re Wasfi Suleman Mahmod* (Case no. 2 in Appendix 1: Case Table) the Singh principles were upheld, with Laws J stating that:

> "While, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards."

And in *Tan Te Lam -v- Tai A Chau Detention Centre* (Case no. 3 in Appendix 1: Case Table), Lord Browne-Wilkinson of the Privy Council said this:

> "The principles enunciated by Woolf J in the Hardial Singh case are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain ‘pending removal’ their Lordships agree with the principles stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time."

The Detained Fast Track

In 2000 (during a time of increased asylum applications) Oakington IRC began to be used as a facility for the fast track asylum process in which single, male asylum seekers would be detained for the purpose of processing their asylum claims. The fast track process was designed to take seven days, at which point an initial decision would be made on their claim, resulting in release (either after having been granted leave to remain or after having been refused leave but allowed to pursue appeals in the community). The DNSA process was introduced in 2002, in which asylum seekers whose claims were considered as being clearly unfounded under section 94 of the NIAA 2002 were given no in-country right of appeal. Instead, they could appeal from their country of origin.

In 2003, a new DFT process was introduced, based at Harmondsworth, in which accelerated appeals are heard while the asylum seeker remains in detention. In 2005, the DFT was introduced for women asylum seekers detained in Yarl’s Wood. On 18 January 2006 the Home Office announced the New Asylum Model (NAM) which envisaged asylum seekers being placed into categories called ‘segments’ (including the DFT

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process). Although the notion of segments has largely disappeared, the DFT process has remained an integral part of NAM. By 2007, applicants of any nationality could be processed under the DFT, provided their case could be decided quickly.

In Detention Action’s 2012 submission to the UN Special Rapporteur on the Human Rights of Migrants, it stated that over 2,000 asylum seekers are detained under the DFT process in the UK (representing around 9% of all asylum claims).

**Legislation and UKBA policy**

Most rules on the DFT are provided for in UKBA policy. Instructions on the suitability of applicants for detention in Fast Track processes are set out in the [UKBA Guidance for Detained Fast Track Processes](http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/detention/guidance/detained_fast_processes.pdf).

According to this document, an applicant may enter into, or remain, in DFT/DN/SA processes only if

> “there is a power in immigration law to detain, and only if on consideration of the known facts relating to the applicant and their case obtained at asylum screening (and, where relevant, subsequently), it appears that a quick decision is possible, and if none of the Detained Fast Track Suitability Exclusion Criteria apply [...] The suitability consideration must take place both at the time of referral to entry to DFT and at all stages of ongoing case management, particularly following a change in circumstances relevant to the reasons for detention.”

The decision to process an asylum seeker in the DFT is made by the UKBA following an initial screening interview which covers the basic factual questions but (crucially) not the details of the asylum claim. A UKBA case owner is assigned to take responsibility for an individual case throughout the process. Following a substantive interview in which asylum-seekers are asked detailed questions about their reasons for claiming asylum and any evidence they may have, the UKBA case owner decides whether to grant or to refuse international protection. If the claim is refused, asylum seekers have the opportunity to appeal to the First-Tier Tribunal and the Upper Tribunal of the IAC. The appeals procedure for the DFT process is governed by the [Immigration and Asylum Appeals (Fast Track Procedure) Rules 2003](http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/detention/guidance/detained_fast_processes.pdf) (as amended by the Immigration and Asylum Appeals (Fast Track Procedure) (Amendment) Rules 2004).

In 2009, timescales for the DFT were the following:

- **Day 1**: Arrival at Harmondsworth IRC. Legal representative visit;
- **Day 2**: Legal representative visit (if not on Day 1) and substantive interview;
- **Day 3**: Service of initial decision by UKBA. If granted, released from detention;
- **Day 5**: If refused, final day in which to appeal to First-Tier Tribunal;
- **Day 9**: Appeal hearing;
- **Day 11**: Determination from appeal hearing. If granted, UKBA considers whether to appeal. If not, released from detention;

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Days 13–21: If appeal refused, reconsideration and further appeals on a point of law possible at the Upper Tribunal and outside the Immigration and Asylum Chamber;

Day 22: All appeal rights exhausted.  

As the timescales are indicative, there is some flexibility within the DFT procedures. According to Section 9 of the UKBA Guidelines on timetable flexibility in DFT cases, an asylum claim may be taken out of the DFT process and processed under the usual timescales in the community if it emerges that

“It is not possible to fairly consider and manage a case within the DFT or DNSA timescales, even if allowing for reasonable extension of those timescales according to flexibility considerations.”

Furthermore, the guidelines provide that

“Without prejudice to outcome, there is a general presumption that the majority of asylum applications are ones on which a quick decision may be made.”

Applicants and their legal representatives can ask for more time, something which – until recently - could be refused without proper justification. When this practice was questioned by the UNHCR, the UKBA introduced a clause into the flexibility guidelines which provides that “the fact that an individual is [in fast track] should not bear on the decision to wait for further evidence”. Furthermore, it adds that while delays will generally not be appropriate, minor delays can be authorised in the interests of fairness.

Cases where a quick decision may not be possible include:

- Where it is reasonably foreseeable that further enquiries are necessary to obtain clarification, complex legal advice or corroborative evidence, which is material to the consideration of the claim, and where those enquiries and the decision cannot be concluded within normal indicative timescales;
- Where it is reasonably foreseeable that the case will require a level of consideration not possible within indicative timescales;
- Where it is reasonably foreseeable that translations are required in respect of documents presented by an applicant, which are material to the consideration of the claim, and where the necessary translations cannot be obtained to allow a decision to take place in the normal indicative timescales.

Those individuals who are unlikely to be suitable for the DFT or DNSA processes are:

- Women who are 24 or more weeks pregnant;
- Families;
- Children (whether applicants or dependants) whose claimed date of birth is accepted by the UKBA will not in any circumstances be suitable for DFT/DNSA processes. If, however, the claimed age is disputed

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These are taken from the Detention Action Report, which sourced them from Detained Fast Track and Detained NSA, (9 September 2009), UKBA, which is an outline of the process circulated to stakeholders.


by the Agency (according to the Assessing Age instruction\textsuperscript{86}), the case may be suitable for the DFT process:

- Those with a disability which cannot be adequately managed within a detained environment;
- Those with a physical or mental medical condition which cannot be treated adequately within a detained environment or which, for practical reasons, including infectiousness or contagiousness, cannot be properly managed within a detained environment;
- Those who clearly lack the mental capacity or coherence to sufficiently understand the asylum process and/or cogently present their claim;
- Those for whom there has been a reasonable grounds decision taken (and maintained) by a competent authority stating that the applicant is a potential victim of trafficking or where there has been a conclusive decision taken by a competent authority stating that the applicant is a victim of trafficking;
- Those in respect of whom there is independent evidence of torture.\textsuperscript{87}

For those applicants with dependent children aged less than 18 years with whom they live as a family, it will only be appropriate for them to enter DFT in the most exceptional circumstances.\textsuperscript{88} The Guidance states that IOs must have regard to the rights of the applicant and his/her child under Article 8 of the ECHR. It also states that when considering such issues it is important for the IO to note that DFT/DNSA detention will neither preclude family contact (through IRC visits, telephone calls, emails, etc.), nor of itself be of an extended duration, and so in many cases it will be possible to conclude that the interference with any accepted family life is proportionate.\textsuperscript{89}

Asylum seekers on the DFT have the right to be allocated a legal representative from a duty rota of independent solicitors’ firms who have an exclusive legal aid contract for the DFT.\textsuperscript{90} According to Detention Action, the UKBA document provided to asylum-seekers on the DFT, “Asylum Procedures Under the Fast Track Process”, states that asylum-seekers will have the opportunity to discuss their case with a legal representative on Day 1, depending on time of arrival in the centre. The document for asylum-seekers only goes up to Day 9, after which it states that the solicitor will advise on the process.\textsuperscript{91}

**Commentary**

1] The continued suitability of the DFT process:

It is argued by Detention Action that the rationale behind the DFT system is no longer relevant. According to the NGO, the DFT

> “was developed in 2000 as a response to unprecedented numbers of asylum claims and an increasing backlog. However, the number of asylum applications has fallen by 79% since 2002, processing times have been reduced, and the backlog has largely been resolved. Yet the DFT continues to expand, increasing by 39% in 2009.”\textsuperscript{92}

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Moreover, there has been much criticism of the initial screening process. The JCHR has expressed concerns that "the decision to detain an asylum-seeker may be arbitrary because it is based on assumptions about the safety or otherwise of the country from which the asylum-seeker has come".3 The UNHCR observed "excessive and inappropriate emphasis" on factors which are not relevant to the assessment of credibility. It criticised the "inappropriately heavy burden onto Detained Fast Track applicants to prove their claim" and the "unreasonable expectations of evidence provision" which were particularly concerning given asylum-seekers on the DFT have to present their case in detention and to fast timescales. It also found "insufficient engagement with individual characteristics and circumstances of the applicant".4 The UNHCR has further expressed concerns that "safeguards do not always operate effectively enough to identify complex claims and vulnerable applicants not suitable for a detained accelerated decision-making procedure".5 Lastly, ILPA has noted that "it is a mystery of the fast track process how the straightforwardness of claims can be accurately assessed when the screening interview elicits no or virtually no information about the substance of the claim".6

Furthermore, the locations for detention are considered by some as unsuitable for most DFT detainees. Asylum seekers in Harmondsworth are often held in high security facilities equivalent to a Category B prison.7 These high security wings were supposedly designed for some of the most challenging detainees, however in reality most DFT asylum seekers are held in them. And, although all detention centres are built on prison specifications,8 as the new wings were prepared for opening, the Harmondsworth IMB found it shocking that "brand new facilities have been built that are ill-suited to their intended purpose and that offer lower standards of decency than the facilities they replace."9 These high security wings are also very expensive waiting rooms - one month in a high security detention centre can cost over £5,500 per person.10

2] Vulnerable people and the DFT process:

It is argued that unsuitable candidates are being placed in the DFT system, including significant numbers of torture victims and mentally ill people.11 The DFT process for women is not adequate to address the complexities and obstacles to early disclosure associated with the high prevalence of histories of rape and sexual violence.12 The assessment of suitability for the DFT has been found to be "overly simplistic, flawed

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9 This allows the private companies financing the build to repurpose the buildings if necessary.
and ineffective in identifying gender related cases”. For more on this see the Human Rights Watch 2010 report on the DFT process and its failings when addressing female asylum claims.

3] The unreasonable length of detention:

UKBA policy states that detainees should be interviewed on day 2 of their detention. However, asylum seekers are detained for an average of two weeks before the process even starts, due to administrative delays by the UKBA. 18% wait for over a month in detention. After this lengthy wait, asylum seekers then face an asylum process at “breakneck speed”, in most cases meeting their duty solicitor on the morning of their asylum interview with no advance notice. They are given only two days to gather evidence for, and submit, an appeal and have only minutes with their solicitor before their interview. Conversely, the UKBA routinely misses its own deadlines by days or weeks.

Furthermore, the decision of the ECtHR in Saadi v UK (see below) is considered as no longer relevant when justifying the length of time a person may be detained in the DFT system. Since Dr Saadi was detained in 2000, the duration of detention and the levels of security in the centres have increased. In particular, the conditions of detention considered in Saadi were much different from those at Harmondsworth – where the majority of DFT detainees are now held. This is while the pressure of the number of asylum claims has greatly reduced. Moreover, this interpretation of Article 5 ECHR and the DFT does not differentiate between asylum seekers seeking protection under the Refugee Convention and any other migrants entering the country. Given these changes, the operation of the DFT today risks violating Article 5 of the ECHR.

Detention Action also argues that the nature of the DFT as an accelerated process is hugely disadvantageous to the asylum seekers caught up in it, claiming that:

“The nature of detention [in the DFT process] undermines the ability of asylum-seekers to pursue their cases or engage with the asylum process. Detention is inevitably a stressful environment. It is not surprising that asylum-seekers take time to orientate themselves, as they struggle to come to terms with being detained in a prison-like setting, to cope with isolation from friends, family and local support organisations, and to process a wealth of information about how the detention centre itself operates. In this environment, it is questionable whether many asylum-seekers would be able to properly comprehend the complexities of the asylum system, particularly one that is accelerated, whatever processes were in place to explain it to them. Movements around the detention estate, and delays and failures in providing accessible information can only exacerbate this confusion [...] Although asylum-seekers on the Detained Fast Track should have an induction interview with a UKBA officer within 48 hours in Harmondsworth, in which the asylum process is explained, the majority of asylum-seekers we interviewed were confused and disorientated. This might be due to limited or late information, lack of interpreters or translated materials, literacy,
the stress of detention, and isolation from the community support structures that usually help asylum-seekers in the community to understand the asylum process. Some asylum-seekers did not remember having the Detained Fast Track explained to them in an induction interview. Some who did not speak English did not seem to have been provided with information in translation and others were illiterate in their own language, relying on friends or NGOs to explain documents to them. This appeared to undermine their ability to prepare their claim or engage meaningfully with the asylum system, putting them at a serious disadvantage.\footnote{Detention Action, ‘Fast Track to Despair: The Unnecessary Detention of Asylum-Seekers’, (May 2011), p. 17-18, \url{http://detentionaction.org.uk/wordpress/wp-content/uploads/2011/10/FastTracktoDespair.pdf}}

4) The lack of access to proper legal advice and representation:

For more on this, see Access to Legal Aid and Advice.


5) Findings of the ICIBI

In his report, the ICIBI outlines some good practices, for example:

- Although only one person was granted asylum out of all the cases sampled, the Independent Tribunal confirmed 93% of the Agency’s decisions to refuse;
- The number of complaints from applicants in the DFT was low;
- The UKBA had taken account of its safeguarding duties to children and, in the sample, no children under 18 and no families with dependent children under 18 had been allocated to the DFT.\footnote{ICIBI, ‘Asylum: A Thematic Inspection of the Detained Fast Track, July-September 2011’, p. 3-4, \url{http://icinspectorgovuk/wp-content/uploads/2012/02/Asylum_A-thematic-inspection-of-Detained-Fast-Track.pdf}}

However, the ICIBI also noted several faults in the system:

- A significant number of people initially screened as suitable for the DFT were subsequently released. Most of these people were released due to health issues and evidence demonstrating that they were victims of torture or trafficking;
- The above led to the observation that the initial screening was not tailored to capture information that could fully determine whether someone was suitable for the DFT;
- There was a significant disparity between the published timescales for interviews and decisions in the DFT and the timescales from the sample. The average time between arrival and interview was 11 days instead of the two days. This produced an additional total cost to the taxpayer of £106,692. On average, people waited 13 days in detention before a decision was made on their claim compared to the three to four day timescale the UKBA aimed to meet. In the overwhelming majority of cases the UKBA did not record the reasons for delay. It was therefore not possible to determine whether these were due to applicants being allowed more time to prepare for interview or to other issues such as resource and capacity constraints in the UKBA;
- In the sample, 73% of those refused asylum and who had no right to remain were removed from the UK. The report found that 62% were removed within three months but it took longer than three months to remove 38% of people;
- Despite there being few complaints in the sample, there was an inconsistent understanding by staff of what constituted a complaint as set out in the UKBA’s guidance. Information on how to make a complaint at the ASU was limited with only one poster explaining the process and no information in languages other than English. Also the screening environment at the ASU was not sufficiently private and potentially affected the personal and sensitive information applicants needed to disclose;
- Lastly, the UKBA did not routinely monitor or publish the timescales and cost of the DFT.\footnote{\textsuperscript{116}}
Case law

Detention for a short period of time to enable a rapid decision to be taken on an asylum or human rights claim has been upheld as lawful by domestic courts and by the ECtHR in Saadi v UK (see Case no. 17 in Appendix 1: Case Table). In this case, the ECtHR held that seven days in the ‘relaxed regime’ of Oakington (a low security centre) did not breach Article 5 ECHR:

“[G]iven the difficult administrative problems with which the United Kingdom was confronted during the period in question, with an escalating flow of huge numbers of asylum-seekers [...] it was not incompatible with Article 5 § 1(f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily” (paragraph 80).

This was in line with the judgment of the Court of Appeal whereby Lord Phillips concluded that “[a] short period of detention is not an unreasonable price to pay in order to ensure the speedy resolution of the claims of a substantial proportion of this influx.” The similar decision in the House of Lords was, in part, based on the relaxed conditions in Oakington however, the House of Lords noted that “[i]f conditions in the centre were less acceptable than they are taken to be there might be more room for doubt”. In view of this statement and the significantly reduced number of asylum applications, Detention Action argues that this judgment no longer applies to DFT detainees.

In the Refugee Legal Centre case (see case no. 9 in Appendix 1: Case Table) it was argued that asylum seekers did not have a fair chance to put forward their claim because of the timescales of the substantive interview and initial decision. The Court of Appeal ruled that the system was not inherently unfair, but expressed concern that there was no written flexibility policy clarifying circumstances in which additional time would be granted or the case would be taken out of the DFT. As a result, the UKBA Guidance on flexibility in the DFT timescales was published in April 2005.

What is a Fair Hearing?

Case law and commentary

In cases of national security the use of closed material is a contentious issue. Closed materials procedures and safeguards were introduced in the UK after the ECtHR ruling in Chahal v. the UK. Mr Chahal’s original case had been considered in private by an advisory panel to which neither he nor his lawyers had access. On appeal to the ECtHR, the Court found that Chahal’s rights under Articles 5(4) and 13 ECHR had been violated because he had not been given the opportunity to challenge the closed material used against him. (For more see Case no. 4 in Appendix 1: Case Table).

