Experiences of the UK Immigration Service:
Report launch and information day, Refugee & Migrant's Forum

Detention: Rights & Remedies

Introduction:

1. These notes accompany a workshop to be held on Tuesday, 15th May. The aim of the workshop is to broaden participants understanding of:

   - the circumstances in which a person may be detained;
   - the rights to which such a person ought to be entitled; and
   - the remedies available if such rights are not properly made available.

2. These notes are designed to provide an overview of the subject, but also to give an introduction to some of the technical detail. The notes are not essential for the workshop. However, for participants who are new to some of the technical detail, it is intended that the notes and that detail should be more accessible following the workshop.

3. These notes are divided into specific sub-topics with distinct headers as follows:

   - **OISC regulation** – some participants may be registered with OISC whereas others will not. Given the subject of the workshop does fall within OISC regulation, it is important that participants understand what they are in law allowed and not allowed to do with information discussed at the workshop.

   - **The power to detain** – Immigration officers and officials at the Home Office are given certain powers to detain. It is important to know what these powers are, and where they can be found. Although, the powers have in recent years been extended and are now far reaching indeed, it is still necessary to check under what power somebody is detained.

Firstly, if there is no relevant power, the detention will be unlawful. Secondly, the particular power used may affect the rights and remedies that may be available to the detained person.

- **Article 5: the right to liberty** – The 1950 European Convention on Human Rights (incorporated into UK law by the Human Rights Act 1998) provides a general right to liberty. It sets out the limited circumstances, in which a person may be detained.

- **Home Office policy on detention** – Although the powers to detain are very wide, their use is subject to restrictions and limitations explained in various Home Office policy documents. A person's detention may, therefore, be unlawful even though there is power to detain. This will be the case, if the power to detain has been used in circumstances where its use is contrary to Home Office policy.

- **Temporary admission** – Most people, who are liable to be detained, are not detained. Many of these people are given what is known as temporary admission.

- **Bail** – A person who is detained may seek bail. This can be given by a chief immigration officer or an immigration judge. Bail is the most common remedy a person may have if they are detained. A person may be granted bail even though his or her detention is lawful. This section gives further information about how to make a bail application.

- **Unlawful detention** – If a person's detention is unlawful, an application for judicial review of the detention may be made to the High Court. If the court finds the detention to be unlawful, the person's release may be ordered. In some cases, the person may also be entitled to financial compensation.

- **Habeas corpus** – The High Court has power (which dates back many hundreds of years) to order the release of a person who is wrongly detained. This power, however, does not entitled a person to seek compensation for the detention.

- **Treatment in detention** – There are rules and guidance governing how a person should be treated when detained. Although a person's detention may be lawful, it is still necessary for the authorities to treat the person properly; and mistreatment in detention may be subject to a legal challenge or formal complaint. In some instances, it could provide a reason for seeking financial compensation or release from detention.

- **Detention Centre Rules** – These set out some of the procedures and standards that may apply when a person is detained.

- **Complaints and oversight of detention** – There are various statutory bodies that have responsibility in relation to detained people. In this section, the roles of the Chief Inspector of the Border and Immigration Agency, Prisons Ombudsman, HM Chief Inspector of Prisons and Independent Police Complaints Commission will be discussed.

- **Legal aid** – The Rules relating to how legal aid may be provided to people who are detained are set to change in October 2007. This section gives an short introduction to the expected changes.

- **Fast track detention** – Some asylum-seekers are detained in order to fast track (or accelerate) the determination of their asylum claims. There are special provisions relating to fast track detention.

- **Detention and removal** – Many people are detained in preparation for their removal from the UK. In some of these cases, the time between the point of detention and removal from the UK may be very short

indeed. There have been recent changes to how the Home Office and High Court deal with such cases. Some information on this is given in this section; and some general advice regarding the situation of people who are at risk of removal.

OISC regulation:

4. It should be recalled that it is a criminal offence to provide immigration advice or immigration services unless you are a qualified person[1].

5. It is not the purpose of these notes or the workshop to review the rules relating to OISC regulation. However, since some participants may not be familiar with OISC, the following information is provided:

   a. OISC stands for the Office of the Immigration Services Commissioner. OISC have a website at www.oisc.gov.uk; and can be contacted by email at info@oisc.gov.uk or telephone on 020-7211 1500.

   b. Immigration advice means advice that:
      - relates to a particular person;
      - is given in connection to a relevant matter;
      - is given by someone who knows the advice is for a particular person and about a relevant matter; and
      - is not given in the course of representing a person in criminal proceedings.

   c. Immigration services means writing or speaking on behalf of a person in a court or tribunal or in correspondence with the Home Office or other government department if this relates to a relevant matter.