In response to the judgment in Chahal, Parliament passed the Special Immigration Appeals Commission Act 1997 which established the SIAC procedures. These procedures provide for the use of ‘special advocates’ - independent lawyers appointed by the Attorney General to act on behalf of the appellants and represent their interests in closed sessions. In the Belmarsh case concerning the indefinite detention of FNPs subject to immigration control, the ECtHR found that SIAC’s procedures in cases involving the deprivation of liberty were required to meet “substantially the same fair trial guarantees” enshrined Article 6 ECHR as in criminal cases. (For more see Case no. 18 in Appendix 1: Case Table).

117 Saadi v SSHD [2001] EWCA Civ 3512, paragraph 27.
118 R (Saadi & Ors) v SSHD [2002] UKHL 41, paragraph 24.
In relation to bail hearings, it is argued by BiD that the increased use of video link causes trouble in terms of the detainee’s ability to understand, follow, and/or participate in the court proceedings. Furthermore, there was nothing in the 2003 Bail Guidance Notes to suggest that applicants or their representatives should be given adequate opportunity to make their case at the hearing and/or to respond to assertions put by the Home Office.\textsuperscript{121} For more see Access to Justice and the Right of Appeal and Access to Legal Aid and Advice.

### Duration of Detention

#### Legislation and UKBA policy

Since the UK chose to opt out of the EU Returns and Qualifications Directives, there is no upper limit on the length of time a detainee can be held in administrative detention. In fact, the UK has been criticised for being one of only a few countries in Europe that practices indefinite detention, having one of the lowest rates of removal of refused asylum seekers and the longest detention of its migrants than any other EU MS.\textsuperscript{122}

The government White Paper ‘Fairer, Faster, Firmer’ stated that “\textit{individuals should only be detained where necessary},” and that “\textit{detention should always be for the shortest possible time}”.\textsuperscript{123} Chapter 55.1.3 of the UKBA EIG 2011 reflects this policy, stating that:

> “Detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted. A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable.”

The EIG also provides that migrants can be held in immigration detention - under the powers stipulated in the legislation described above - “\textit{where there is a realistic prospect of removal within a reasonable period}.”\textsuperscript{124}

In the case of FNPs, the Guidelines state that

> “If detention is indicated, because of the higher likelihood of risk of absconding and harm to the public on release, it will normally be appropriate to detain as long as there is still a realistic prospect of removal within a reasonable timescale.”\textsuperscript{125}

The EIG also provides that in cases involving serious offences, a decision to release is likely to be appropriate only in exceptional cases. However

> “[T]his does not mean [...] that individuals convicted of offences on the list can be detained indefinitely and regardless of the effects of detention on their dependants.”\textsuperscript{126}

It is worth noting that during January 2011, the Migration Observatory calculated that FNPs were held, on average, for 190 days.\textsuperscript{127}

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\textsuperscript{124} UKBA, ‘Enforcement Instructions and Guidance’, Chapter 55, Section 55.1.3., http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary

\textsuperscript{125} UKBA, ‘Enforcement Instructions and Guidance’, Chapter 55, Section 55.3.2., http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary

Commentary

There has been widespread criticism of the UK’s use of indefinite detention (for example, in the HRC 2001 concluding observations, and the Commissioner for Human Rights of the Council of Europe Thomas Hammarberg’s 2008 Memorandum). The OHCHR has also called on governments to respect the rights of migrants by “ensuring that the law sets a limit on detention pending deportation and that under no circumstance detention is indefinite.” Also, the Committee on Migration, Refugees and Population of PACE identified in January 2010 the UK’s practice of indefinite detention as being “one extreme.”

According to Johnston, the objectives behind indefinite detention (namely (i) to prevent absconding; (ii) to prevent harm to the public; and (iii) to encourage voluntary repatriation) are unfounded:

“In some cases it is thought that those incarcerated bring it upon themselves by refusing to return to their country. In others, the risk of harm that they might pose to the public is thought to suffice. These justifications it has been shown are insufficient. The former are based on misconceptions that deny the veracity of a person’s fears while the latter promote the idea that liberty should be the preserve of the popular, denying the rights that would be accorded to British nationals in similar situations counter to the basic tenets of rational thought and counter to the principle that human rights are human rights [...] In other cases it is the risk that the immigrant will run away and evade removal that is said to warrant detention [...but...] in relation to the harm caused to the individual and to society, indefinite detention is simply not worth the cost.”

He also contrasts the detention of migrants to that of terrorist suspects. (The current maximum for pre-charge detention is 14 days, but this can be extended to 28 days in an emergency and when parliament is not sitting).

A further argument for a maximum duration is the impact of indefinite detention on the mental health of detainees. In a Detention Action study, interviewees described witnessing other detainees self-harming or attempting suicide, many described symptoms of mental disorder, including hearing voices, talking to themselves and memory problems, despite having no previously diagnosed conditions. A few others described harming themselves, and some described suicidal feelings.

According to the ICIBI in his thematic report on the treatment of FNPs, one of the factors affecting the length of detention is the ‘timeliness of consideration’ (in other words the point at which the Agency begins to consider deportation). In the case of FNPs, the report’s findings illustrated clear examples where the Agency had not made a deportation decision as early as it could have. As a result, the FNPs were detained for longer than was necessary.

One of the recommendations of the joint report was...
that an independent panel should be established to examine all cases of detainees held for lengthy periods to establish if prolonged detention is justified.\textsuperscript{138}

**Case law**

According to Detention Action, since 2009 the UK has seen a sharp increase in the number of findings of unlawful detention by the High Court. Between 2009 and early 2011, the High Court ruled on 15 occasions that a detainee held for over a year with little prospect of removal was detained unlawfully.\textsuperscript{139}

The limits on detention under article 5(1)(f) of the ECHR were demarked in *Chahal v UK* which concerned the six year detention of a Sikh separatist leader while he appealed against the decision to deport him. The detention was deemed to be lawful under article 5(1)(f) since the deportation proceedings were handled with due diligence.\textsuperscript{140} (See case no. 4 in Appendix 1: Case Table).

In *Sino*, (See case no. 29 in Appendix 1: Case Table) the High Court found that an Algerian national with a psychological disorder and a history of minor offending had been detained unlawfully for the entirety of his 4 years and 11 months in immigration detention. The Court found that there was at no point any prospect of his deportation becoming possible in a reasonable period, so there was never a power to detain him. Efforts to obtain travel documentation had been unsuccessful for three years prior to Sino’s detention, so it should have been clear at the outset that further efforts would prove unsuccessful.\textsuperscript{141}

The Court also found that detention can be prolonged by the failure of a detainee to cooperate with the removal process. In *R (on the application of A) v SSHD* (see case no. 15 in Appendix 1: Case Table) the Court held that an immigrant or asylum seeker’s refusal to accept voluntary repatriation may justify his detention on the basis that he possesses the power to end that detention whenever he wants by agreeing to leave the country.\textsuperscript{142} However, as Johnston argues, in reality, this argument overlooks the fact that a detainee may have real and pressing reasons to fear return to his home country preventing him from accepting repatriation.\textsuperscript{143}

**Alternatives to Detention**

**Legislation and UKBA policy**

There is no specific provision in UK legislation which refers to the need to seek out alternatives to detention where possible. *The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* does, however, allow the government to tag, track and use voice recognition technology to trace asylum seekers.

*Chapter 55 of the UKBA EIG 2011* states that there is a presumption in favour of temporary admission or release and that, wherever possible, “[a]ll reasonable alternatives to detention must be considered before...”

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\textsuperscript{142}See paragraph 54.

detention is authorised.” More specifically, it refers to the use of bail as an alternative to detention (for more on bail see below).

The SSHD is required to consider alternatives to detention prior to and at all stages of a person’s detention, including during the monthly detention review and when an application is made for release on temporary admission. The First Tier Tribunal is also required to consider alternatives to detention in the course of an application for release on immigration bail, provided the less intrusive alternative is in the public interest. 

Chapter 55.20 of the Guidance provides the procedure for IOs in the case of the temporary admission, temporary release or release on restrictions of detainees. The power to grant temporary admission to illegal entrants and persons served with notice of administrative removal who are liable to detention under paragraph 16 is set out in paragraph 21(1) and (2) to Schedule 2 of the IA 1971:

“(1) A person liable to detention or detained under paragraph 16 (1), (1A) or (2) above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.

(2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer.”

A person who is in pre-deportation detention may also be placed on a restriction order under paragraph 2(5) of Schedule 3 to the IA 1971:

“(5) A person to whom this sub-paragraph applies shall be subject to such restrictions as to residence as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by the Secretary of State.”

For general detainees released into the community (i.e. not specific groups such as children or families) there are two main conditions that can be imposed: reporting requirements and electronic tagging. Reporting requirements oblige migrants to appear at a UKBA reporting centre at specified days and times. The frequency of the reporting times is determined on a case by case basis by the UKBA. The procedure is uncomplicated and takes only a few minutes. Electronic tagging requires ex-detainees to wear a small device on their ankle which contains an in-built transmitter. G4S, a private security company, provides, manages and maintains electronic tagging devices for the UKBA. A migrant may be asked to simultaneously report and wear an electronic tag.

Commentary

In January 2010, the Committee on Migration, Refugees and Population of PACE criticised European states for their use of detention as “an option of first resort and not last resort [that] can be prolonged, particularly where there is no practical and imminent possibility of removal”.

In its 2011 report on alternatives to detention in the UK, the JRS questioned the appropriateness and effectiveness of reporting and/or electronic tagging. In doing so, it raised the following issues:

• Reporting and electronic tagging does not actually reduce bed spaces in detention centres. Instead “It would appear that migrants are asked to report or wear a tag when there are no beds available in detention centres. As a consequence, any migrant who is reporting or wearing an electronic tag is vulnerable to detention at any given time.”149
• Release under these conditions represents little improvement on administrative detention. Rather, the poor reception conditions that people experience upon release (such as the restrictive tagging and reporting requirements, the inability to work, the social stigma, the lack of money and social support) does not lead to much improvement in people’s lives.150
• Refused asylum seekers who report are subject to detention, and even deportation, at any given time. The uncertainty that ensues not only causes a great amount of anxiety, but can also encourage an individual to abscond.151

Another alternative to detention – or means of reducing length of administrative detention - is voluntary return. According to the JRS study, interviewees said that they received constant pressure from the UKBA to consider voluntary return. But many still fear for their lives; are uncertain they could support themselves or their families; feel a sense of entitlement to live in the UK; have little or no connections in their country of origin; or associate return to their home country with a sense of shame.152

From a different perspective, Matrix conducted a study into the economics of using alternatives to long-term detention. According to their findings, the UKBA should extend the scope of their risk assessment (which they do prior to detaining FNOS) in order to identify those individuals who cannot be deported within a reasonable and lawful period of detention, and who will, therefore, eventually be released back into the community.153 The early identification and timely release of these individuals would save the cost of their protracted detention, thus allowing the same numbers of removals to be achieved using a reduced number of detention spaces.154

According to Matrix, an improved risk assessment could result in savings of £377.4 million over a five-year time period (an average £75.5 million per year). This estimate comprises:

• £344.8 million in detention cost savings over five years - the equivalent of running at least three detention centres over the next five years.
• £37.5 million in avoided unlawful detention payments over five years (for more on compensation see Right to Compensation).
• Minus £5 million in the extra cost of support, including housing and living costs, for the additional time that migrants spend in the community.155

Matrix also found that a proportion of the expected savings could be reinvested in more intensive community-based support, which would generate increased rates of case resolution and voluntary return. Currently in the UK, interventions are being piloted that replicate elements of the Australian practice of case management, although they have not been used as alternatives to detention. Providing case management in

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the UK to all the migrants who would be subject to timely release would cost around £164.2 million. However, as voluntary returns are far cheaper than enforced removals, this could lead to further savings as well as an increase in the overall number of returns.\textsuperscript{156}

\textbf{Case law}

In \textit{Shylolibavan v SSHD} (see case no. 19 Appendix 1: Case Table) the Court ruled on a case where an individual (S) had been granted temporary admission subject to reporting requirements and who was re-detained when he mistakenly reported one day late. The IO’s reason for detention was the risk of absconding that S posed. However, as the Court noted, S had reported without fail for two years and had been living with a close relation in one place for eight years. The decision to detain S had been taken before S had failed to report on the correct day “\textit{and, accordingly, before the decision maker had the opportunity to properly assess S’s current situation, in particular the likelihood of him absconding.}” Moreover, there was no evidence that the IO in question had given any adequate consideration to reasonable alternatives to detention. This, according to the Court, was contrary to the UKBA policy that every case had to be considered on its individual merits.

In \textit{S, C (by her litigation friend S), D (by his litigation friend S) v SSHD} (see case no. 14 Appendix 1: Case Table) the Court had to consider the case of a mother and her two children who were detained on the DFT after having arrived illegally in the UK. The Court found that since the detention of young children was inherent in any decision to detain S, the SSHD’s policy had not been correctly applied. “\textit{No strong grounds existed for believing that S would not comply with conditions of temporary admission or release and all the reasonable alternatives had not been considered.}” (See paragraph 62).

In \textit{AAM (A Child) v SSHD} (see case no. 36 Appendix 1: Case Table) the Court found that the SSHD had failed to correctly apply her policy when she detained a child. In doing so, the SSHD had breached Article 3 of the UNCRC and had failed to consider an alternative to detention, contrary to Article 37 of the UNCRC. See also \textit{R v. SSHD ex parte Khadir} (case no. 10 Appendix 1: Case Table).

PART II: Procedural Safeguards

Bail

Legislation

Paragraphs 29 and 34(1) of the IA 1971 (as amended) provide the general procedure for bail, the powers of granting bail, and the conditions which may be placed on the granting of bail. Rule 33 of the IAAR 2003 provides further details on the bail procedure, paragraph 5 stating that “where bail is refused, the notice must include reasons for the refusal”.

Provision 44 of the IAA 1999 provided for two automatic bail hearings for all those detained under IA 1971 powers. However, the relevant sections were never brought into effect and were instead repealed by Section 68(6) of the NIAA 2002. As a consequence, the onus is on the representative (or the detainee themselves) to make an application for bail.\(^{157}\)

According to Schedule 2, paragraph 22(1A) & (2) IA 1971, bail can be granted by a CIO (as opposed to an adjudicator). This power is also exercisable by the HO. CIO or SSHD bail is an option in all cases except for those pending examination where the detainee has been in the UK for less than 7 days (see NIAA 2002, section 68(2)(b)).

The adjudicator has the power to: (i) refuse bail; (ii) grant unconditional bail; (iii) grant bail subject to conditions. According to BiD’s best practice guidelines, if bail is refused, it is possible to:

- Make further applications after a change in circumstances. Guidance suggests that 28 days is sufficient to constitute a change in circumstances;
- Make further applications with ‘fresh additional grounds’;
- Keep pressing the Immigration Service to release the detainee on TA/TR;
- Make an application for judicial review/habeas corpus.\(^{158}\)

UKBA policy

Although Chapter 55 of the UKBA EIG 2011 provides general considerations which must be made by when assessing bail applications, the key guidance is provided in Chapter 57.

According to Chapter 57.1.1 & 2 of the Guidance, the following groups are eligible for bail:

- Those detained pending the issuance of removal directions (Paragraph 22(1)(A) of Schedule 2 to the IA 1971 as amended).
- Those in the first 8 days of detention (beginning with the day on which detention commences) may only apply for bail to an IO not below the rank of CIO. Thereafter, application for bail should be made to either the SSHD or the AIT.
- Those detained pending removal after removal directions have been set (Paragraph 34 of Schedule 2 to the IA 1971 as amended).
- Those detained pending an appeal to an immigration judge or to the Tribunal (Paragraph 29 of Schedule 2 to the IA 1971 as amended).
- From 10 February 2003, paragraph 2 of Schedule 3 of the IA 1971 (as amended) extended the right to apply for bail to those subject to deportation action.


Chapter 57.3 of the Guidance provides that:

“When a person is eligible for bail, notify him and/or his representative that he has the right to apply for bail and give the bail information and application forms ... It is only necessary to notify a person once of his bail rights. You do not need to inform him every time his circumstances change.”

Guidance is available to judges presiding over immigration and asylum hearings. This can be found in Presidential Guidance Note No 1 of 2012. This guidance was revised substantially in 2011, at which point several issues relating to bail proceedings were addressed:

- Once presented with arguments that address the lawfulness of detention, the HO presenting officer often suggests to the immigration judge that he/she does not have the jurisdiction to hear those views and that they are better dealt with by the Administrative Court through a judicial review application. The bail guidance addresses this at paragraph 5 by stating that “it will be a good reason to grant bail if for one reason or another continued detention might well be successfully challenged elsewhere”. BiD has questioned this paragraph, as arguments on the lawfulness of detention can be factually complicated and, as such, outside the specialist knowledge of First Tier judges.

- To address the sometimes unsubstantiated claims made by HO bail summaries, paragraph 28 of the guidance places emphasis on the need for evidence-based decision-making by judges. “Failure by one side or the other to provide relevant evidence that is reasonably available should result in an immigration judge giving less weight to that party’s arguments”. This is especially important for cases on FNPs (see paragraph 12): “The immigration authorities must substantiate any allegation ... that a person poses a risk of harm to the public or a risk of reoffending where this is disputed.”

- In the 2003 guidance, the absence of a bail summary provided the automatic right to bail. However, in the 2011 revision, paragraph 6 states that “where the bail summary is absent the judge may be able to infer the reasons for detention from other available information. Absence of the bail summary is not of itself a reason to grant or refuse bail or to invite withdrawal of the application.”

Commentary

In its 2012 Human Rights Review, the EHRC stated that:

‘Under Article 5, anyone deprived of their liberty must have the opportunity to challenge their detention. However, the bail process remains inaccessible to many immigration detainees, including those unlawfully detained.’

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In addition to this, several criticisms have been raised regarding the notification of a detainee’s right to apply for bail, the nature of the bail hearings, and post-bail circumstances.

In relation to the notification of detainees of their right to claim bail, the following issues have been raised:

- Since detention is not reviewed automatically by a judicial authority, detainees (or their representation) must take the initiative and apply for bail.\(^{166}\) This causes particular problems for detainees who do not speak English, who are illiterate, who are held in prisons (as communication with lawyers is restricted), or who have mental health problems.\(^{167}\)
- The bail application form is available only in written English.\(^{168}\) Forms should be translated, however, this is more likely to be a matter of good practice than a mandatory obligation on IRC and prison officials.
- In a joint thematic review of immigration detention casework, it was found that a number of the detainees had never made a bail application, seemingly because they were unaware of bail processes, were unable to navigate the process, or had poor legal advice.\(^{169}\)
- UKBA guidance states that when a detainee is given written reasons for their detention they must also be “informed of their bail rights” by an IO. BiD has argued that the fact that IOs are not legally trained and can only ‘inform’ the detainee about their bail rights means that they are unable to ‘explain’ them – which makes understanding the bail process even more complicated for the detainee.\(^{170}\)

With regard to the bail procedure itself, the following concerns have been raised:

- The option of an in-court hearing is not being explained to bail applicants.\(^{171}\)
- There are systemic problems in the production and accuracy of bail summaries. Often, they are not completed by the same official defending the HO’s position at the bail hearing and so there is “frequently a disconnect between evidence in the case file, the bail summary and the case knowledge of the Home Office presenting officer at the Tribunal. There is also a significant amount of copying and pasting between bail summaries which leads to mistakes.”\(^{172}\)
- According to the Bail Observation Project, there is substantial variation in the conduct of the hearings and a disturbing lack of consistency in approach and process.\(^{173}\) The charity also found little evidence that the revised guidance for judges is being taken into account as a matter of course.\(^{174}\)
- There are issues surrounding the use of video link - they lead to problems in making sure the applicant can see and hear, and can have a detrimental impact on the quality of the pre-hearing legal consultations.\(^{175}\) The Bail Observation project has noted that the use of video link could be an obstacle to


\(^{167}\) BiD, ‘A Nice Judge on a Good Day – immigration bail and the right to liberty’, (July 2010), p. 21-22, http://www.irr.org.uk/pdf2/bid_good_judge.pdf, see also the statement of the ICHR in 2007 (cited in BiD report, p. 22) “We have heard considerable evidence that although the right to apply for bail is available to all detained asylum seekers after seven days, in reality many detainees are unaware, or unable to exercise, this right because of language difficulties, a lack of legal representation and mental health issues.”


\(^{175}\) BiD, ‘A Nice Judge on a Good Day – immigration bail and the right to liberty’, (July 2010), p. 32, http://www.irr.org.uk/pdf2/bid_good_judge.pdf, see also p. 34 where it is described that Barristers felt that the ten minute video link consultation period for legal representatives and bail applicants before the hearing starts was insufficient time to consult with the applicant by video link, something which was exacerbated by problems with the quality of the video link and difficulties with interpretation.
a fair hearing since bail was granted to approximately half of applicants appearing in person, but only a third of those appearing by video link.176

- “Unrepresented applicants are highly unlikely to be aware that evidence in relation to their case could be submitted in advance, let alone be able to obtain such evidence. [...] In theory, the burden of proof is on the Secretary of State who must justify the need for ongoing detention, in practice the evidence in support of arguments put before the Tribunal is provided almost exclusively by [...] the detained bail applicant.” 177

Regarding the post-bail application process, the following problems have been highlighted:

- Even if successful in their application, it is increasingly common for Immigration Service Reporting Centres to be used instead of police stations. Since there are fewer reporting centres than police stations, immigrants have to make considerably longer (and thus more expensive) journeys to report. 178
- According to BID “[t]here is no route within the Tribunal to appeal a decision to refuse bail. It is possible for an applicant to judicially review the immigration judge’s refusal of bail in the High Court, but in practice it is often quicker and easier to apply for bail again. Many bail applicants are unaware that the option of judicially reviewing a bail refusal exists and/or feel that it can only be pursued with a legal representative, which many detainees do not have. For these reasons judicial reviews of bail refusals are rare.” 179
- Furthermore, “[t]he manner in which many of the refusal notices were filled in served to disadvantage the applicant at future bail hearings.” For example, it can be very difficult to read the immigration judge’s handwriting, decipher the judge’s decision or reasoning, or understand the acronyms and jargon used. 180

Case law

In the bail proceedings, the burden of proof rests on the Home Office. It is the job of the HO representative to justify continued detention and to set out the reasons why bail should not be granted. This is based on the Singh principles, which were later upheld in the Privy Council decision in Tan Te Lam v Tai A Chau Detention Centre and R. (on the application of I) v SSHD (for more see Cases no. 1, 3 and 8 in Appendix 1: Case Table).

In R v Uxbridge Magistrates’ Court and Another ex parte Adimi (see Case no. 5 in Appendix 1: Case Table) the Court found that the principle of Article 31 UNCRC is often ignored by the Immigration Service and by adjudicators who will often detain or refuse bail on the grounds that someone entered illegally, even if she presented his/herself to the authorities as soon as possible. Similarly, in R. v SSHD Ex p. Mendje the Court set out the assessment a judge must make when balancing the presumption in favour of bail with the circumstances of the case. Here, the Court found that it was reasonable for the judge to consider the applicant’s risk of absconding, his/her lack of contacts in the UK, and his/her illegal mode of entry. (For more see Case no. 6 in Appendix 1: Case Table).

Convention rights (in particular Articles 5 and 6 ECHR) have also been discussed in relation to cases of national security. For example, in R. (on the application of BB (Algeria)) v Special Immigration Appeals Commission, it was held that the Convention rights do not apply because bail hearings in the Special Immigration Appeals Commission are interim or ancillary to deportation proceedings. As such they did not effectively determine the civil right or obligation at stake. (See Case no. 27 in Appendix 1: Case Table).

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Finally, in R. (on the application of MXL) v SSHD the Court had to consider whether a refusal to grant bail was unlawful when there had been a material change in the circumstances of the detainee's case and where the reasons relied upon for denial of bail were weak, inconsistent and in breach of the SSHD's policy. The Court held that both the failure to take into account the detailed published policy on detention in low or medium risk cases of criminality, and where the detention affected the welfare of minor dependent children, was causative of the ensuing continued detention of the applicant and thus constituted a violation of Articles 5 and 8 ECHR. (See Case no. 24 in Appendix 1: Case Table).

**Automatic Review of Detention Order**

There is no requirement in UK legislation or policy to have a judicial authority automatically review an initial decision to place a person in administrative detention and there seems to be little mention of it in academic commentary. This lack of requirement for automatic review has been confirmed in case law, with the Court in *Lumba* stating (at paragraph 48) that “[t]here is...no provision in article 5(1)(f) [of the HRA] corresponding with article 5(3).” (See Case no. 25 in Appendix 1: Case Table).

**Continuous Review of the Appropriateness of Detention**

**Legislation**

Rule 9 of the DCR 2001 sets out the statutory requirement for detainees to be provided with written reasons for detention at the time of initial detention, and thereafter monthly (i.e. every 28 days). The written reasons for continued detention at the one month point and beyond should be based on the outcome of the detention review.

**UKBA policy**

Chapter 55.8 of the UKBA EIG 2011 states the government policy for detention reviews. According to the Guidance, in all cases of persons detained solely under IA 1971 powers, continued detention must, as a minimum, be reviewed at the points specified in the table provided (see Table 1). The initial decision to detain must be reviewed after 24 hours by an Inspector and thereafter weekly. Detention must be reviewed again by an Inspector after 28 days, after which the DRU takes responsibility for reviewing detention. The SEO in the DRU reviews detention at the 1-month stage and has the authority to maintain detention up to the 2-month stage. From the 2 to 11 month stage, detention reviews are conducted monthly by the Deputy Director and at 12 months and over by the Chief Inspector.

**Table 1**

<table>
<thead>
<tr>
<th>Period in Detention</th>
<th>Review Authorised by</th>
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<tbody>
<tr>
<td>24 hours</td>
<td>CIO/HEO</td>
</tr>
<tr>
<td>7 days</td>
<td>CIO/HEO</td>
</tr>
<tr>
<td>14 days</td>
<td>CIO/HEO</td>
</tr>
<tr>
<td>21 days</td>
<td>CIO/HEO</td>
</tr>
<tr>
<td>28 days</td>
<td>Inspector/SEO</td>
</tr>
<tr>
<td>Weekly reviews between 28 and 40 days</td>
<td>Inspector/SEO</td>
</tr>
<tr>
<td>40 days</td>
<td>Assistant Director</td>
</tr>
<tr>
<td>Weekly reviews between 40 and 80 days</td>
<td>Inspector/SEO</td>
</tr>
<tr>
<td>80 days</td>
<td>Assistant Director</td>
</tr>
<tr>
<td>Weekly reviews between 80 days and 6 months</td>
<td>Inspector/SEO</td>
</tr>
<tr>
<td>Weekly reviews between 6 and 11 months</td>
<td>Deputy Director</td>
</tr>
<tr>
<td>12 months and over</td>
<td>Director</td>
</tr>
</tbody>
</table>
In TCU cases (i.e. those cases which are likely to result in a return to a safe third country), the appropriateness of detention is reviewed on a weekly basis and written reasons for detention are provided at the time of initial detention and every 28 days thereafter.

The Guidance also states that in CCD cases the standard timetable does not apply since the “detainees come from prison and their personal circumstances have already been taken into account by UKBA when the original decision to detain was made.” So, in regular CCD cases, there is no requirement for adult detention to be reviewed during the first 28 days. Thereafter, reviews should be conducted monthly at the levels indicated in Table 3 under section 55.8 of the Guidance. However, CCD cases involving the detention of children must be reviewed at days 7, 10, 14 and every seven days thereafter.

The Guidance also provides the possibility for additional reviews on an ad hoc basis where there has been a change in circumstances.

Detainees should all receive a monthly progress report. This report sets out the stage the case has reached and normally does not contain any reasons for detention. The detention reviews should comprise grounds for detention, timescale, proposals for progressing the case, prospects of removal, and compassionate circumstances. These reviews are not, however, disclosed to the detainee or their legal representation.

Commentary

In a joint thematic review the HMIP and the ICIBI discovered several issues concerning the review of detention:

- The progress reports provided to detainees contained very little new information. Instead, they regularly repeated the first report with little or no additional information about case progression and errors were sometimes repeated from month to month;
- Reports were all issued in English so detainees who spoke little or no English could not understand them, even those who did speak English could not necessarily understand the reports since they were not written in plain English;
- Detention reviews were carried out on time in less than a third of the cases reviewed;
- Only 41 per cent of cases were consistently reviewed at the right level of authority;
- The ‘reasonable period’ principle was inaccurately applied in some cases;
- Monthly progress reports often appeared to be provided as a matter of bureaucratic procedure rather than as a genuine summary of progress;
- Many reports did not consider all factors relevant to the case;
- Due to the requirement for different levels of authority, there was no mechanism for checking whether any actions had been set, or if they had been followed, unless the case owner specifically mentioned them in the current detention review.

Case law

In *R. (on the application of Kambadzi) v SSHD*, the Supreme Court affirmed the importance attached by the law to procedural safeguards against arbitrary detention and, specifically, the key function performed by

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detention reviews. It found that a failure to conduct a detention review required by published policy is a material public law error.

“In Lumba the argument on behalf of the detained persons was put in this way: a public law error that bears directly on the decision to detain will mean that the authority for detention is ultra vires and unlawful, and will sound in false imprisonment. That argument was accepted by the majority of the court in Lumba. The public law error in the present case bore directly on the decision to detain in that it was made without the necessary review of the justification for detention.” (See paragraph 88).

The published policy of the HO - which contained the frequency and grade of the officer to carry out reviews - was not applied since the reviews were not frequent enough and the seniority requirement was met in only a small majority of the reviews. Moreover, there were two instances where the reviews were flawed by material errors of fact. The Supreme Court held that the failure to regularly review Kambadzi's detention rendered his detention unlawful for the periods in which no review was carried out and that, for those periods, K had a claim in the tort of false imprisonment. (For more see case no. 26 in Appendix 1: Case Table).

In R. (on the application of Moussaoui) v SSHD (see case no. 31 in Appendix 1: Case Table) only two detention reviews had been conducted for the duration of M's detention. However, since M would have been lawfully detained if his detention had been properly reviewed, no more than nominal damages would be awarded.

In R. (on the application of LE (Jamaica)) v SSHD (see case no. 34 in Appendix 1: Case Table) the lack of monthly reviews during a certain period did render this period of detention unlawful and, therefore, E could be awarded nominal damages of £1 for that period.

Access to Justice and the Right of Appeal

Legislation

A detainee can appeal a decision to detain on two grounds: namely habeas corpus or judicial review. Habeas corpus is the correct remedy when it is argued that the detention is unlawful. It can be pleaded in a judicial review action if a joint challenge is appropriate, but the relief available is different. In judicial review, relief is discretionary, in habeas corpus it is a remedy of right.

The right to challenge detention by means of habeas corpus or judicial review satisfies the requirement in Article 5(4) ECHR that everyone who is deprived of his liberty shall be entitled to take proceedings by which the lawfulness of his detention is decided speedily by a court.

Other pieces of legislation that provide additional measures related to the appeal procedure include: the NIAA 2002, which states that a decision under section 82 of the same Act can be appealed on human rights grounds; the AI 2004, which creates a single tier of appeal for asylum seekers, namely the Asylum And Immigration Tribunal; the IANA 2006, which provides that only asylum refusals made in Britain carry a full right of appeal; and the BCIA 2009 which allows fresh claim judicial review applications to be transferred from the High Court to the upper tribunal.
The AI 2004 also states that further appeals to the High Court can only be made on the grounds that the tribunal made an error of law. As a consequence, it is argued that the aim of the act is to limit the role of the courts in immigration appeals. 186

The appeals procedure for the DFT process is governed by the Immigration and Asylum Appeals (Fast Track Procedure) Rules 2003 (as amended by the Immigration and Asylum Appeals (Fast Track Procedure) (Amendment) Rules 2004).

UKBA policy

According to Chapter 41 of the UKBA EIG 2011, the responsibility for handling judicial review applications rests with the case owner. Chapter 60 of the Guidance, 187 Chapter 27, Section 1 of the Immigration Directorate’s Instructions, 188 and Chapter 27, Section 3 of the Immigration Directorate’s Instructions, 189 provide further guidance to case owners when handling applications for judicial review.

The Immigration Directorate’s Instructions also provide for a ‘pre-action protocol’. 190 This protocol sets out the steps that should be taken before commencing an application for judicial review. 191 It provides the case owner with the opportunity to consider the grounds at issue and provide a response in the hope that it will resolve any concerns and rectify any errors before commencing judicial review proceedings. 192

The UKBA EIG 2011 also provides guidance for cases where an expedited process is appropriate. According to the guidance, if the case owner’s case falls into one of the following categories, it may be suitable for expedition:

- The claimant is in detention;
- The claim is from a family being managed to departure through the family return process;
- The claim appears to be clearly without merit;
- The claim is an abuse of process;
- The issue of public safety arises;
- The decision-making process has previously been subject to accelerated timescales (e.g. NSA or DFT cases);
- There is a risk of self-harm;
- The claimant is/was to be removed as part of an enforcement operation (e.g. such as a special charter flight).

For third country and CCD cases expedition will be agreed directly with TSol. Moreover, the decision as to whether a case is expedited or not rests with the High Court. 193

If an appeal has been allowed, Chapter 55.12.2 EIG states that where detention has been considered appropriate whilst a challenge is heard:

“care should be taken to ensure detention on this basis does not continue beyond a reasonable time period. Detention after an appeal has been allowed is not automatic and temporary release should always be considered. Any decision on what constitutes a reasonable period of time should be on a case by case basis.”

Commentary
Some of the issues relating to the judicial review procedure include the following:

- BiD argues that the unofficial test for the standard of proof is whether the applicant is more likely than not to abscond. This, according to BiD, ignores all other factors (such as length of detention) and reverses the burden of proof onto the applicant;\(^{194}\)
- The lawfulness of the decision to detain can be challenged either by judicial review or by a habeas corpus application. However, due to the lack of access to legal advice and representation, many detainees are unaware that these options are available to them or are unable to navigate the legal system.\(^{195}\)
- In December 2012, proposals for the reform of judicial review were published by the MoJ. These proposals could significantly reduce the access of detainees to redress.

N.B. In relation to the interpretation of the law by judges when considering challenges to the decision to detain, the UK Parliament endorsed, in 2012, instructions on how cases based on a violation of Article 8 ECHR should be treated. These instructions did not form part of primary legislation, however the intended effect was to make it harder for FNO's to resist deportation by relying on their Article 8 ECHR rights.\(^{196}\)

According to the provisions, provided certain criteria are met “it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors”.\(^{197}\) However, the current SSHD (Theresa May) is not satisfied with the standard to which these instructions are being applied as too many FNOs are having their deportation rulings removed due to successful Article 8 ECHR claims.\(^{198}\)

Case law
Case law relating to a plea of habeas corpus:

*R v Governor of Durham Prison ex parte Hardial Singh* (see case no. 1 in Appendix 1: Case Table). It was in this landmark case that the plea of habeas corpus was considered and the three criteria to ensure lawfulness of detention were outlined. These criteria were later upheld in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* (see case no. 3 in Appendix 1: Case Table) and *R v SSHD ex parte I* (see case no. 8 in Appendix 1: Case Table).