[1] Section 84(1) of the Immigration and Asylum Act 1999

d. A relevant matter includes:

- an asylum claim;
- an application for entry clearance, leave to enter or leave to remain;
- unlawful entry into UK;
- UK nationality and citizenship;
- admission to, and residence in, Member States under European law;
- removal or deportation from UK;
- an application for bail under UK immigration laws; and
- appeals or judicial reviews relating to any of the previous matters.

e. To be a qualified person, you must be:

- registered with OISC; or
- authorised to practice by a "designated professional body" (e.g. the Law Society, Bar Council); or
- fall within a further category (these are very limited, and are not discussed further here).

6. If you are not registered with OISC and you give advice or assistance in connection with the issues discussed in this workshop for the benefit of a particular person, you may be committing a criminal offence.

The power to detain:

7. The Home Office have far reaching powers to detain people:

- who have entered the UK illegally;
- who do not have permission (generally called leave) to be here and whose cases are under consideration; or
- who have been granted permission (leave) to be here, but they have been recommended for deportation or deportation is being considered.

8. The Immigration Act 1971 provides many of the key provisions setting out detention powers. These are found in Schedule 2 and Schedule 3 to that Act. Schedule 2 deals with the majority of situations in which a person may be detained. Schedule 3 is specifically concerned with people who are detained in connection with deportation[2].

9. A person may be detained in the following circumstances:

   a. An immigration officer may detain a person on arrival in the UK in order to check whether the person is entitled to enter the UK – this may include interviewing the person or requiring the person to provide documentation[3].

   b. An immigration officer may detain a person attempting to leave the UK in order to check whether: (i) the person entered the UK lawfully, (ii) the person's period of stay in the UK was lawful and/or (iii) the person may be prohibited from returning to the UK[4].

   c. An immigration officer may detain a person in preparation for making a decision to remove the person from the UK or in preparation for that removal[5]. The Home Office may also detain a person in similar circumstances[6].

   d. The Home Office may detain a person, who has been convicted of a crime in the UK and recommended for deportation by the sentencing judge, in preparation for making a deportation order[7].

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[2] Deportation must be distinguished from removal (often referred to as administrative removal). Both deportation and removal are steps by which the Home Office may remove a person from the UK. However, most such cases are by way of removal. Any person who has no lawful entitlement to be here, may be removed from the UK. Deportation may, however, only be used if removing the person serves some wider public interest – e.g. where a person is a danger to the community or poses a security risk. Deportation is much more serious than removal. A person who is deported is also barred from seeking to re-enter the UK.
[3] Paragraph 16(1) and (1A), Schedule 2 to the Immigration Act 1971
[4] Paragraph 16(1B), Schedule 2 to the Immigration Act 1971
[5] Paragraph 16(2), Schedule 2 to the Immigration Act 1971
[6] Section 62 of the Nationality, Immigration and Asylum Act 2002
[7] Paragraph 2(1), Schedule 3 to the Immigration Act 1971

e. If a deportation order is made or in force, the Home Office may detain a person in preparation for deportation[8]. If a deportation order is ready to be made, the Home Office may also detain[9].

10. There is no maximum time set out in UK law for how long a person's detention may be continued. However, guidance has been provided by the courts:

> "*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 in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given to enable the machinery of deportation to be carried out, I regard the power as being impliedly limited to a period which is reasonably necessary for the 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 the power of detention.*"[10]

11. The UK Borders Bill will give further powers in relation to detention:

a. An immigration officer will be empowered to detain a person for up to 3 hours at a port if the officer thinks the person is liable to be arrested by the police or subject to an arrest warrant[11]. This power has nothing to do with immigration matters, and may be used to detain anyone including British citizens if the officer thinks they may have committed a criminal offence of any kind. An officer,

[8] Paragraph 2(2) and (3), Schedule 3 to the Immigration Act 1971
[9] Paragraph 2(4), Schedule 3 to the Immigration Act 1971
[10] *R v Governor of Durham Prison, ex parte Hardial Singh* [1983] Imm AR 198 – This judgment remains good law and is frequently cited; and the general principle holds good whatever the specific purpose for which a person is detained.
[11] Clauses 1 to 4 of the UK Borders Bill relate to this new power.

who uses this power, must make arrangements for a police officer to attend as soon as possible.

b. The Bill creates a new deportation power – called (somewhat misleadingly) automatic deportation[12]. Automatic deportation will only apply to someone who has been convicted of a crime in the UK and sentenced to a term of imprisonment. In many such cases, this new deportation power will mean that the person must be deported without consideration of his or her individual circumstances (unless deportation would be contrary to the Refugee Convention or the person's human rights). The Home Office will be empowered to detain a person, who has served a prison sentence, while considering whether this new deportation power applies and, if so, in preparation for making the deportation order[13]. If the order is made, detention will usually continue up until deportation.