Case law relating to judicial review:

In *Lumba v SSHD* (see case no. 25 in Appendix 1: Case Table) the court reaffirmed that trespassory torts (such as false imprisonment) were actionable regardless of whether the victim suffered any harm and regardless of the fact that the appellants would have been lawfully detained in any event. Instead, the fact that the appellants would have been lawfully detained was relevant to the claim for damages.\(^{199}\)

In *R. v SSHD Ex p. Saleem* (see case no. 7 in Appendix 1: Case Table) the Court held that the right to appeal against a decision of the special adjudicator under section 20(1) of the IA 1971 was a fundamental right.

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similar to the right to unhindered access to the courts. Any rule which provided that an asylum seeker was deemed to have received a notice of a decision after the second day of posting, irrespective of when or whether it was actually received, went beyond the scope of the power to regulate the right of appeal provided under section 22 of the Act. In practice, rule 42(1)(a) of the Asylum Appeals (Procedure) Rules 1996 had the effect of destroying the right of appeal where an asylum seeker, through no fault of their own, failed to receive notice of a decision. (N.B. both section 20 and 22 of the IA 1971 have since been repealed).

In R. (on the application of AM (Iraq)) v SSHD (see case no. 13 in Appendix 1: Case Table) the long delay before X’s appeal was heard was used as supporting evidence for the argument (and judgment) that the stage had been reached where continued detention of AM had become unlawful.

In R. (on the application of Adesote) v SSHD (see case no. 21 in Appendix 1: Case Table) the continued detention of X for a period of seven days to see if the judicial review proceedings could be expedited was unreasonable.

**Right to Compensation**

If a detainee is successful in a claim of habeas corpus, damages may be available for the tort of false imprisonment. The damages awarded will depend on the length of time of the unlawful detention and the other circumstances of the case. The extent of the damages paid out by the government can have an impact on public spending, since an increasing number of detainees are bringing cases before the courts and successfully claiming damages for prolonged, unlawful detention. For example, in 2009-10 £12 million was paid in compensation and legal costs in ‘special cases’ which include unlawful detention cases. In the financial year 2011-2012, this amount increased to approximately £18 million.

**Case law**

*Muuse v SSHD* provides an example where the Court held it necessary to award exemplary damages due to the arbitrary nature of the detention. For more, see *Arbitrariness* and case no. 23 in Appendix 1: Case Table.

In *R. (on the application of N) v SSHD* (see case no. 32 in Appendix 1: Case Table) M and her three children were detained pending removal, subsequent to the institution of judicial review proceedings. According to the Court, acting with particular dispatch would have required the SSHD to release the family within 48 hours of the decision being reached that the judicial review could not be expedited. In this case, M and her children were detained for three days more and were therefore entitled to substantial damages in respect of those days.

**Places of Detention**

The majority of immigration detainees are held in UKBA IRCs or STHFs located inside or near airport terminals. As of February 2012, there were approximately 10 IRCs, 3 residential STHFs, 14 non-residential STHFs, and 12 combined non-residential STHFs/reporting centres. Except for 3 IRCs that are managed by HM Prison Service, the HO has outsourced the management of its detention facilities to private firms like

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200 House of Lords Hansard, ‘Written Answers - HL3794’, (November 2010), Column WA397,  
http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101129w0001.htm  
http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Immigration%20Detention%20Briefing.pdf  
http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Immigration%20Detention%20Briefing.pdf
MITIE, GEO Group, G4S, and Serco. Immigration detainees are also held in Prison Service establishments. It costs roughly £20 million per year to run a detention centre.

**Legislation**

Detention in UK IRCs is covered by the [DCR 2001](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/immigrationdirection2011/immigrationdirection11/immigrationdirection2011?view=Binary) and non-statutory detention centre operating standards. However, not all places of immigration detention are covered by the statutory safeguards offered by these Rules. STHFs and the Cedars Pre-Departure Accommodation are not covered by any statutory safeguards. However, rules concerning STHFs are apparently (at the time of writing) in the process of being drafted.

**UKBA policy**

Chapter 55.13 of the UKBA EIG 2011 provides details of the places of detention.

> "Illegal entrants and persons subject to administrative removal may be detained in any place of detention named in the Immigration (Places of Detention) Direction 2011. This includes police cells, immigration removal centres, prisons or hospitals ... Some facilities, such as police cells ... are only suitable for detention for up to 5 nights continuously (7 if removal directions are set for within 48 hours of the 5th night). The Immigration (Places of Detention) Direction 2011 does not prevent a person already detained for the specific period in time-limited accommodation from being re-detained, but this must never be used as a device to circumvent the time limits on the use of short term holding facilities."

Chapter 55.10.1 of the Guidance also provides the criteria for detention in prison. According to the Guidance, NOMS and the UKBA have a service level agreement governing the provision of bed spaces within prisons. Under that Agreement, NOMS makes a number of bed spaces available for use by the UKBA to hold immigration detainees. It is for the UKBA to determine how those bed spaces are used and the type of detainees who are held in them.

For individuals who fall within the following categories, the normal presumption will be that they should remain in or be transferred to prison accommodation and they will be transferred to an IRC only in very exceptional circumstances:

- National Security – for example, where there is specific, verifiable intelligence that a person is a member of a terrorist group or has been engaged in/planning terrorist activities;
- Criminality – those detainees who have been involved in serious offences;
- Specific Identification of Harm - those detainees who have been identified in custody as posing a risk of serious harm to minors, and those identified in custody as being subject to harassment procedures.

Individuals in the following risk categories will usually be transferred to or remain in prison accommodation, although subject to some exceptions:

- Criminality – those detainees who are subject to notification requirements on the sex offenders register (with the exception of those sentenced to less than 12 months or individuals subject to notification

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207 Short term holding facilities can be residential (detainees can be held there for up to 7 days), or they can be non-residential (detainees are held for a few hours, typically at ports and airports). Residential short term holding facilities are located at Colnbrook IRC, Pennine House at Manchester Airport, and Larne House, Northern Ireland. See UKBA ‘Enforcement Instruction & Guidance’, Chapter 55, Section 55.13, [http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary](http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary)


requirements on the sex offenders register who have otherwise been assessed by UKBA as being suitable for transfer);

- Security – where the detainee has escaped from prison, police or immigration custody or escort, or planned or assisted others to do so;
- Control – engagement in, planning or assisting others to engage in/plan serious disorder, arson, violence or damage whilst in prison, police or immigration custody.

Individuals in the following categories may be unsuitable for transfer to an IRC and DEPMU staff must assess their suitability for transfer on a case by case basis:

- Behaviour during custody – where an immigration detainee’s behaviour whilst in either IRC or prison custody makes them unsuitable for the IRC estate;
- Health Grounds – where a detainee is undergoing in-patient medical care in a prison. Transfer will only take place when an IRC healthcare bed becomes available, provided the individual is medically fit to be moved and their particular needs can be met at the IRC in question.

The normal expectation is that any remaining prison bed spaces made available under the agreement with NOMS - after allocation to individuals presenting one or more of the criteria/risk factors above - will be filled by time-served FNOs **not** falling into the above categories.

In the absence of the criteria set out above, the length of time that an FNO has been held in prison solely as an immigration detainee will be the main factor in deciding when to transfer to an IRC. If transfer to an IRC is agreed, it should take place as soon as is reasonably practicable. Any individual may request a transfer from prison accommodation to an IRC. Prompt and evidenced consideration must be given to such a request and, if rejected by DEPMU, the individual concerned will be given written reasons for this decision. Reasons for deciding not to transfer an individual must be recorded, as must the reasons for any delay in effecting agreed transfers.

When it comes to detention in police cells, **Chapter 55.13.2 of the Guidance** provides that detainees should preferably spend only one night in police cells, with a normal maximum of two nights. In exceptional cases, a detainee may spend up to five nights continuously in a police cell (seven if removal directions have been set for within 48 hours of the fifth night). Such detention must be authorised by an Inspector/SEO.

The **DCR 2001** states that: no room shall be used as sleeping accommodation (**rule 15**), for removal from association (**rule 40**), for temporary confinement (**rule 42**), or for the application of special control or restraint (**rule 43**), unless the SSHD has certified that its lighting, heating and ventilation are adequate.\(^\text{210}\)

**Commentary**

UK immigration detention facilities are monitored by HMIP and IMBs. HMIP regularly inspects all IRCs and STHFs and each IRC has its own IMB, which is made up of volunteers from the local community. In addition, there are three IMBs for some STHFs at airports and reporting centres.\(^\text{211}\) In 2010-11 HMIP noted inconsistent progress across the IRCs.

“**Dungavel became the first centre where outcomes for detainees were assessed as good across all four of HMIP’s tests of a healthy establishment (safety, respect, purposeful activity and preparation for release) ... By contrast, safety at the newly opened Brook House IRC was poor; there was a high level of bullying and violence, and the use of force by staff was frequent.**”


Detainees there lacked confidence in staff’s ability to protect them or manage difficult situations.”

In 2010-11, the IMBs highlighted the following problems in their reports:

- the length of time that detainees were held in IRCs;
- the number of detainees arriving at detention facilities with inadequately completed documentation, compromising the risk assessments necessary to allocate them to their accommodation;
- the delays in the resolution of age-disputed cases;
- the number of detainees subjected to unnecessarily long travel and waiting times before their arrival at airports for removal;
- the inadequate handling of detainee complaints against non-immigration agencies, such as the police.

Moreover, Detention Action has highlighted the fact that, in Brook House, Colnbrook and Harmondsworth IRCs, migrants are detained in conditions with the same security as high security prisons, conditions which are considered by some as unsuitable for most detainees. In all three centres, wings have been built to “Category B” prison standards. Although the new high security wings in Harmondsworth were supposedly designed for some of the most challenging detainees, in reality many asylum seekers (mostly on the DFT) are held in these high security conditions. As the new wings were prepared for opening, the Harmondsworth IMB found it shocking that

“brand new facilities have been built that are ill-suited to their intended purpose and that offer lower standards of decency than the facilities they replace.”

Morton Hall, previously a women’s prison, was reopened in 2011 as an IRC. It has recently been subject to some scrutiny following an alleged outbreak of violence in the Centre. Detention Action has criticised the Centre’s high-security facilities and geographically isolated location.

These high security wings are also very expensive; one month in a high security detention centre costing over £5,500 per person.

For up-to-date information on the capacity and operators of the various IRCs, see the 2013 report by AVID.

Case law

According to the Court in R. (on the application of T) v SSHD there was no support for the proposition that the detention of an individual in prison, for his own protection and on the basis that he was treated as an unconvicted prisoner, could cause such humiliation or suffering at the minimum level of severity required to engage Article 3 ECHR. Moreover, Rule 3(1) of the DCRs described the necessary conditions for an IRC but did not provide a right for a person detained under IA 1971 powers to be detained in an IRC rather than a prison. (For more see case no. 16 in Appendix 1: Case Table).
In *R. (on the application of C) v SSHD* government policy was that immigration detainees should only be held in prisons when they posed a serious risk to the stability of the IRC. It had to be largely a matter of judgment for those running the centre whether they could maintain order and control other detainees while the detainee in question remained there. If they could not, then it was perfectly justifiable, and in accordance with the policy, to direct that his detention should be in a prison. However, government policy was that persons detained only under the IA 1971 had to be treated as unconvicted prisoners, and should not be required to share a cell with a convicted prisoner against their will. To do otherwise would breach Article 5 ECHR. (For more see case no. 20 in *Appendix 1: Case Table*).
Access to Healthcare

Legislation and UKBA policy

According to the HO Detention Services Operating Standards Manual for IRCs 2005 those who are detained “must have available to them the same range and quality of services as the general public receives from the National Health Service.”

Legislation on the provision of healthcare in immigration detention facilities can be found in the DCRs 2001. According to Rule 33, every detention centre shall have a medical practitioner and healthcare team. The rules also state the obligations that the detention centre has vis-à-vis the medical welfare of the detainees, including requirements that the medical staff report any case of a detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention; any detained person suspected of having suicidal intentions; and any detained person who may have been the victim of torture. Rule 34 provides that the physical and mental needs of detainees must be assessed within 24 hours of admission. And Rule 35 provides that, in the event of a report on a person falling under the above three categories in Rule 33, the manager of the detention facility must send a copy of that report to the SSHD without delay.

The provisions of the DCRs are repeated in Chapter 55.8.A of the UKBA EIG 2011. According to the Guidance, the purpose of Rule 35 is to ensure that “particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention.” Upon receipt of a Rule 35 report, caseworkers must review continued detention and respond to the centre within two working days of receipt. Detention Services Order 17/2012 provides further guidance on the application of DCR Rule 35. This order focuses on the UKBA policy regarding the preparation of and response to a Rule 35 report.

In relation to the provision of mental health treatment in IRCs, Rule 24 of the DCRs states that:

“The Centre must provide primary care services for the observation, assessment, and management and care of detainees with mental healthcare needs. Where a detainee presents serious mental health needs the healthcare team must make arrangements for an assessment of that person and facilitate access to secondary care services where required. Detainees must be treated by appropriately trained healthcare professionals in line with national standards and guidance.”

Furthermore, the Department of Health offers guidance on the use of section 48 of the MHA 1983 to transfer immigration detainees for treatment in hospital. In April 2011 this guidance was amended to include, at section 4.42, the following statement:

“The aim is to return detainees to the IRC when inpatient treatment is no longer required”.

Note that this amendment has been criticised by ILPA since it

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224 See ‘Good Practice Procedure Guide: The transfer and remission of adult prisoners under s 47 and s 48 of the Mental Health Act’, (April 2011), www.rcpsych.ac.uk/pdf/goodpracticeguide.pdf
“does not accurately reflect the legal basis of immigration detention, nor does it reflect the full range of options for release from immigration detention for the assessment and treatment for detainees who are mentally ill, specifically those who have been transferred initially under the Mental Health Act 1983.”

Also, any immigrant detainee (interned either in prison or an IRC) who is identified as at risk of suicide or self-harm is cared for using the Assessment, Care in Custody and Teamwork (ACCT) procedure. Under this procedure the detainee is interviewed and a CAREMAP is drafted. This CAREMAP contains detailed and time-bound actions aimed at reducing the risk the detainee poses. It should follow the detainee as they are moved around the detention estate.

The delivery of healthcare in immigration detention facilities is split between the NHS and private companies. Of the 10 IRCs in the UK, seven are managed by Serco, G4S, and GEO and these companies, in turn, deliver privately contracted healthcare provisions to immigration detainees. Serco, operating Yarl’s Wood and Colnbrook IRCs, provide healthcare through the use of their own employed medical staff. Brook House, Campsfield House, Dungavel, Harmondsworth, and Tinsley House IRCs all sub-contract their healthcare arrangements to different healthcare providers. The cost of healthcare for detainees in immigration detention is covered by the State. Under the current system, there is no centralised needs assessment for healthcare in immigration detention. Instead, these assessments are carried out by individual healthcare contractors. As a result, provision for the identification and treatment of illness varies between IRCs, as does the type of facilities available in each centre. Despite these differences, there is no independent audit of IRC healthcare provision other than contract monitoring carried out by the UKBA. As the contract arrangements are not publicly available, there is an absence of information on how decisions are made and resources allocated by private healthcare contractors operating in IRCs. This has, as a consequence, raised questions about the level of scrutiny and accountability for healthcare providers.

In a Memorandum of Understanding, the UKBA and the Department of Health agreed that healthcare commissioning for IRCs in England and Wales should move incrementally to the NHS. Resulting from this Memorandum was the decision that the Department of Health will assume policy responsibility for IRC healthcare commissioning from the UKBA as from 1st April 2013. Subject to legislation, these responsibilities will then be transferred to the NHS Commissioning Board by April 2014.

Commentary

Recently, there has been criticism of the provision of healthcare services to detainees in immigration detention. This is partly because of cases that have come to light in which individuals have suffered alarming levels of maltreatment by medical and general immigration detention staff.

In 2011 two men died from heart attacks at Colnbrook immigration centre near Heathrow and a third man committed suicide at Campsfield House detention centre (the sixth self-inflicted death in an IRC since 2004). All three incidents occurred within the space of two months. April 2012 saw the fourth case in...
two years in which a detainee with mental health problems experienced inhuman and degrading treatment whilst in immigration detention. Furthermore, in February 2013, an 84-year old Canadian man died of a suspected heart attack at Harmondsworth IRC. According to The Guardian, his death brings the total number of deaths in UK immigration detention to 17, seven of which occurred in Harmondsworth IRC.

NGOs such as Medical Justice have documented gross failures in healthcare provision, including denial of medication, denial of access to hospital, and a failure to diagnose and treat serious medical illnesses such as tuberculosis. In the case of detainees suffering from HIV, Medical Justice found that there were:

- failures by detention staff to carry out adequate investigations and procedures when a detainee arrives in detention (e.g. failure to contact previous treating clinicians; obtain medical records; arrange appointments with HIV specialists; and ensure continuity of care);
- interruptions in antiretroviral therapy (e.g. failure to provide drugs; facilitate external appointments; and ensure that people were given medication en route to detention centres);
- clinical practices which were demeaning, degrading and which, in some cases, worsened the detainees’ condition (e.g. practices putting the detainees at risk of contracting infections; failure to investigate symptoms indicative of HIV infection; failure to respect confidentiality; and failure to carry out or pass on the results of tests determining resistance to particular medications).

In response to the decision in R(HA v SSHD (Nigeria)) v SSHD (see below), Mind’s legal unit, said that:

“Mind intervened in this case because HA’s experience is just one of many cases of shocking and systemic failings in the provision of mental healthcare to immigration detainees, who are some of the most vulnerable people in the UK.”