Article 5: the right to liberty:

12. In certain cases, Article 5 of the European Convention on Human Rights provides a significant additional safeguard against unlawful or arbitrary detention. The European Convention is incorporated into UK law by the Human Rights Act 1998. A public authority (this includes immigration officers, the Home Office and the immigration judiciary) is required to respect these human rights, including Article 5[14].

13. Article 5 provides a number of protections. Firstly, it sets out an exhaustive list of purposes for which detention may be authorised[15]. These purposes include prevention of unauthorised entry to, or removing a person from, the country[16]. Secondly, any detention must be in accordance

[12] Clauses 31 to 38 of the UK Borders Bill relate to this new deportation power.
[13] Clause 35 of the UK Borders Bill
[14] Section 6 of the Human Rights Act 1998 means it is unlawful for a public body to act in a way that is contrary to the human rights set out in the Act.
[15] Article 5(1)
[16] Article 5(1)(f)

with a procedure set out in law[17]. Thirdly, a person who is detained must be told promptly, and in a language he or she understands, of the reasons for detention[18]. Fourthly, a person who is detained must have ready and speedy access to a court before which his or her detention can be challenged and which has the power to order his release if the detention is not lawful[19]. Fifthly, a person subject to detention that is contrary to Article 5 shall be entitled to compensation[20]. In addition, to be compatible with Article 5 it is necessary that detention is generally proportionate – i.e. that it is a necessary step to achieve the purpose for which it is used because that purpose cannot reasonably be achieved in some other way.

14. In several ways these protections are provided in UK law and Home Office policy. However, they provide a useful benchmark against which to consider that law and policy.

15. It should be noted that other human rights may be relevant to detention and a person's treatment in detention. In particular, Article 3 which prohibits degrading or more serious mistreatment; and Article 8 which requires respect for private and family life.

Home Office policy on detention:

16. The key source of Home Office policy on detention is the Operational Enforcement Manual (OEM). It is available on the website of the Border and Immigration Agency at http://www.ind.homeoffice.gov.uk/lawandpolicy/policyinstructions/oem. The OEM is a lengthy document and covers many aspects of enforcement work.

[17] Article 5(1)
[18] Article 5(2)
[19] Article 5(4)
[20] Article 5(5)

17. The key chapter relating to detention is chapter 38. Chapter 39 deals with bail. Importantly, the OEM states:

> "*In all cases detention must be used sparingly, and for the shortest period necessary.*"[21]

18. This starting point of principle is supplemented by further criteria set out in the OEM:

> "***Factors influencing a decision to detain (excluding pre-decision fast track cases)***
>
> *1. There is a presumption in favour of temporary admission or temporary release.*
> *2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.*
> *3. All reasonable alternatives to detention must be considered before detention is authorised.*
> *4. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.*
> *5. Each case must be considered on its individual merits.*
>
> *The following factors must be taken into account when considering the need for initial or continued detention.*
>
> ***For detention:***
>
> - *what is the likelihood of the person being removed and, if so, after what timescale?*
> - *is there any evidence of previous absconding?*
> - *is there any evidence of a previous failure to comply with conditions of temporary release or bail?*
> - *has the subject taken part in a determined attempt to breach the immigration laws? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry)*
> - *is there a previous history of complying with the requirements of immigration control? (e.g. applying for a visa, further leave, etc)*

[21] Paragraph 38.1 of the OEM

- *what are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? Does the person have a settled address/employment?*

- *what are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?*

Against detention:

- *is the subject under 18?;*

- *has the subject a history of torture?;*

- *has the subject a history of physical or mental ill health?;*"[22]

19. In addition to the general criteria set out above, there are special provisions for certain categories of people:

"***Persons considered unsuitable for detention***

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated IS accommodation or elsewhere. Others are unsuitable for IS detention accommodation because their detention requires particular security, care and control.