Moreover, the co-ordinator of Medical Justice, said that:

“Medical Justice volunteer doctors have assessed many detainees and documented the toxic effect of indefinite immigration detention on mental health. This, coupled with disturbingly inadequate healthcare in immigration removal centres, demonstrates that a policy review is urgent as the risk of death is real.”

In 2012, the ICIBI and HMIP highlighted unacceptable failures to provide adequate mental healthcare in the immigration detention estate. Their study found that there was little evidence of the effectiveness of Rule 35 procedures, with a torture survivor and a victim of trafficking being held in detention without knowledge of the exceptional reasons for which they were being detained. The report also found that, according to the sample, the Rule 35 reports are

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234 BMJ, ‘Deaths at UK immigration detention centres prompt concerns about inadequate healthcare’, (11 August 2011), http://www.bmj.com/content/343/bmj.d5172
“often perfunctory and contain no objective assessment of the illness condition or alleged torture. The replies are often cursory and dismissive and ... it is extremely rare for a Rule 35 report to lead to release.”

This concern was reiterated in the 2013 report on the UKBA issued by the House of Commons Home Affairs Committee. The report notes UKBA data on Rule 35 reports, which indicate that, of the 231 reports made to the Agency, only 13 resulted in the individual in question being released. According to evidence provided by Rob Whiteman, this was because both detainees and their legal team could refer them to the Agency under Rule 35. This, as the Committee notes, is contrary to published UKBA policy whereby “Rule 35 reports should be prepared and submitted by medical practitioners only”. In response to these findings, the Committee stated that:

“We are concerned at the enormous gap between the number of reports received and the number of individuals released...Further intransigence will continue to pose a risk to individuals, as mental health issues may not be properly identified.”

Provision of mental healthcare at Harmondsworth IRC:

As stated by the Home Affairs Committee in October 2012, the provision of healthcare and mental healthcare at Harmondsworth has been a major concern for several years. In 2011 the IMB published its annual report in which it highlighted two systemic issues with the provision of treatment for mentally ill detainees:

- There were 109 Rule 35 reports made to the UKBA concerning detainees at Harmondsworth in 2011 but only five resulted in the detainee being released.
- There was a lack of appropriate accommodation for detainees suffering from mental illness and a number of said detainees had been moved backwards and forwards between healthcare wards and segregated accommodation. The IMB found this to be major cause of distress for the detainees concerned.

The House of Commons concluded that the findings of the IMB report did not demonstrate a system which works in the majority of cases at Harmondsworth and recommended that the UKBA carry out an independent review of the application of Rule 35 in both Harmondsworth and its other IRCs across the country.

Case law

R(HA v SSHD (Nigeria)) v SSHD (see case no. 33 in Appendix 1: Case Table) concerned a Nigerian man with mental health problems who experienced inhuman and degrading treatment while in immigration detention. Whilst detained, HA was not given appropriate medical treatment and as a result descended into an acute mental health crisis that left him lying on the floor of his cell for hours on end, drinking from the toilet, avoiding other detainees and refusing food and medication for weeks at a time. In April 2012, the High


Court found that HA had been unlawfully detained. The Court also found that HA’s treatment was so bad that it breached Article 3 ECHR and violated his right to physical and mental integrity under Article 8 ECHR. The current SSHD (Theresa May) decided to pull out of the appeal in early 2013, a move which indicated – to certain NGOs – that the UKBA effectively accepts that its policy of detaining people with mental health problems in immigration detention led to a serious breach of HA’s human rights.

In R. (on the application of D) v SSHD (see case no. 35 in Appendix 1: Case Table) the Court had to consider the lawfulness of the SSHDs decision to detain D, who had a history of psychiatric illness. The Court found that there had been a breach of Chapter 55.10 of the EIG 2011 for the entirety of D’s detention. The failure of the IRC to provide treatment for his condition, organise psychiatric assessments, transfer him to a unit with better facilities, and generally ensure that his condition was suitably managed breached Articles 3 and 8 ECHR.

Detention Action cites three other examples which illustrate the level of healthcare in IRCs:

1. H, who is one metre high due to achondroplasia (restricted growth syndrome), was detained by UKBA and placed in a van for 9 hours to transfer him from Scotland to London. During the journey he complained of pain due to his legs dangling without support. This resulted in him needing spinal surgery and permanent residential care. Two years later he was re-detained in an IRC, the healthcare wing of which did not have an adapted shower, a hoist or a bed at a suitable height. He spent a month there, unable to have a shower and required to use a bed pan on the bed as a toilet. At least once, he was left in the soiled sheets for over 24 hours. Eventually he was transferred to hospital where two detention centre officers guarded his bed, even though he could not move. After a judicial review he was released into a residential care home.

2. In MD (Angola) & others, three detainees received inadequate care whilst in detention for lengthy periods (one for almost four years). Essential daily medication was not provided, appointments were routinely missed, medical records were not obtained, and complaints were not dealt with. The treating doctor of one man believes that medication missed whilst in detention has severely compromised his survival chances if he is removed to Angola.

3. Mr D was detained for almost three years until 2008, during which time he became ill with paranoid schizophrenia and proved impossible to remove. He was treated in the community with anti-psychotic medication. After committing a minor offence with a conditional discharge, he was re-detained in February 2011. He was not provided with any treatment for his mental health needs in the detention centre. An independent psychiatric report confirmed the diagnosis of paranoid schizophrenia. At the end of November 2011, Mr D was transferred to another centre where he was prescribed medication and seen once a week by a psychiatrist. The independent psychiatrist found in December 2011 that Mr D’s condition had worsened, he had lost mental capacity and he needed a transfer to a psychiatric hospital. This was not provided. In January 2012, Mr D started a dirty protest because “the spirit had told him to put shit on himself”. He was placed in isolation for 9 days. At the time the Detention Action report was written, Mr D was still in detention.

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Protection of Vulnerable People

Chapter 55.10 of the UKBA EIG 2011 sets out those groups that would normally be considered suitable for detention in only very exceptional circumstances. These categories include children, the elderly, people who are disabled, pregnant women, victims of trafficking or torture, and people who are mentally ill.

Children and families

Part 4, Section 55 of the BCIA 2009 imposes a duty on the SSHD to safeguard and promote the welfare of children in the UK. According to Chapter 55.9.3 of the Guidance, unaccompanied young children must not be detained other than in exceptional circumstances, for example to establish their identity and pending suitable alternative arrangements being made for their care and safety. It also states that, normally, children should only be detained for the shortest possible time. In CCD cases, detention of an FNO under 18 may be authorised in exceptional circumstances where it can be shown that they pose a serious risk to the public and a decision to deport or remove has been taken. This is subject to the advice of the Family Returns Panel and Ministerial authorisation. If there is a dispute as to the actual age of a detainee claiming to be under 18, UKBA staff must refer to Chapter 55.9.3.1 of the UKBA EIG and Detention Services Order 14/2012 for guidance. Chapter 55.9.4 of the Guidance provides the policy for cases where families are placed in immigration detention.

The UKBA has implemented pilot projects in recent years to encourage immigrant families to return to their country of origin and, in doing so, reduce the frequency and length of child detention. For example, in November 2007 there was the ‘Millbank alternative to detention for families with children’, which ended after only ten months. A few years later the UKBA collaborated with local partners in Glasgow to implement the ‘Family Return Project’ which was equally unsuccessful.

In 2010 the coalition government made a commitment to end the immigration detention of children. Prior to this, children were being detained throughout the UK, but mostly at Yarl’s Wood IRC. Despite this, the government opened the Cedars pre-departure family detention facility in 2011, described by the UKBA as ‘Pre-departure-Accommodation’. This is a secure facility, with space for nine families, where they can be held under IA 1971 powers for up to a week. It has self-contained apartments in which there is a kitchen and lounge area, family bathroom and up to three bedrooms. It has areas where families and individuals can be held in isolation. Facilities within the accommodation centre include childrens’ play areas and exercise facilities, access to the internet, 24 hour healthcare - including daily access to a GP - and a prayer room.

It is thought that the opening of Cedars has been the cause of a rise in the number of children being registered as entering detention since the second quarter of 2011. Some campaigners argue that Cedars is a detention centre in all but name, pointing out, for example, that the accommodation is surrounded by boundary fences, and that family members cannot enter and leave the accommodation or receive visitors at will.

In spring 2012 HMIP conducted his first inspection of Cedars and identified concerns regarding the inconsistency in the application of referral criteria, the behaviour of arrest teams and the use of force to effect removal. Overall, however, the report found that the conditions and treatment given to families in Cedars was a considerable improvement. It was found that the conditions and length of detention at Cedars...
could not be said to cause distress to children and parents; that families received “exceptional” care from staff and that they felt welcomed and safe in the centre; that staff received suitable training on the safeguarding and management of children; and that many practices applied at Cedars should be replicated in other detention centres. This is backed up by the annual report of the Independent Family Returns Panel for 2011-12, which praised Cedars for providing an environment which helped families to prepare for their return.

Families and unaccompanied children can also still be held in STHFs at UK ports of entry pending their admission to or immediate removal from the UK. The Government said that it expected these powers to be used sparingly (for a “few dozen families each year, usually for less than 24 hours”). However figures suggest that, in practice, a far greater number of children are being held in these facilities. Chapter 55.9.4 of the UKBA EIG provides that families can be held in Tinsley House STHF instead of Cedars in certain circumstances, namely: where a family presents risks which make the use of Cedars inappropriate; where CCD is returning a mother and baby from a prison mother and baby unit during the ERS period but it is not practicable or desirable, owing to time or distance constraints, to transfer mother and infant direct from prison to the airport for removal; and where after reuniting a single parent FNO with their child at the airport for removal, the removal does not proceed.

HMIP inspected the STHF at Heathrow Airport in March 2011 and found that in the space of three months, 174 children had been detained, including 16 unaccompanied minors. The average length of detention was between eight and 10 hours. He also observed a child being detained with his father without the necessary authority (the child was signed in as a ‘visitor’ and, consequently, his detention went unrecorded).

Some campaigners argue that the Government’s commitment to banning child immigration detention is undermined by the secure nature of Cedars and the use of STHFs. “On the other hand, the Government says that these ‘last resort’ measures are necessary for maintaining robust immigration controls, and are preferable to alternatives such as separating children from their parents.”

N.B., For more information on the treatment of unaccompanied migrant children in the UK immigration system, see the report published by the JCHR in May 2013.

The mentally ill

It has been acknowledged by the National Clinical Director for Health and Criminal Justice for the Department of Health that custody causes mental distress and acts to exacerbate existing mental health problems, heighten vulnerability and increase the risk of self-harm and suicide. Studies in the criminal justice sector show that there is a greater risk of suicide among certain ‘high risk’ groups in custody, including young adults, males, those who have suffered a previous traumatic experience, and those who do not have family or social support. The UK’s immigration detention population includes high proportions of each of the aforementioned categories of people. The damaging effect of custody in immigration detention

on the mental health of both adults and children is well documented.\textsuperscript{270} One study found even higher levels of suicide and self-harm amongst immigration detainees than amongst the prison population.\textsuperscript{271}

**Chapter 55.10 of the UKBA EIG 2011** places the mentally ill in the category of people who should only be detained in exceptional circumstances. However, in recent years, qualifiers have been introduced to this provision which have had the effect of significantly widening the SSHD’s power to detain the mentally ill. For example, a qualifier was inserted in 2010 which states that detention would be suitable “unless [the condition] cannot be satisfactorily managed in detention”. Another caveat which was introduced was that a person must be “suffering from” mental illness, and would need to have a “serious” mental illness before they could be considered as unsuitable for detention. When this terminology was challenged by ILPA, the UKBA noted that the qualifier ‘satisfactorily managed’

> “is not defined, nor do we consider it necessary to do so. The phrase is intended to cover the broad basis on which a person’s healthcare, mental health or physical needs might need to be met if they were to be detained, with the expectation being that where these needs cannot be met the persons concerned would not normally be suitable for detention.”\textsuperscript{272}

Various cases have come to the fore demonstrating that the UKBA policy on detention of the mentally ill is not necessarily effective.

The Home Affairs committee refers to the cases S, BA, HA and D (for discussion of the latter two cases, see above).\textsuperscript{273} The Committee voiced its concern regarding the treatment of the individuals in question and stated its concern that the cases outlined “may not be isolated incidents but may reflect more systemic failures in relation to the treatment of mentally ill immigration detainees.”\textsuperscript{274}

In S, R (on the application of) v SSHD, the High Court ruled for the first time that the detention of a man with severe mental illness had amounted to inhuman or degrading treatment in breach of Article 3 ECHR. S had a history of serious ill treatment and abuse prior to arriving in the UK which had been accepted by a number of medical experts. After serving a prison sentence, he was sectioned under mental health legislation until April 2010, when he was transferred to immigration detention, despite evidence that detention caused deterioration in his psychotic state. By continuing S’s detention, the UKBA was found to have breached the negative and positive obligations under Article 3 ECHR.\textsuperscript{275} (See case no. 28 in Appendix 1: Case Table).

In BA, R (on the application of) v SSHD, a Nigerian with a criminal conviction for smuggling was detained between June and October 2011. He had been assessed by the Probation Service as posing a low risk of reoffending. He was twice sectioned under the MHA during his prison sentence. By July 2011, the UKBA had been informed by the Healthcare Manager at Harmondsworth that he was not fit to be detained as he could die imminently due to his refusal of fluids. After a spell in hospital, he was transferred back to detention, in breach of a court order. He was not released until a further order was issued. In finding a breach of Article 3 ECHR, the High Court described “callous indifference” on the part of the UKBA, alongside


“a deplorable failure ... to recognise the nature and extent of BA’s illness.”276 (See case no. 30 in Appendix 1: Case Table).

Other cases cited by Detention Action in its 2012 submission to the UN include that of Mr E who had been detained for over three years despite suffering from severe mental health problems. It is believed that Mr E was sex-trafficked to Europe at a young age. His nationality is unknown, and there has never been any progress in documenting him for removal. From the very start of his detention he made frequent suicide attempts and his mental health has deteriorated further. He has received multiple diagnoses whilst in detention including bi-polar and schizoaffective disorder. The High Court made an interim ruling in January 2012 that he should be released to a psychiatric intensive care unit as soon as possible.277

Detention Action also refers to the case of KM, a Zimbabwean male suffering from schizophrenia who has now been detained in an IRC for over five years. An independent psychiatrist has found that KM needs treatment for schizophrenia, including anti-psychotic treatment, CBT and family interventions, none of which are being met in detention. The expert further advised that detention is detrimental to his mental health because he is not receiving adequate treatment.278

Other

Torture victims represent another category of persons who should only be detained under exceptional circumstances (provided there is independent evidence of torture). It is estimated that between five and 30% of asylum seekers have suffered torture.279 Whilst some of these will bear scars of the abuse they underwent, others who may have been raped or electrocuted, for example, will rarely bear physical signs.280

There is some evidence to suggest that the UKBA is not following its stated policy. In September 2012, the Court held in R (on the application of EH) v SSHD (see below) that the SSHD had unlawfully detained a survivor of the Rwandan genocide for a three month period in 2010 and ordered the SSHD to pay damages of £35,000.281 Despite the evidence of torture always being on EH’s body, none of the medical staff employed by the UKBA’s contractors produced evidence to satisfy the SSHD that EH was a victim of torture for the purpose of her policy.282

Furthermore, in a report published in May 2012, Medical Justice claimed that Rule 35 of the DCRs, despite being presented as a safeguard, “is trumped by wider political and economic goals, thus making it little more than a fig leaf.”283 The report exposes start to end process failure, including at the initial healthcare screening on arrival at the IRC, in the Rule 34 assessment, in the Rule 35 medical reports, and in the reviews of detention by responsible UKBA case owners.284

“Furthermore, healthcare teams in detention centres frequently fail to: conduct a mental and physical examination of patients arriving into the IRCs; identify torture victims; identify signs of torture and provide relevant clinical information to UKBA; carry out sexual health tests for rape

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victims; screen for post traumatic stress disorder (PTSD); provide adequate care and/or make appropriate referrals.\textsuperscript{285}

These concerns were reiterated in the Annual EHRC report for 2012 in which it raised concerns regarding the routing of torture victims into the DFT process:

“[T]orture survivors may enter the system because the information needed to assess suitability for fast track is usually only available at the asylum interview which takes place once the person is in detention. Prior to this, asylum seekers undergo an initial screening process to assess whether they are suitable for the fast track process. At this screening, asylum seekers are not initially asked whether they have been tortured, but whether they have any medical conditions or disabilities, which torture survivors may not equate with their experience. Torture survivors are unlikely to realise that they will need to produce ‘independent evidence of torture’ at the screening interview to avoid being routed into the fast track process, or in order to establish their protection claim.”\textsuperscript{286}

More recently, in its concluding observations on the UK, UNCAT expressed concern over the detention of torture survivors, people with mental health conditions, children, and victims of trafficking, especially on the DFT, whilst their asylum applications were being processed.\textsuperscript{287} In response, it recommended that the UK seeks to ensure that detention is a measure of last resort, to introduce a maximum duration of detention and

\textit{[to] take necessary measures to ensure that vulnerable people and torture survivors are not routed into the Detained Fast Track System, including by: i) reviewing the screening process ... ii) lowering the evidential threshold for torture survivors; iii) conducting an immediate independent review of the application of Rule 35 of the Detention Centre Rules ... and iv) amending the 2010 UK Border Agency Enforcement Instructions and Guidance, which allows for the detention of people with mental illness unless their mental illness is so serious it cannot be managed in detention.} \textsuperscript{288}

Lastly in relation to torture survivors, in May 2013, a test case before the High Court resulted in the Home Office being ordered to pay compensation to four torture survivors who were unlawfully detained in UK IRCs. It is thought that the results from this test case will lead to a further 100 torture victims claiming compensation for unlawful detention.\textsuperscript{289}

Another category of \textbf{Chapter 55.10 is victims of trafficking}. Research by the Poppy Project found that 21% of their trafficked clients had been detained in IRCs or prisons and that, despite exhibiting symptoms of PTSD, only 15% of these were given medication in detention.\textsuperscript{290} Moreover, the EHRC found evidence that suggested that some trafficked children and young people are incorrectly assessed as adults and, consequently, are placed in immigration detention.\textsuperscript{291}

\textbf{Pregnant women} in immigration detention have also been the subject of some discussion recently. \textbf{Chapter 55.9.1 of the Guidance} states that:

\textsuperscript{289} For more see Alan Travis, ‘Torture Victims win test case over detention in UK immigration centres’, The Guardian, (21 May 2013), http://www.theguardian.com/uk/2013/may/21/torture-victims-win-case-uk-detention
“Pregnant women should not normally be detained. The exceptions to this general rule are where removal is imminent and medical advice does not suggest confinement before the due removal date, or, for pregnant women of less than 24 weeks gestation, at Yarl’s Wood as part of a fast-track asylum process.”

This policy is likely to be based on the potential impact that incarceration can have on pregnancy. Research carried out on pregnant women in prison found that

“The experience of being pregnant in a custodial setting induces fear and stress. Being pregnant in prison has been found to have negative implications for a woman’s reaction to the discovery of her pregnancy, her diet, her support network, antenatal care, exercise, birth preparation and the woman’s knowledge about her pregnancy. Pregnant women in custody suffer feelings of isolation, insecurity and disempowerment. Antenatal care is compromised by the necessity of negotiating access to midwives and doctors with gatekeepers such as prison officers and nurses.”

However, in 2013, the UKBA rejected a call by prison inspectors to stop using force on pregnant women and children when attempting to remove them from the UK. This was in response to the recommendations made by HMIP in his report on Cedars. For more on the treatment of pregnant asylum seekers and women generally in the UK immigration detention estate see the reports by Asylum Aid and Maternity Action and the Refugee Council.

Lastly, one other vulnerable category not included in Chapter 55.10 of the EIG 2011, but which also requires special treatment is transsexuals. As of 30 July 2012, the UKBA has implemented Detention Services Order 11/2012 which provides for the care and management of transsexual detainees.

Case law

Other cases not cited above include:

- **HK (Turkey) v SSHD**, in which the Court held that Rule 34 of the DCRs was breached since HK was denied a medical examination within 24 hours of arrival and that the completion of allegation of torture forms did not meet the requirements of Rule 35(3) of the DCRs. (See case no. 11 in Appendix 1: Case Table).

- **R. (on the application of E) v SSHD**, in which the decision to detain a family (one member of which was mentally ill) was unlawful and a breach of Article 5 ECHR as it was not in accordance with the SSHD’s own policy. (See case no. 12 in Appendix 1: Case Table).

- In **S, C (by her litigation friend S), D (by his litigation friend S) v SSHD**, the decision to detain a woman and her two daughters was unlawful and resulted in a breach of Article 8 ECHR. This was because the SSHD had not applied his own stated policy on the detention of children with sufficient rigour and that the rickets and anaemia developed by one of the children was both foreseeable and avoidable. (See case no. 14 in Appendix 1: Case Table).

- In **R. (on the application of Moussaoui) v SSHD** the Court discussed the threshold of what constituted a mental illness of ‘sufficient seriousness’. (See case no. 31 in Appendix 1: Case Table).

- In **AAM (A Child) v SSHD** the Court found that the failure to comply with the Merton standards rendered the age assessment so unfair as to be unlawful. As a consequence M’s detention breached Article 5(1) ECHR and was unlawful under section 6(1) HRA 1998. (See case no. 36 in Appendix 1: Case Table).

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• In *R. (on the application of EH) v SSHD* the fact that there was no evidence to suggest that E’s mental illness was taken into account when his detention was reviewed led to the inference that the SSHD had failed to have any regard to her policy on the mentally ill. E had not been subjected to inhuman or degrading treatment or punishment since a degree of suffering was an inevitable consequence of detention. The question was whether any additional level of suffering by a mentally ill detainee amounted to inhuman or degrading treatment. (See case no. 37 in Appendix 1: Case Table).
• In the recent case *R. (on the application of Das) v SSHD* the failure by the SSHD to review a medical report in her possession, prior to detaining a person in immigration detention, was contrary to published policy and rendered the whole period of detention unlawful. (See case no. 38 in Appendix 1: Case Table).

**Access to Legal Aid and Advice**

“Judicial safeguards are meaningful and effective only if appropriate legal advice and information are available to detainees.”

Two groups of immigration detainees face particular barriers to accessing high quality legal advice:

• For people held under immigration powers in prisons it is not possible to send and receive faxes, use mobile phones or access the internet in the same way as immigration detainees in IRCs. This is despite the fact that some of the most complex and long-term immigration cases are in the prison population.
• Detainees who have been transferred around a series of IRCs and prisons within the detention estate (especially across the Scottish/English border) often suffer because links with lawyers and support groups can be severed.

In its findings of a survey of immigrant detainees and their experiences accessing legal advice, BiD highlighted the following:

• 14% of the detainees surveyed had NEVER had legal representation whilst in detention;
• family and friends outside detention played a large part in helping to find immigration lawyers for detainees; and
• severe delays in accessing legal advice in centres was a major concern: “47% of detainees who sought legal aid advice were waiting over a week for an appointment, 20% waited over 2 weeks, and 27% waited over 3 weeks or 3 weeks to date to get an initial appointment”.

More restrictive LSC funding rules and the closure of the two national organisations that provided the bulk of immigration legal representation (Refugee and Migrant Justice and the Immigration Advisory Service), means that there are now fewer providers able or willing to take on detainees’ cases. The LSC funds a detention duty advice scheme in all IRCs and although this provides detainees with access to advice, it is limited to 30 minutes (including interpreting time) with no guarantee of ongoing representation.

Furthermore, from April 2013, deportation and general immigration matters will be taken out of the scope of legal aid under the provisions of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.
The implications for those applicants without legal representation have been commented on by the former President of the AIT who, in evidence to the JCHR said that

“more people were appearing unrepresented than before legal aid cuts, and the quality of legal representation in general had gone down”.

In relation to the access to proper legal advice and representation for those detained on the DFT process, there are significant hurdles to overcome. Although comprehensive documents (and translations) with an explanation of the process and the detainee’s rights are available, not all detainees receive them. Moreover, the UKBA’s onsite DFT office is useful for some asylum seekers in giving procedural information, but no case owners are based there and not all detainees are aware of its existence.

Asylum seekers are not normally able to access legal advice before a decision is made to put them into the DFT. The UNHCR was concerned that asylum seekers who are representing themselves may not be aware of the option of requesting an extension. At appeal, the majority of asylum seekers on the DFT are unrepresented, in most cases following decisions by their legal aid duty solicitors that their cases have insufficient merit. By contrast, the HO is always represented. ILPA has argued that this imbalance is “on the borderline of human rights compliant”.

The limited time available restricts the legal advice which can be given. Although applications can be made to take cases out of the DFT, legal representatives have noted that there can be insufficient time to attempt this because they are “battling even to present [the] case”. The Refugee Legal Centre argued that

“legal representatives are often unable to take full instructions in the time available and feel that the applicant is placed under too great pressure in having to face an asylum interview the same day as he may be meeting his legal representative for the first time”.

And, since it is very difficult for many of the asylum seekers to trust someone (such as a lawyer or an IO) that they have met for only a brief period of time, the JCHR considered it to be “self-evident” that an asylum seeker who has had traumatic experiences will find it difficult to fully disclose what has happened to them.
To address the concerns surrounding access to legal advice and representation, the UKBA launched “The Early Legal Advice Project” (ELAP) in November 2010.\(^{312}\) The project aimed to

“test whether the provision of legal advice to asylum seekers at an earlier stage in the process gets more cases right first time. It also aims to identify those who are in need of protection earlier, manage public funds effectively, and increase confidence in the asylum system.”\(^{313}\)

An asylum-seeker on ELAP would see their legal representative two or three days after the asylum application is lodged. The substantive interview would then take place after 14 days, during which time the asylum-seeker is likely to meet their legal representative at least three times. Legal advisors discussed the claim with the decision-maker before an initial decision is taken, to ensure that all material facts and evidence are available.\(^{314}\) The project closed to new asylum applicants on the 31\(^{st}\) December 2012 and ended as a whole in March 2013. The UKBA is now evaluating the results of the project.\(^{315}\)

**Restrictions on Movement**

In his 2010-11 reports, HMIP found that most detainees had reasonable freedom of movement.\(^{316}\) However, he did note that this varied between centres: detainees could move around for 19.5 hours a day at one centre but less than 10 hours at another.\(^{317}\) Overall, detainees in IRCs had good access to the outside world through the ability to access the internet and to retain their mobile telephones.\(^{318}\)

By contrast, in Colnbrook detention centre it is reported that detainees are locked in their rooms both at night and during the day for roll-calls. Moreover, there is allegedly no freedom of movement around the centre and detainees are locked on the wing unless they have booked to use the facilities.\(^{319}\)

There have been other reported occurrences in other IRCs where detainees have been locked in their room for long periods of time. For example, in an unannounced visit to Dover IRC in April 2012, HMIP inspectors found that detainees did not receive 12 hours freedom of movement and were locked up too early and for too long.\(^{320}\) As a consequence, the HMIP repeated its previous recommendation to the IRC, namely that

“the centre should increase detainees’ freedom of movement around the centre to at least 12 hours a day, reduce the length of time that detainees are locked in their rooms each day and establish a later evening lock-up time.”\(^{321}\)

A further concern is the remote location of some IRCs and prisons in which FNPs are detained. This can make access to the detainees by support groups or visitors financially and logistically difficult. This isolation arguably worsened after July 2009, when the British government introduced a new policy for managing FNPs entitled ‘hubs and spokes’. This policy concentrations FNPs in and around selected prisons (some of which are

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\(^{316}\) I have been unable to locate any policy or legislation which stipulates the extent and time detainees can move freely around the detention centre.


Conclusion

It is worth recognising that there is a lot that is good about UK immigration detention practices. Generally, the relevant legislation and policy is both precise and comprehensive, and its implementation in the majority of cases is done expeditiously and with reasonable care, skill and understanding. It is also worth noting that some of the cases depicted above are extreme examples of gross miscalculations of judgment, law and policy which, whilst remaining unacceptable, are fortunately relatively infrequent.

These negative and positive elements of UK immigration detention must not, however, overshadow the work that remains to be done. Rather, in order to aspire and adhere to the rule law, constant review, development and critical evaluation is required at all levels and in all areas. In particular, much remains to be done to fortify the protection of those people for whom the immigration detention experience is especially distressing and for whom current rules and practices erode basic human rights. More specifically, there are certain issues which, in the view of the author, merit further deliberation.

Firstly, more needs to be done to ensure that detention remains a measure of last resort and, when it is necessary, that individuals are detained for as short a time as possible and in facilities which are appropriate to, and address, their physical and psychological needs. This is especially important given the absence of any limit on the duration of detention. In the light of this, greater attention should also be given to further developing fair and effective alternatives.

Secondly, concerns remain over the detention of children in short-term holding facilities and pre-departure accommodation. Although neither establishment falls within the scope of government policy, it is nonetheless important to ensure, through frequent review, that immigration services do not circumvent the provisions designed to protect migrant and, in particular, unaccompanied children by using such facilities to detain them.

Thirdly, further clarification is required for the policy under which specific groups of vulnerable individuals are detained, in particular in relation to the interpretation and application of Rule 35 of the DCRs on torture survivors and Chapter 55.10 of the UKBA EIG on the mentally ill. This is especially important given the harmful impact that detention can have on the psychological well-being of the individual concerned.

Fourthly, greater efforts need to be made to ensure that those subject to immigration detention are able to access, understand and effectively enforce their rights before an independent and impartial adjudicator. This includes access to interpreters, legal advice and, where appropriate, representation. On this point, the author notes that there is no, one comprehensive overview of the rights and rules concerning immigration detention in the UK which is accessible and understandable to the lay person. In the interests of the rule of law, and especially in view of the recent changes to the provision of legal aid, such a comprehensive yet easily accessible guide would be extremely valuable.

Many elements of UK immigration detention are designed to set high standards for the protection and security of both the immigrant and society as a whole. Nonetheless, it is essential that the monitoring of UK immigration law, policy and practice continues, thus allowing the constant revision and development of a system which is fair, non-arbitrary and efficient for all.
## Appendix 1: Case Table

N.B. Contents are based on the full texts of the cases and case summaries as provided by Westlaw.co.uk.

<table>
<thead>
<tr>
<th>No.</th>
<th>Date</th>
<th>Name and Citation</th>
<th>Issue</th>
<th>Facts</th>
<th>Issues and Arguments</th>
<th>Judgment</th>
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<tbody>
<tr>
<td>1.</td>
<td>13/12/1983</td>
<td>R v. Governor Durham Prison, Ex parte, Hardial Singh, [1984] 1 WLR 704</td>
<td>Reasons for detention</td>
<td>Singh, an Indian national, was in the UK on indefinite leave. After having committed various criminal offences, he was sentenced to 2 years imprisonment. On completion of his term of imprisonment, he was issued with a deportation notice, after which he absconded and lost his remission. He was later placed in pre-deportation detention.</td>
<td>S applied for a writ of habeas corpus for his detention.</td>
<td>The Court found that the SSHD may only detain a person prior to deportation for a reasonably necessary period and he must act with reasonable expedition. If that was impossible, he should not exercise his power. Reasons for detention: The SSHD can only authorise detention if the individual is being detained pending his removal. It cannot be used for any other purpose. Authority to detain: Although the power which is given to the SSHD in paragraph 2 to detain individuals is not subject to any express limitation of time, it is subject to limitations. Bail: It is the job of the HO representative to justify continued detention and to set out the reasons why bail should not be granted. Access to justice and right of appeal: Detention was unlawful if the abovementioned conditions were not met.</td>
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<td>2.</td>
<td>17/01/1994</td>
<td>Re Wasfi Suleman Mahmud [1995] Imm AR 311</td>
<td>Authority to detain</td>
<td>A had been recognised as a refugee by the German authorities. After entering the UK, A was convicted of illegally importing a controlled drug and sentenced to four years' imprisonment with a recommendation for deportation. A was awarded parole but was later detained pursuant to the SSHD's power. The German authorities declined to accept him.</td>
<td>A applied for a writ of habeas corpus.</td>
<td>Held, directing a writ of habeas corpus to be issued. Authority to detain: While, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards. The power under the Immigration Act 1971 Sch.3 para 2(3) was not without limitations. The first was that the power could only be exercised pending removal, on the words of the statute. The second arose from the Singh judgment, namely that the power of detention is limited to an amount of time reasonably necessary for the purpose of removal.</td>
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<td>3.</td>
<td>27/03/1996</td>
<td>Tan Te Lam v Tai A Chau Detention</td>
<td>Authority to detain</td>
<td>L and three others claimed in habeas corpus proceedings that their detention in Hong Kong was unreasonable and unlawful. They contended that they</td>
<td>L and others argued that the length of their detention was unreasonable and unlawful.</td>
<td>Held, allowing the appeal. Authority to detain: Reiterating the Singh principles - First, the</td>
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<td>4</td>
<td>15/11/1996</td>
<td>Chahal v UK</td>
<td>What is a fair hearing</td>
<td>C, an Indian citizen, was given indefinite leave to remain in the UK. In 1990 the SSHD decided to deport C in the interests of national security and the need to combat terrorism, and he had been held in custody since then. C's application for political asylum was refused and he was held in custody pending deportation proceedings. All three applicants relied upon the 1951 Refugee Convention to argue that, although not formally incorporated into domestic law, ratification of the Convention created a legitimate expectation that its provisions would be followed. The ECtHR Court found that Chahal's rights under Articles 5(4) and 13 ECHR had been violated because he had not been given the opportunity to challenge the closed material used against him.</td>
<td>Duration of detention: The detention was deemed to be lawful under Article 5(1)(f) since the deportation proceedings were handled with due diligence. (See para 123). Bail: It was emphasised that the burden of proof is on the Home Office to show the legality of the detention. (See para 29).</td>
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<td>5</td>
<td>29/07/1999</td>
<td>R. v Uxbridge</td>
<td>Bail</td>
<td>A, S and K, three asylum seekers, applied for judicial review of decisions by the CPS to prosecute them for possession of false documents on arrival in the UK. The principle of Article 31 is often ignored by the Immigration Service and by adjudicators who will often detain or refuse bail on the grounds that someone entered illegally, even if the person presented herself to the authorities as soon as possible. Per Simon Brown LJ at page 498: “If Mr Adimi's intention was to claim asylum within a short time of his arrival even had he successfully secured entry on his false documents, then I would not think it right to regard him as having breached his condition” (i.e. he is entitled to claim protection under Article 31).</td>
<td>Held, allowing the applications and directing that C's prosecution be discontinued and that S and K should not have been prosecuted. Bail: The principle of Article 31 is often ignored by the Immigration Service and by adjudicators who will often detain or refuse bail on the grounds that someone entered illegally, even if the person presented herself to the authorities as soon as possible. Bail: The adjudicator's decision to detain M was not irrational in the absence of satisfactory restraints and was made in accordance with the appropriate principles.</td>
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<td>6</td>
<td>21/12/1999</td>
<td>R. v SSHD Ex p. Mendje</td>
<td>Bail</td>
<td>M had entered the UK on a false passport and was subsequently apprehended and detained whilst trying to embark to Canada. The adjudicator's decision to detain M was not irrational in the absence of satisfactory restraints and was made in accordance with the appropriate principles.</td>
<td>Held, refusing the application. Bail: The adjudicator's decision to detain M was not irrational in the absence of satisfactory restraints and was made in accordance with the appropriate principles.</td>
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<td>7.</td>
<td>13/06/2000</td>
<td>R. v SSHD Ex p. Saleem [2001] 1 W.L.R. 443</td>
<td>Access to justice and right of appeal</td>
<td>S, an asylum seeker, was informed that her appeal against a decision of the special adjudicator would not be considered on the basis that under r.42(1)(a) of the Asylum Appeals (Procedure) Rules 1996 she was deemed to have received the decision on the second day after it was posted and had failed to appeal within the five-day rule.</td>
<td>[2] the adjudicator had unlawfully fettered his discretion by requiring two substantial sureties and had wrongly considered his marital status and lack of contacts in the UK as relevant factors; [3] M’s illegal mode of entry should have been disregarded; and [4] the decision was irrational and in conflict with HO policy given the presumption in favour of bail.</td>
<td>The appeal was dismissed.</td>
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<td>8.</td>
<td>28/06/2002</td>
<td>R. (on the application of I) v SSHD [2002] EWCA Civ 888</td>
<td>Reasons for detention Bail Access to justice and right of appeal</td>
<td>I, an Afghani asylum seeker, had been convicted of indecent assault and sentenced to three years imprisonment with a recommendation for deportation. When placed in pre-deportation detention, I submitted that removal within a reasonable time was impossible.</td>
<td>I appealed against the refusal of his habeas corpus and judicial review applications.</td>
<td>Held, allowing the appeal.</td>
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**Access to justice and right of appeal:** The right to appeal against a decision of the special adjudicator under s.20(1) of the IA 1971 was a fundamental right similar to the right to unhindered access to the courts. Any rule which provided that an asylum seeker was deemed to have received a notice of a decision after the second day or posting, irrespective of when or whether it was actually received, went beyond the scope of the power to regulate the right of appeal provided under s.22 of the Act. It followed that such a rule should have no effect. In practice, r.42(1)(a) had the effect of destroying the right of appeal where an asylum seeker, through no fault of their own, failed to receive notice of a decision.