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated IS detention accommodation or elsewhere:

- *unaccompanied children and persons under the age of 18…*

- *the elderly, especially where supervision is required;*

- *pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this…*

- *those suffering from serious medical conditions or the mentally ill;*

[22] Paragraph 38.3 of the OEM

- *those where there is independent evidence that they have been tortured;*
- *people with serious disabilities;*"[23]

20. The OEM also sets out further provisions covering who may be detained, in what circumstances and the conduct of detention including:

- certain cases where a decision to detain cannot be taken at the level of immigration officer[24];
- forms that must be completed for the purposes of detention[25];
- requirements for regular review of detention[26]; and
- further details for the treatment of special cases[27].

21. The OEM is a policy document. This means that it sets out Home Office policy, and must be complied with by immigration officers and Home Office officials. If it is not followed, this may mean any detention is unlawful. It may mean that the detention is contrary to Article 5 of the European Convention. It may mean that the detained person can claim compensation. The policy may be relied upon in order to show why bail should be granted.

Temporary admission:

22. As indicated above, although many people are liable for detention most are not detained. Many are granted temporary admission. This is not permission to enter the UK. It is a peculiar legal device, which merely recognises that a person is in the UK without granting the individual a formal status of leave to enter or remain.

[23] Paragraph 38.10 of the OEM
[24] Paragraph 38.5.3 of the OEM
[25] Paragraph 38.6 of the OEM
[26] Paragraph 38.8 of the OEM
[27] Paragraph 38.9 of the OEM

23. A person granted temporary admission is usually prohibited from work. However, permission to work may be granted. If a person has made an asylum claim, which remains undecided by the Home Office for a period of 12 months, permission to work ought to be granted. A person with temporary admission should be given form IS96. This form sets out the conditions of temporary admission, which will include (i) reporting conditions, (ii) requirement that the person lives at a stated address and (usually) (iii) a prohibition on working.

24. If a person does not comply with conditions of temporary admission, he or she may be considered an absconder risk. This may increase the chance that the person is detained; and if the person is detained will reduce the chances of the person being released.

Bail:

25. Bail may be obtained from a chief immigration officer or from the Asylum and Immigration Tribunal (AIT). It is possible to apply for bail to both, and sometimes an application made to a chief immigration officer may reveal information that is helpful for any application to the AIT.

26. Chapter 39 of the Operational Enforcement Manual (OEM) deals with chief immigration officer bail. It is significant that the OEM states:

> "*As explained in chapter 38, Ministers have given a commitment that detention will only be used as a last resort. The presumption is to grant temporary release wherever possible but there will be occasions when temporary release is not considered appropriate.*"[28]

27. Accordingly, the chief immigration officer is empowered to order temporary release. This is effectively temporary admission – see the section above on what conditions may be applied. However, the chief immigration officer may, as an alternative, grant bail. The key difference between temporary release/admission and bail is that:

[28] Introduction to chapter 39 of the OEM

- all the conditions that can be attached to temporary release can be attached to bail; but
- if bail is granted, a recognizance will be required and sureties may also be required (see below for information on recognizance and sureties).

28. The chief immigration officer's power to grant bail does not continue beyond the eighth day of detention[29]. If detention has lasted for more than eight days, a bail application may be made to the Home Office. The decision may still be made by a chief immigration officer, but he or she will be acting on behalf of the Secretary of State. An application for bail to a chief immigration officer or the Home Office may be made by sending a letter or fax explaining why bail should be granted. Other information to include in any such letter or fax mirrors the information that should be considered in making a bail application to the AIT (see below).

29. The AIT may grant bail in any case, however long the detention has lasted and whatever part of an asylum or immigration process the individual's case has reached. There are two exceptions to this:

- national security cases (these cases are dealt with by the Special Immigration Appeals Commission – and are not discussed further in these notes); and
- during the first seven days of arrival where the person is detained in order to examine his or her entitlement to enter the UK[30].

30. An application for bail may be made to the AIT on form B1, which is available from the AIT website at http://www.ait.gov.uk/forms_and_guidance/documents/pdf/b1_application_to_be_released_on_bail.pdf. The Rules for AIT bail applications are set out in the Asylum and Immigration Tribunal (Procedure) Rules 2005, these are available at http://www.opsi.gov.uk/si/si2005/20050230.htm.

[29] Section 68(2) of the Nationality, Immigration and Asylum Act 2002
[30] Paragraph 22(1B), Schedule 2 to the Immigration Act 1971

There have been some amendments to these Rules, but not to Part 4 which is the part dealing with bail.