**Reasons for detention:** The risk of re-offending was considered relevant to the period for which a person could reasonably be detained. “If, say, one could predict with a high degree of certainty that, upon release, the detainee would commit murder or mayhem, that to my mind would justify allowing the Secretary of State a substantially longer period of time within which to arrange the detainee’s removal abroad.” (See para. 29).

The refusal to go voluntarily was considered to be of some limited relevance but not central, particularly as it had only just become an option. (See para. 32).

**Bail:** Repeated the Singh principles and reiterated that the burden of proof lies with the SSHD. (See para. 37).

**Access to justice and right of appeal:** “What Chahal illustrates is that a detained asylum seeker cannot invoke the delay necessarily occasioned by his own asylum claim (and any subsequent appeal(s)).
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<td>9.</td>
<td>12/11/2004</td>
<td>R (Refugee Legal Centre) v SSHD [2004] EWHC 684 (Admin)</td>
<td>Detained Fast Track</td>
<td>The case concerned the DFT process.</td>
<td>The RLC appealed against a decision that the DFT process of asylum adjudication was not inherently unfair or unlawful.</td>
<td>Held, dismissing the appeal.</td>
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<td>RLC contended that the process was inherently unfair because it compressed the sole interview with a legal representative and the asylum interview into a single day, with no opportunity to make supplementary representations before a written decision was given the following day.</td>
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<td>The SSHD argued that while it was impossible to guarantee against error in the initial decision making process, the built in availability of appeal was a safeguard for this.</td>
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<td>10.</td>
<td>16/06/2005</td>
<td>R v. SSHD ex parte Khadir (FC), [2005] UKHL 39</td>
<td>Reasons for Detention, Alternatives to detention</td>
<td>K arrived in the UK and sought asylum which he was refused. K was issued with removal directions. K’s appeal against the refusal of asylum was dismissed, as was his application for exceptional leave to enter. K successfully challenged the decision to refuse him exceptional leave to enter. The SSHD appealed against that decision, but before the hearing took place, the NIAA 2002 came into force. The Court of Appeal found that the judge had been right to decide that the SSHD did not have the power to continue K’s temporary admission, however s.67 of the 2002 Act operated retrospectively and deemed there to be such power, therefore K’s temporary admission could be continued.</td>
<td>K appealed against decision [2003] EWCA Civ 475 that the SSHD had the power to authorise the continuation of his temporary admission to the UK pursuant to the IA 1971 Sch. 2 Para 21. The issue was whether K could be temporarily admitted under Sch.2 para.21 of the 1971 Act which, in turn, depended upon whether he was a person liable to be detained under Sch.2 para.16 of the 1971 Act. K submitted that the power to detain under Sch.2 para.16 of the 1971 Act existed only when removal was pending.</td>
<td>Held, dismissing the appeal.</td>
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<td>11.</td>
<td>22/05/2006</td>
<td>HK (Turkey) v</td>
<td>Vulnerable persons</td>
<td>HK, an Alevi Kurd and Turkish. HK applied for judicial review of their case.</td>
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<td>Held.</td>
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<td>20/12/2006</td>
<td>R. (on the application of E) v SSHD [2006] EWHC 3208 (Admin)</td>
<td>Vulnerable persons Access to legal advice/representation</td>
<td>Concerned a family, composed of a husband, a wife and two children of majority (one of whom (S) had a mental condition and a degree of mental incapacity). They arrived in the UK as visitors. S subsequently unsuccessfully claimed asylum on his own behalf and the father unsuccessfully claimed for himself, his wife and daughter. Their application for judicial review of the second claim was refused, whilst the judge hearing S’s claim ordered a reconsideration of his case on the basis of possible material errors of law and a real prospect of success. However, S was treated as having (like the rest of his family) exhausted his rights of appeal. They were detained and removed during the Easter weekend when their access to legal advice was restricted. Following their removal, the family went into hiding in the country of detention and claimed declarations that the SSHD had acted in breach of the DCR 2001 and contrary to the government’s policy relating to the handling of asylum cases. HK also claimed damages. HK contended that: (i) the decisions to transfer him to a detention centre was unlawful; (ii) the SSHD had failed to comply with the rules as no medical examination was carried out within 24 hours of arrival; (iii) a policy of the contracted firm working for the SSHD that stated that medical personnel should not express any opinion as to the possible causes of injuries on a detainee subverted the purpose of the rules; (iv) HK’s detention was in breach of the HRA 1998.</td>
<td>The claimant family sought judicial review of their detention and removal by the SSHD. The family members (excluding S) contended that their removal was unlawful and/or a violation of the HRA and that they should be awarded interim damages. They also submitted that the SSHD had discretion to remove them and that the decision in respect of S had been relevant and not taken into account. They further contended that the timing of their detention and removal and lack of access to legal advice was in breach of the HRA. The SSHD submitted that the decision in respect of S was not a relevant consideration because it could not have application to the rest of the family, whose claim had been determined.</td>
<td>Held, granting the application. Vulnerable persons: The decision to detain was not in accordance with the SSHD’s own stated policy, and was unlawful and in breach of Art.5. Access to legal advice/representation: The detention itself had been rendered unlawful by timing in a way that prevented legal advice being obtained where there had been absolutely nothing in the circumstances of the case requiring such an urgent procedure.</td>
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<td>13.</td>
<td>18/04/2007</td>
<td>R. (on the application of AM [Iraq]) v SSHD  [2007] EWHC 867 (QB)</td>
<td>Reasons for detention: There was no evidence that the SSHD had made an offer of voluntary repatriation and it could not be held against him that he had failed to ask for voluntary return.</td>
<td>The SSHD had conceded that S's detention and removal was unlawful and granted him £4000 for his detention.</td>
<td>Judgment accordingly.</td>
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<td>Reasons for detention: origin.</td>
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<td>Vulnerable persons: X, an Iraqi national, had arrived in the UK and unsuccessfully claimed asylum. He was subsequently granted exceptional leave to remain.</td>
<td>X was a prisoner serving a sentence for sexual assault and was subsequently convicted of sexual assault.</td>
<td>Alternatives to detention: Y was applied for permission for judicial review of a SSHD decision to keep him for an order that the SSHD release him on a restriction order.</td>
<td>Declaration granted in favour of claimant.</td>
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<td>Vulnerable persons: X was exercised on the SSHD's policy to be applied with rigour. (See para. 61)</td>
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<td>Vulnerable persons: The SSHD had a responsibility to ensure the welfare of detainees. On the evidence there had been no meaningful investigation of D's health whilst he was at the detention centre.</td>
<td>D's development of rickets and anaemia had been foreseeable and avoidable.</td>
<td>Alternatives to detention: Y was exercised on the SSHD's policy to be applied with rigour. (See para. 61)</td>
<td>Declaration granted in favour of claimant.</td>
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<td>Vulnerable persons: Y was a Somali national, had been granted exceptional leave to remain.</td>
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<td>14.</td>
<td>18/07/2007</td>
<td>S, C (by her litigation friend S), D (by his litigation friend S) v SSHD  [2007] EWHC 1654 (Admin)</td>
<td>Reasons for detention: origin.</td>
<td>Y was exercised on the SSHD's policy to be applied with rigour. (See para. 61)</td>
<td>Alternatives to detention: Y was exercised on the SSHD's policy to be applied with rigour. (See para. 61)</td>
<td>Declaration granted in favour of claimant.</td>
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<td>Vulnerable persons: Y was a Somali national, had been granted exceptional leave to remain.</td>
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<td>Vulnerable persons: Y was a Somali national, had been granted exceptional leave to remain.</td>
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<td>16.</td>
<td>18/12/2007</td>
<td>R. (on the</td>
<td>Places of detention</td>
<td>T, a Jamaican national, had overstayed his leave and was convicted of several crimes. When released from prison he was placed in pre-deportation detention in prison. Due to his identification as an informer, he was threatened in the prison. He was moved to an IRC where he was also threatened and, when placed back in prison, was attacked by his cellmate. This continued.</td>
<td>T applied for judicial review of the SSHD's decision to accommodate him in prison rather than an IRC. T contended that: (i) the ECHR required the state to ensure that prison conditions did not cause unnecessary suffering; (ii) art.5(1) was breached by his detention in prison because there was not the necessary relationship between the grounds for his detention and the place and conditions of his detention; (iii) the terms of the DCRs suggested that the SSHD had unlawfully failed to provide protection for T in an IRC; (iv) it was contrary to the SSHD's policy to detain someone in prison for their own protection; (v) the restrictive regime in prison interfered with his art.8 rights.</td>
<td>Application refused.</td>
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<td>T) v SSHD</td>
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<td>[2007] EWCA Civ 804</td>
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<td>17.</td>
<td>29/01/2008</td>
<td>Saadi v UK</td>
<td>Detained Fast Track</td>
<td>S complained under art.5(1) and art.5(2) of the ECHR 1950 about his placement in administrative detention. S had fled from Iraq and had claimed asylum. He was placed in the DFT. As there was no room, S was granted temporary admission to</td>
<td>S applied for judicial review of his detention.</td>
<td>Complaint upheld in part.</td>
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<td>Application No. 13229/03</td>
<td>Duration of detention</td>
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<td>18.</td>
<td>20/02/2009</td>
<td>A v UK ECHR [2009] Application No. 3455/05 (the Belmarsh case)</td>
<td><strong>What is a fair hearing</strong></td>
<td>Stay at a hotel. S was later detained and transferred to the detention centre. After 76 hours of detention, S's lawyer was informed of the reason for detention. S was detained for seven days. He was eventually granted asylum.</td>
<td>C submitted that: (i) contrary to Article 3 ECHR, they had suffered an intense degree of anguish due to their indeterminate detention in high security conditions; (ii) contrary to Article 13 ECHR, they were denied an effective remedy; (iii) contrary to Article 5(1) ECHR, their detention was unlawful, the derogation was invalid, and the enactment of Pt. 4 of the 2001 Act and the power contained therein to detain foreign nationals indeterminately without charge was not &quot;strictly required by the exigencies of the situation&quot; under Article 15(1) ECHR; (iv) contrary to Article 5(4) ECHR, the proceedings to challenge the lawfulness of their detention involved closed material.</td>
<td>Held, allowing the appeal. What is a fair hearing: &quot;[I]n the circumstances of the present case, and in view of the dramatic impact of the lengthy—and what appeared at that time to be indefinite—deprivation of liberty on the applicants' fundamental rights, art. 5(4) must import substantially the same fair trial guarantees as art. 6(1) in its criminal aspect.&quot; (See para. 217).</td>
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<td>19.</td>
<td>15/05/2009</td>
<td>Shylibavan v SSHD [2009] EWHC 1067 (Admin)</td>
<td><strong>Alternatives to detention</strong></td>
<td>S applied for judicial review of the SSHD's decision to treat S's further representations as a fresh asylum claim and claimed that the SSHD had unlawfully detained him.</td>
<td>Application granted in part. Alternatives to detention: On the evidence the reason given by the IO for detention was not a reasonable conclusion. S had reported without fail for two years and had been living with a close relative in one place for eight years. There had been no compliance with the provisions of the SSHD's Operational Enforcement Manual. The decision to detain had been taken before S failed to report on the correct day and, accordingly, before the decision-maker had the opportunity to properly assess S's current situation, in particular the likelihood of him absconding. Under para 38.3.5 of the manual it was specifically provided that each case had to be considered on its individual merits. Further, the reasons advanced for detention</td>
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<td>20.</td>
<td>01/07/2009</td>
<td>R. (on the application of C) v SSHD [2009] EWHC 1989 (Admin)</td>
<td>Places of detention</td>
<td>C had been refused leave to enter the UK and had then tried to enter using false documents. He was arrested, later applying unsuccessfully for asylum. He absconded and over the subsequent years accumulated a number of criminal convictions, for which he received sentences of imprisonment. While in prison, he harmed himself on several occasions. The SSHD decided to deport him and, after his last term of imprisonment ended, he spent time in an IRC, before returning to jail under immigration detention pre-deportation powers.</td>
<td>C applied for judicial review of the SSHD's decision to detain him in immigration detention, and to do so in a prison rather than in an IRC. C submitted that: (i) his self-harming showed he was mentally ill and the SSHD had failed to consider government policy on the pre-deportation detention of the mentally ill; (ii) his 21 months of detention was not reasonable; (iii) he should not have been detained in a prison; (iv) his sharing a cell with a convicted prisoner breached art.5 ECHR.</td>
<td>Application granted in part. Places of detention: Government policy was that immigration detainees should only be held in prisons when they posed a serious risk to the stability of the IRC. It had to be largely a matter of judgement for those running the centre whether they could maintain order and control other detainees while the detainee in question remained there. If they could not, then it was perfectly justifiable, and in accordance with the policy, to direct that his detention should be at a prison. Given C's disruptive and non-compliant behaviour while in the IRC, the decision to move him to prison was not unlawful. (See para. 43). Government policy was that persons detained only under the IA 1971 had to be treated as unconvicted prisoners, and as such should not, in any circumstances, be required against their will to share a cell with a convicted prisoner. Therefore, C's art.5 rights had been breached as he had not given his express agreement. (See para. 49).</td>
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<td>21.</td>
<td>03/07/2009</td>
<td>R. (on the application of Adesote) v SSHD [2009] EWHC 1783 (Admin)</td>
<td>Access to justice and right of appeal</td>
<td>X entered the UK illegally. Over a five-year period he attempted to regularise his position. Both of X's brothers were ultimately granted leave to remain but X was refused leave to remain. An immigration judge held that the facts of X's case were not truly exceptional so as to justify a departure from immigration control. The immigration judge also urged the SSHD to consider exercising his discretion so as to allow X to remain in the UK. Thereafter X's legal representative wrote to the SSHD on a number of occasions but received no reply. X subsequently made further representations to the SSHD on the basis that the truly exceptional test</td>
<td>X applied for judicial review of the SSHD's decision to detain him pending deportation. X contended that his detention was unreasonable and not justified in the circumstances of his case because there were outstanding representations. The SSHD contended that time had to be allowed for administrative decision-making and, in the instant case, seven days was a reasonable period to consider whether the expedition of judicial review proceedings should be sought.</td>
<td>Application granted. Access to justice and right of appeal: The continued detention of X for a period of seven days to see if the judicial review proceedings could be expedited was unreasonable. A decision on the matter could have been expected to have been made within four days and accordingly the last three days of X's detention were unlawful. (See para. 48).</td>
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<td>22.</td>
<td>22/01/2010</td>
<td>R. (on the application of Nukajam) v SSHD [2010] EWHC 20 (Admin)</td>
<td>Reasons for detention</td>
<td>N and his family were facing deportation. They had been granted temporary admission on two occasions and had complied with the conditions both times. Following expiry of temporary admission, they were detained in a detention centre for three weeks before being granted bail. The SSHD’s policy stated that time should be allowed for a malaria vaccination for under-fives to be administered and for it to take effect. The initial detention was based on the assumption that the medication would take effect within a few days and departure would be imminent, whereas the drug actually administered took two to three weeks to take effect.</td>
<td>N applied for judicial review of a decision of the SSHD to detain him and his family pending removal claiming damages for false imprisonment and compensation for violation of his rights under the ECHR. The SSHD conceded that communication errors had occurred with regard to the drug being administered. The SSHD argued that the detention was nonetheless lawful.</td>
<td>Application granted.</td>
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<td>23.</td>
<td>27/04/2010</td>
<td>Muuse v SSHD [2010] EWCA Civ 453</td>
<td>Arbitrariness</td>
<td>M had been granted asylum in the Netherlands and had acquired a Dutch passport. He came to the UK with his wife and family and settled. He was subsequently made the subject of a restraining order and was charged with common assault and sentenced to a term of imprisonment. However, he was detained pending consideration of his deportation on the mistaken application by the immigration judge had been declared to be an erroneous test. Those representations received no response. X’s detention was subsequently authorised by an IO and removal directions were made. X sought to challenge his detention by way of judicial review. X’s detention was then continued for a period of seven days to see if the judicial review proceedings could be expedited.</td>
<td>The SSHD appealed against decision [2009] EWHC 1886 (QB) that the unlawful pre-deportation detention of M had arisen from a misfeasance in public office and against an award of exemplary damages.</td>
<td>Appeal allowed in part.</td>
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<td>30/09/2010</td>
<td>R. (on the application of MXL) v SSHD [2010] EWHC 2397 (Admin)</td>
<td>Bail</td>
<td>M had been granted leave to remain in the UK as the spouse of a British citizen. She had two young children. She was imprisoned for conspiracy to steal and subsequently placed in pre-deportation detention.</td>
<td>M applied for judicial review of the SSHD’s decision to detain and to maintain that detention for a period of around eight months. M argued that: (i) the decision to detain was procedurally flawed in that it was based on erroneous information or irrelevant considerations; (ii) the decisions were inconsistent with relevant policies adopted to regulate the exercise of the power to detain; (iii) the decisions were irrational and in breach of the Articles 5 and 8 ECHR, as they failed to take into account the welfare of her children, or to accord the factors in favour of her release the decisive weight they required.</td>
<td>Application granted. Bail: The reasons for the denial of bail were weak, inconsistent and in breach of the SSHD’s own policy. In the instant case there was a detailed published policy designed to restrict the use of the power to detain in low or medium risk cases of criminality and where the detention affected the welfare of minor dependent children. If that policy had been taken into account and applied to the bail decision taken in November 2009, on the balance of probabilities bail on restrictive terms would not have been opposed. The failure to apply the policy was therefore causative of the ensuing continued detention and was a violation of Articles 5 and 8 ECHR.</td>
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<td>25</td>
<td>23/03/2011</td>
<td>Lumba v SSHD [2011] UKSC 12</td>
<td>Automatic review of detention order Access to justice and right of appeal Right to compensation</td>
<td>At the time of the appellant FNPs’ detention, there was a published policy on the circumstances in which immigrants would be detained. However, an unpublished policy providing for a near blanket ban on FNP release pending deportation was applied. The trial judge and the Court of Appeal found no liability for false imprisonment because the appellants would have been detained if the published policy had been applied to them. The appellant FNPs appealed against a decision rejecting their claims for damages for unlawful detention pending deportation.</td>
<td>Issues: (i) The appellant’s detention was unlawful in circumstances where they would have been detained under the published policy; (ii) the unpublished policy was also unlawful for containing a presumption of detention; (iii) the appellants were entitled to more than nominal damages; (iv) the appellants were entitled to damages for unlawful detention.</td>
<td>Appeal allowed. The appellants had been unlawfully detained because the SSHD had breached public law duties in exercising the power of detention. Automatic review of detention order: There is no provision in article 5(1)(f) corresponding with article 5(3). (See para. 48). Access to justice and right of appeal: Trespassory torts (such as false imprisonment) were actionable per se regardless of whether the victim suffered any harm and the fact that the appellants would have been lawfully detained in any event. (See para. 64). Right to compensation: There had been a deliberate decision not to publish the hidden policy but that conduct was not so...</td>
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<td>26.</td>
<td>15/05/2011</td>
<td>R. (on the application of Kambadzi) v SSHD [2011] UKSC 23; [2011] 1 W. LR 1299</td>
<td>Continuous review of the appropriateness of detention</td>
<td>The appellant, after having overstayed his leave, was convicted of two common assaults and a sexual assault. After serving his prison sentence he was placed in detention pending deportation under Sch.3. para. 2(2) of the IA (1971). The appellant's detention was reviewed only 10 out of the expected 27 times, of which only six had been conducted by officials of the correct rank.</td>
<td>detention for breach of the Singh principles for determining when a period of detention is reasonable; (v) exemplary damages should be awarded.</td>
<td>unconstitutional, oppressive or arbitrary as to justify exemplary damages.</td>
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<td>27.</td>
<td>2/08/2011</td>
<td>R. (on the application of BR (Algeria)) v SIAC [2011] EWHC 2129 (Admin)</td>
<td>Bail</td>
<td>B was an Algerian national who lived in the UK with his family. The SSHD decided to deport B on national security grounds. His appeal to the Supreme Court against that decision was pending. B was released on bail by the Commission on conditions. His bail conditions were varied to reduce his curfew to 16 hours following his application for judicial review.</td>
<td>B applied for judicial review of a SIAC decision that his bail proceedings were not proceedings to which Article 6(1) ECHR applied.</td>
<td>Application refused.</td>
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<td>28.</td>
<td>5/08/2011</td>
<td>S, R (on the application of) v SSHD [2011] EWHC 2120 (Admin)</td>
<td>Vulnerable persons</td>
<td>S was an Indian national of Sikh origin. He entered the UK illegally and remained undetected until arrested and imprisoned for violent criminal offences. During his detention he had been placed on &quot;Assessment, Care in Custody, and Teamwork&quot; (ACCT) due to his self-harming and suicide attempt. At the conclusion of his sentence the UKBA determined that he should be detained pending deportation. During that period of immigration detention, S was again placed on ACCT and was prescribed anti-</td>
<td>S applied for judicial review of the decision of the SSHD to detain him pending deportation and sought damages for false imprisonment and compensation for violation of his human rights.</td>
<td>Application granted.</td>
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**Continuous review of the appropriateness of detention:** The policy was the means by which the SSHD gave effect to the Singh principles and the reviews were fundamental to the propriety of continued detention. If the limits imposed by the policy were breached without good reason, continued detention was unlawful and tortious remedies would be available. It was not sufficient for the SSHD to say that there were good grounds for detaining the appellant, regardless of the reviews. Accordingly the appellant was entitled to damages under the common law of false imprisonment.
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<td>29.</td>
<td>25/08/2011</td>
<td>R. (on the application of Sino) v SSHD [2011] EWHC 2249 (Admin)</td>
<td>Duration of detention</td>
<td>S entered the UK illegally. After his claim for asylum was refused and his appeal rights exhausted, he was convicted of a number of theft offences and sentenced to a term of imprisonment. After release from prison he was placed in pre-deportation detention. The SSHD sought, without success, to obtain emergency travel documentation from the Algerian authorities. S did not cooperate in this process. After 5 years in detention, he was released, the judge having declared that any further detention would be unlawful.</td>
<td>S's pre-existing mental condition was both triggered and exacerbated by detention and that involved a serious lack of respect for his human dignity.</td>
<td>Application granted.</td>
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<td>30.</td>
<td>26/10/2011</td>
<td>R. (on the application of BA) v SSHD [2011] EWHC 2748 (Admin)</td>
<td>Vulnerable persons</td>
<td>B was arrested upon arrival in the UK for attempting to import cocaine. He was sentenced and recommended for detention pending deportation when his custodial sentence came to an end. However, during his custodial sentence he became psychotic and was transferred to and from psychotic drugs. A detention review did not, however, refer to any mental health issues and stated that there was no change in S's circumstances, despite representations on S's behalf from health professionals. Following an interim hospital order under the Mental Health Act 1983 s.38 S made an attempt at escape and was transferred to a low security mental health unit. He was then sentenced for the escape attempt and taken back into immigration detention. He was again transferred to hospital and eventually released on conditional bail.</td>
<td>B claimed a declaration that his detention was unlawful, an order quashing the decisions to detain and damages. B submitted that the SSHD had failed to comply with her detention policy by not carrying out detention reviews as required by the EIG and that, when reviews were conducted, she had failed.</td>
<td>Application granted.</td>
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<td>31.</td>
<td>03/02/2012</td>
<td>R. (on the application of Moussaoui) v SSHD [2012] EWHC 126 (Admin)</td>
<td>Continuous review of the appropriateness of detention; Vulnerable persons</td>
<td>M’s mental health was unstable. He was assessed as almost psychotic and a serious suicide risk. The SSHD was asked to consider his suitability for detention and refused to release him. His mental health declined. M was served with a deportation order but was re-detained the next day for no reason. He was eventually released.</td>
<td>Application granted in part. Continuous review of the appropriateness of detention: Only two detention reviews had taken place however M would have been lawfully detained if his detention had been properly reviewed. Therefore no more than nominal damages would be awarded. Vulnerable persons: The crucial consideration was the manageability of the illness. The SSHD believed that the risks of M's absconding/reoffending outweighed his mental health concerns and that his mental health condition could be satisfactorily managed in detention. The mental illness therefore did not cross the threshold of sufficient seriousness.</td>
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<td>32.</td>
<td>26/03/2012</td>
<td>R. (on the application of N) v SSHD [2012] EWHC 1031 (Admin)</td>
<td>Right to compensation</td>
<td>M had come to the UK with her three children (C) and was refused leave to enter. She remained without leave until the exceptional leave was applied for and refused. M and C argued that (i) contrary to policy, the family welfare form had not been completed before the decision to detain the family; and (ii) detention had become unlawful once judicial review proceedings had been instituted, particularly once the SSHD’s official had concluded that judicial review could not be expedited.</td>
<td>Application granted. Right to compensation: Acting with particular dispatch would have required the SSHD to release the family within 48 hours of the judicial review being reached. That the judicial review could not be expedited was not a reason to continue detention. Acting with particular dispatch would have required the SSHD to release the family within 48 hours of the judicial review being reached. In this case, M and C were detained for several days in respect of their continuing detention.</td>
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<td>33.</td>
<td>17/04/2012</td>
<td>R. (on the application of HA (Nigeria) v SSHD [2012] EWHC 979 (Admin))</td>
<td>Access to healthcare</td>
<td>H had been imprisoned for a drug offence. After his release, he was placed in pre-deportation detention under the UKBA 2007. During detention he displayed unusual behaviour and it was recommended that he be transferred to a hospital for assessment. A further report requested that the SSHD review her decision to maintain H's detention within two working days. Over five months later, H was transferred to a hospital where he was diagnosed with a psychotic illness requiring medication. He was later transferred back to an IRC. The SSHD's policy on detention of the mentally ill had been amended during H's hospital stay.</td>
<td>H applied for judicial review of the SSHDs decision to continue authorising his detention and of the conditions of that detention.</td>
<td>Application granted.</td>
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<td>34.</td>
<td>09/05/2012</td>
<td>R. (on the application of LE (Jamaica)) v SSHD [2012] EWCA Civ 597</td>
<td>Continuous review of the appropriateness of detention</td>
<td>E had leave to remain indefinitely in the UK as a husband of a British citizen. The marriage dissolved and E was charged with drug offences. He breached bail conditions and attempted to flee the country with a false passport. He was diagnosed a paranoid schizophrenic and, on release from hospital, was convicted for conspiracy to kidnap and blackmail and sentenced to 7 years in prison. On early release he was placed in pre-deportation detention.</td>
<td>E appealed against the dismissal of his claim for judicial review of his immigration detention. E contended that: (i) the decision to detain had been made solely on the imminence of his deportation; (ii) the judge had been wrong to find a strong risk of absconding; (iii) the judge had erred in examining only the Wednesbury rationality of the decision to detain and not also whether the decision conformed with policy; (iv) E had at all times been mentally ill and should therefore have been considered suitable for detention only if there existed 'very exceptional circumstances' to justify it.</td>
<td>Appeal dismissed.</td>
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<td>35.</td>
<td>20/08/2012</td>
<td>R. (on the application of D) v SSHD [2012] EWHC 2501 (Admin)</td>
<td>Access to healthcare</td>
<td>D had a history of psychiatric illness. Whilst detained in an IRC between February and August 2011, he did not receive treatment for his condition. During that period, unsuccessful attempts were made to be expedited.</td>
<td>D applied for judicial review of a decision of the SSHD to detain him.</td>
<td>Application granted.</td>
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**Access to healthcare:** H's original and subsequent detention was in breach of Article 3 ECHR. The SSHD's decision to return H to the IRC was also in breach of Article 3 and was therefore unlawful under the HRA 1998, section 6(1).