31. The AIT Practice Directions[31] say very little about bail. But what is said is important:

> "*19. Bail applications*
>
> *19.1 An application for bail shall if practicable be listed for hearing within three working days of receipt by the Tribunal of the notice of application.*
>
> *19.2 Any such notice which is received by the Tribunal after 3.30pm on a particular day shall be treated for the purposes of this paragraph as if it were received on the next business day.*"

32. An application for bail made to the AIT must include the following information[32]:

- the full name, date of birth and date of arrival of the applicant (that is the detainee);
- the address of where the applicant is detained;
- whether or not an appeal is outstanding before the AIT;
- the address where the applicant will live if bail is granted (or reasons why an address cannot be given);
- whether (if the applicant is over 18 years old) he or she will agree to electronic monitoring as a condition of bail;
- the amount of recognizance offered by the applicant;
- full names, addresses, occupations and dates of births of any sureties and the amount of recognizance they offer;
- reasons for the request for bail, and if the AIT has previously refused a bail application full details of any change of circumstances; and
- whether an interpreter will be required (and details of language).

[31] These Practice Directions are also available on the AIT website at http://www.ait.gov.uk/practice_directions/documents/2007_practice_dirs_30apr07.pdf.
[32] Rules 38 of the AIT Procedure Rules

33. The AIT will send a copy of the bail application to the Home Office and set a date for the hearing of the application. If the Home Office opposes bail, they must provide the applicant with a bail summary no later than 2.00pm the day before the hearing[33]. The bail summary will set out the detainee's immigration history and explain the Home Office reasons for detention. It is an important document. It is necessary to check with the detainee that the Home Office record of his or her immigration history is accurate. If it is incorrect, it will be necessary to consider what evidence can be obtained to establish the error (the detainee may give oral evidence at the oral hearing – if so, he or she may be cross-examined). It may be useful to inform the Home Office in writing of the error, and demand that the error is corrected; and the decision to oppose bail reconsidered.

34. A bail application will be heard by an immigration judge. At the hearing the Home Office will be represented by a presenting officer (though in asylum cases under the New Asylum Model this may be a case owner). Usually, the judge will hear submissions from the presenting officer and representative of the detainee in order to decide whether he or she is willing to grant bail in principle. At this stage the judge may also hear evidence from the detainee – particularly if there is any dispute about the accuracy of the Home Office bail summary.

35. If, at this stage, the judge decides that bail should not be granted, this will be the end of the hearing. The judge must give brief reasons in writing explaining why bail is refused[34].

36. If the judge, however, decides in principle that bail may be granted, he or she will usual continue the hearing by asking questions of the surety and sometimes the detainee. The judge will want to check that the address available, to which the detainee may be bailed, is suitable. The judge will also want to consider whether a recognizance offered by the detainee or

[33] Rule 39(2) of the AIT Procedure Rules
[34] Rule 39(3) and (5) of the AIT Procedure Rules

surety is adequate. The judge will also want to consider whether (i) the surety is in a position to either exercise some control over or contact with the detainee, (ii) the surety has good reason to think the detainee will not abscond, (iii) the surety has sufficient funds to meet the recognizance and (iv) whether the recognizance is adequate.

37. Chapter 39 of the OEM provides policy guidance on when a chief immigration officer or Home Office should grant or refuse bail, and on when a presenting officer should oppose bail. It is relevant for bail hearings before the AIT. If the policy suggests bail should not be opposed, this would strongly indicate that the judge should grant bail.

> "***Consideration of a bail application***
>
> *When deciding whether or not to oppose bail, consider the following:*
>
> - *the likelihood of the applicant failing to appear when required (see 39.4.1);*
> - *the period of time likely to elapse before any conclusive decision is made or outstanding appeal is disposed of;*
> - *the diligence, speed and effectiveness of the steps taken by the Immigration Service to effect removal;*
> - *any special reason for keeping the person detained (such as those in 39.3);*
> - *the reliability and standing of sureties (see 39.5.2);*
> - *in deportation cases, the views of the relevant senior caseworker in the relevant casework section.*
>
> ***Risk of absconding***
>
> *Indicators of a person likely to abscond include:*
>
> - *a previous escape or attempt to escape from custody;*
> - *a previous breach of temporary admission or temporary release;*
> - *a statement by him or his sponsor indicating an intention to go to ground;*

- *refusal by the person's sponsor to stand surety for him, because the sponsor is of a view the person is unlikely to comply, even if other sureties are produced;*

- *terrorist connections or other considerations in which the public interest is involved.*

If an individual is unlikely to abscond and there is no other reason to detain him, you should normally grant temporary release. Each case should be assessed on its individual merits but you should consider the person's family, social and economic background and his immigration history. Despite an adverse background/history, a CIO or the Secretary of State may grant bail where sufficient and satisfactory sureties are produced."[35]

38. More information about a recognizance:

a. A recognizance is a sum of money offered as a guarantee that the detainee will abide by any conditions of bail. Essentially, the person offering the recognizance agrees that he or she will forfeit (or lose) this sum of money if the conditions of bail are broken.

b. Most detainees are asylum-seekers, and many will not have any significant finances available to them. Although, to be granted bail, the detainee must offer a recognizance, it is often the case that the detainee may offer as little as £5.00; and no real attempt is made to discover whether the detainee has £5.00 in order to make this offer.

c. However, if there are one or more sureties, there will be more attention given to any recognizance offered by them (see below).

39. More information about sureties:

a. A surety is someone who is prepared to offer a recognizance as a guarantee that a detainee will abide by any conditions of bail.

[35] Paragraphs 39.5 and 39.5.1 of the OEM

b. The bail application form provides space for details of two sureties. However, it is not necessary to have two sureties. Indeed, it is not necessary to have any surety in order to make a bail application. Bail can be granted without sureties or with only one surety.

c. Before the hearing, the Home Office will usual run checks on any sureties. They will check to see if the surety has an immigration or criminal history. If the surety has a significant history (e.g. has been convicted of a dishonesty offence) it is unlikely the surety will be acceptable to the judge. It is generally sensible to ask the presenting officer before the hearing starts whether he or she has any concerns about the surety. If there is an immigration or criminal history it will be important to check to see whether it is relevant to whether the surety is suitable; and whether the Home Office records are accurate. However, it is always sensible to check with a surety whether they have such a history before submitting the bail application.

d. At the hearing, the judge will also want to check whether the recognizance is appropriate – (i) has the surety sufficient funds to be able to pay the recognizance; (ii) having regard to the immigration history of the detainee, is the recognizance of sufficient size to constitute a meaningful guarantee; and (iii) having regard to the surety's funds is the recognizance of sufficient size to constitute a meaningful guarantee?

e. The surety will need to bring up to date evidence of his or her financial circumstances. The surety may need to show evidence of their finances over a period of a few months. Bank statements, pay slips and evidence of any other investments or significant outgoings will be considered.

f. If the judge is satisfied the surety can afford the recognizance, he or she will still want to assess whether the sum of money is of an

adequate size. There is no set or preferred amount. It will depend on the detainee's immigration history and the surety's funds. A sum of £50 offered by a surety, who is on income support, may be considered to be substantial. A very wealthy surety offering £500 may not be considered to be offering a substantial sum.

g. The judge will also want to consider why the surety is confident that the detainee will abide by bail conditions; and how the surety will be able to maintain contact with the detainee. It is sensible to discuss with any surety how much contact he or she has had with the detainee before and during the detention; and why the surety thinks the detainee can be relied upon.

40. Sometimes, obtaining a suitable address for a bail application can be problematic. Some more information on addresses:

a. The starting point must be that the address is one where the detainee is entitled to stay and is likely to be willing to stay. If private accommodation is offered, it will be necessary to show the judge evidence that the detainee can stay at the address. Usually, the person offering to accommodate the detainee should attend the bail hearing and show evidence of ownership of the property – this may include a lease agreement, providing the lease does not preclude guests residing at the accommodation.

b. However, the general suitability of accommodation will be considered. If there is no private bedroom for the detainee (assuming he or she is not seeking to be bailed to the family home/home of his or her partner), it may be that the accommodation will not be considered suitable. It will be necessary to consider who else lives at the address. It may be relevant if there are young children living at the address. The detainee's health may be relevant – particularly if he or she has care and attention needs, or suffers from mental illness.

c. In cases where the detainee has a serious criminal history, it may be that a bail hostel address is needed – e.g. if the detainee is a reoffender risk; and needs to be under probationary supervision.

d. If no other address is available, it may be that an address can be obtained through NASS (if the detainee is an asylum-seeker with an outstanding claim or appeal). However, NASS accommodation usually cannot be offered in advance (this is often also the case with bail hostel addresses). In such a case, it may be necessary to seek a decision from the judge that bail in principle should be granted – subjected to obtaining NASS accommodation.

e. It may be relevant in some cases to consider the proximity of the address to where the surety or sureties live.