**Continuous review of the appropriateness of detention:** The lack of monthly reviews during a certain period did render this period of detention unlawful and, therefore, E could be awarded nominal damages of £1 for that period.

**Access to healthcare:** There had been a breach of Chapter 55.10 for the entire period of D's detention. The acts and omissions of the IRCs from February to November 2011 constituted a breach of art.3, and D was entitled to compensation for that period.
remove him owing to complications surrounding his nationality and identifying documents. From August until November 2011, D was transferred to another IRC where he received medication for his condition but no other treatment, such as psychiatric assessments or reviews. A detention review concluded that D was unsuitable for release and a removal date was still pending. D wrote to the UKBA requesting a transfer to another IRC and complained about the lack of treatment for his psychosis since his admission to detention. The UKBA refused his transfer request and his condition worsened. From November 2011 until April 2012, D was transferred to another IRC and was advised that if his condition did not improve he would be transferred to a psychiatric unit. During that period he had bi-weekly meetings with a consultant psychiatrist which saw an improvement in his condition.

Private life within art.8 extended to features and functions within a person, including their physical and mental state. The treatment D received had breached his rights under art.8 for the duration of his detention. His mental state had not been adequately protected which meant a poor future prognosis.

36. 27/09/2012 AAM (A Child) v SSHD [2012] EWHC 2567 (QB)

Alternatives to detention
Vulnerable persons

M had entered the UK on the back of a lorry. He was detained in police custody and referred to social services, who conducted an age assessment. M claimed that he was 15, but social services concluded that he was over 18 and transferred him to immigration detention. The assessment was not conducted in accordance with the Merton principles and the IO failed to check. A second age assessment that was Merton-compliant concluded that M was 17. M's unconditional release from detention was ordered. However, his application for asylum M claimed damages for false imprisonment and breach of the HRA 1998 in respect of his detention by the SSHD.

Judgment for claimant.

Alternatives to detention: On the evidence, the SSHD when detaining M had failed to have regard to M's best interests as a child, contrary to art.3 of the UNCRC, and had detained him with adults and failed to consider an alternative to detention, contrary to art.37 of the UNCRC.

Vulnerable persons: The failure to comply with the Merton standards rendered the assessment so unfair as to be unlawful: no appropriate adult was present; the assessment was conducted by one social worker instead of two; and M had no opportunity to comment on the social worker's adverse findings. On the evidence, the IO's decision to detain M was unlawful: she had not asked herself the right questions, acquainted herself with the information needed to make the decision, or followed the relevant guidance.
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<td>37</td>
<td>27/09/2012</td>
<td>R. (on the application of EHJ v SSHD [2012] EWHC 2569 (Admin))</td>
<td>Vulnerable persons</td>
<td>M’s detention breached art.5(1) of the ECHR and was unlawful under the HRA 1998 s.6(1).</td>
<td>M’s appeal against that decision was dismissed. However, M successfully appealed to the Upper Tribunal where it determined M’s date of birth, holding that he had been 15 as claimed. The SSHD conceded that M’s detention had been unlawful because the IO had unlawfully applied a presumption that an asylum seeker who arrived clandestinely on a lorry should be detained.</td>
<td>E was an ethnic Tutsi from Rwanda who claimed that during the Rwandan genocide his immediate family were attacked and murdered by Hutu militia. He entered the UK and claimed asylum. The refusal of his claim was upheld by the Upper Tribunal and he was detained immigration detention. A risk assessment indicated E had medical problems or concerns but no psychiatric disorder, and he was judged fit to be detained. In a later psychiatric assessment, he had a panic attack, was tearful and frightened, unable to speak and was agitated and sweating. E suffered another anxiety episode with hallucinations in which he became hysterical and screamed. A question also arose as the reasonableness of the use of handcuffs when E was discharged from hospital. E applied for judicial review of the SSHD’s decision to detain and remove him from the UK.</td>
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<td>38</td>
<td>26/03/2013</td>
<td>R. (on the application of vulnerable persons)</td>
<td>Following a failed asylum claim and the dismissal of her appeal against the SSHD’s decision to detain her pending</td>
<td>X applied for judicial review of the SSHD’s decision to detain her pending</td>
<td>Application granted.</td>
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<td>Das v SSHD [2013] EWHC 682 (Admin)</td>
<td>removal, X provided the SSHD with a psychiatric report about damage allegedly caused by a previous spell in immigration detention. In order to avoid her absconding, X was re-detained with a view to her imminent removal from the UK. During that period of detention X resent a copy of the psychiatric report to the SSHD, which indicated that X might suffer from PTSD. The SSHD’s officials knew that the report potentially impacted on any decision to detain. However, the decision-making unit had not obtained a copy of the report prior to detaining X and there was no evidence of a review of the report happening after that decision.</td>
<td>deportation. The issues were whether: (i) the SSHD had breached her public law duty of inquiry by failing to review the report before detaining X or during her detention; (ii) the SSHD had breached her immigration policy relating to detention of persons suffering from mental illness; and (iii) if the detention was unlawful, substantial damages were payable for false imprisonment.</td>
<td><strong>Vulnerable persons:</strong> The SSHD’s officials had failed to take reasonable steps to inform themselves properly about X’s mental conditions and that failure extended throughout X’s detention, undermining the proper application of the policy so as to render the whole period unlawful. However, as X’s mental condition could have been satisfactorily managed within detention and she would have been detained anyway, she was entitled only to nominal damages.</td>
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