41. There is no limit on the number of bail applications a detainee may make. However, if there is no change of circumstances following a refusal of bail by an immigration judge, it is unlikely that bail will be granted at a new hearing.

42. Many detainees have difficulty obtaining a legal representative to assist with a bail application. The Bail for Immigration Detainees (BID) may be able to assist. They can be contacted by email at info@biduk.org, or by telephone. There are different contact details for different BID offices, which are available from their website at http://www.biduk.org/index.htm. BID have also produced two notebooks to assist detainees to make applications themselves. These are available on the BID website at http://www.biduk.org/obtaining/notebook.htm.

43. If bail is refused, the immigration judge must given brief written reasons explaining the reasons for this decision. If bail is granted, the detainee and any sureties will need to complete forms, which will record the bail conditions and the recognizances offered. The bail conditions will require

the detainee to live at the bail address and report to a local immigration office or police station (often conditions will require frequent reporting). The conditions will also state to where the detainee must report to renew bail. If there is no appeal outstanding, this should be to an immigration officer. If there is an appeal outstanding, this will be to return to the AIT. If bail is not renewed, the person will be immediately at risk of being detained again.

44. It may be that the conditions of bail need or can be varied. If the reporting restrictions are very onerous (and especially if the individual has been reporting as required for some period of time), these are sometimes relaxed. If an address is no longer available, it will be necessary to immediately apply to vary the conditions of bail – because living at another address will otherwise be in breach of bail conditions.

45. If bail conditions are breached, any recognizance may be lost. A surety may be required to attend a forfeiture hearing if he or she wishes to ask an immigration judge not to order the recognizance to be paid. If so, at this hearing, the judge will consider what efforts the surety made to (i) maintain contact with the detainee, (ii) ensure conditions were not breached and (iii) inform the authorities when these were breached or looked likely to be breached.

Unlawful detention:

46. Detention may be unlawful in any of the following circumstances:

- there is no power in law to detain;
- the power that is used does not properly apply in the particular case;
- detention is contrary to Article 5;
- detention is contrary to Home Office policy; and
- there is no longer a reasonable prospect of achieving the purpose for which the person is detained.

47. A claim of unlawful detention may be made by judicial review application to the High Court. Compensation (or damages) may be claimed as part of the application. However, if a bail application has not been made to the AIT, depending upon the seriousness of the unlawful detention claim and the length of detention, it may be that the High Court would consider that a bail application was a more appropriate remedy.

48. Judicial review applications ought generally to be made with the assistance of specialist solicitors.

Habeas Corpus:

49. An application for habeas corpus may be made if it can be shown that the power to detain has been exercised wrongly. This is an ancient right. The application may be made to the High Court – essentially the application is a request for the court to order a person's release. However, if it is possible to apply for habeas corpus, it may be equally possible to apply for judicial review of the detention. This does not, however, necessarily apply the other way. If there is a power in law to detain, but it is being exercised in an unlawful manner this is likely to be a case for a judicial review application of unlawful detention. If compensation is sought for unlawful detention, it will be necessary to make a judicial review application (though some lawyers consider that it may be appropriate to make both applications at the same time).

50. Habeas corpus applications ought generally to be made with the assistance of specialist solicitors.

Treatment in detention:

51. Obviously, for many people in detention the all important issue will be whether and how they can be released. However, it must not be forgotten that – even those who have no prospect of getting released – have important rights and concerns regarding how they are treated during detention.

52. The Detention Centre Rules (see below) provide some requirements for the treatment of detainees.

53. A serious infringement of the Rules (or other serious mistreatment of a detainee) might constitute a violation of Article 3 or 8 of the European Convention. A failure to properly investigate an allegation of serious mistreatment, which was capable of amounting to a violation, could itself constitute a human rights violation. Serious mistreatment would include assaults, and in some cases may include improper care or attention to a person's physical or mental health needs.

54. An allegation of human rights violation may be made by way of a judicial review application. However, in some instances an alternative remedy for mistreatment in detention will be by way of formal complaint – see below.

Detention Centre Rules:

55. The Detention Centre Rules 2001 set out requirements for the treatment of those who are detained. The Rules can be found at http://www.opsi.gov.uk/SI/si2001/20010238.htm[36]. The requirements under the Rules include:

- the Rules must be available to all detainees, and written information regarding the Rules must be provided to a detainee in a language he or she understands[37];
- rules relating to personal property[38];
- rules relating to searches[39];
- provision of written reasons for detention at the time of initial detention and then monthly reviews[40];

[36] The Rules were amended in 2005 simply to replace references to the Immigration Appeal Tribunal and adjudicators with references to the Asylum and Immigration Tribunal.
[37] Rule 4
[38] Rule 6
[39] Rule 7
[40] Rule 9

- rules relating to clothing, food (including specific needs, e.g. religious, dietary, cultural and medical needs), standards of accommodation and hygiene[41];
- provision of activities (including educational activities), time in the open air and privileges[42];
- specific provision for religious diversity and practice[43];
- provision for contact, correspondence and visits[44];
- provision for private interviews with legal representatives[45];
- use of telephones[46];
- provision of a health care team at each detention centre[47];
- the right for medical examinations to be performed by a medical practitioner of the same gender[48];
- a medical examination of every detainee within 24 hours of his or her admission to the detention centre[49];
- the requirement that a medical practitioner report to the manager of the detention centre if he or she considers (i) detention is injuring a person's health, or (ii) the detainee may be suicidal; or (iii) the detainee may be a torture victim[50];
- provision for complaints[51];
- provisions for security and safety within the detention centre[52];
- responsibility on officers to comply with the Rules and promptly report any abuse of the Rules[53] and to notify the health care team of any concern regarding the physical or mental well-being of a detainee[54];

[41] Rules 12, 13, 15 and 16
[42] Rules 17 to 19
[43] Rules 20 to 25
[44] Rule 26 to 28
[45] Rule 30
[46] Rule 31
[47] Rule 33
[48] Rule 33(10)
[49] Rule 34(1)
[50] Rule 35
[51] Rule 38
[52] Rules 39 to 44
[53] Rule 45(2)
[54] Rule 45(4)

- a requirement for prompt investigation of any complaint against an officer[55]; and
- provisions for visiting committees[56].

Complaints and oversight of detention:

56. There are a number of statutory bodies that have responsibility in relation to detention centres. A full discussion of each, and the role they perform, is beyond the scope of these notes. However, the following are highlighted:

a. **Her Majesty's Chief Inspector of Prisons** – The chief inspector and her inspectorate do not deal with individual complaints. Her responsibility is to provide independent scrutiny of the treatment of prisoners and detainees, including in immigration removal and short term holding centres. She has published several reports relating to immigration removal centres. Information is available from the website at http://inspectorates.homeoffice.gov.uk/hmiprisons/.

b. **Prisons and Probation Ombudsman** – The ombudsman does deal with individual complaints. However, those who complain are expected to first complain and seek to resolve complaints internally. The ombudsman also has a statutory duty to investigate all deaths in prisons and detention centres. Information on the ombudsman is available from the website at http://www.ppo.gov.uk/.

c. **Independent Police Complaints Commission (IPCC)** – The IPCC does not currently have responsibility for immigration matters, unless these involve the police. However, the IPCC will shortly be launching a consultation regarding their future role in investigating serious complaints against immigration officers. This

[55] Rule 48
[56] Rules 58 to 64

may include a role for investigating serious complaints against others who perform similar roles to immigration officers; and may include a role in relation to immigration removal and short term holding centres.

d. **Chief Inspector of the Border and Immigration Agency (BIA)** – The UK Borders Bill includes powers for the Secretary of State to appoint a new chief inspector to oversee the functions of the BIA. The Bill envisages that the chief inspector may refuse to allow inspections and other cooperation with other bodies providing independent scrutiny of BIA operations – including detention.

e. **Independent Monitoring Boards** – All prisons and immigration removal centres have independent monitoring boards. The Boards are made up of appointed volunteers from the public, who have unrestricted access to the prison or centre. Detainees may request a confidential meeting with a member of the Board. More information about these Boards may be obtained from the website at http://www.imb.gov.uk/.

f. **Parliamentary Ombudsman** – The ombudsman deals with complaints of maladministration. A complaint must be made by a Member of Parliament. The ombudsman will not usually consider complaints where there is an alternative complaint mechanism or a legal remedy available. More information is available from the website at http://www.ombudsman.org.uk/index.html.

Legal aid:

57. Legal aid is advice and representation from a lawyer, which is paid for by state funds because the individual cannot afford to pay. It is generally subject to a means test and merits test. A means test simply means that the financial circumstances of the individual will be assessed to see whether he or she should be expected to pay for themselves. A merits test means

that chances of success will be assessed, and the importance of the case, considered before legal aid is granted.

58. It is generally acknowledged that there are serious difficulties in obtaining legal advice and representation – particularly for detainees needing assistance under legal aid. It is beyond the scope of these notes to address the causes of that, or provide detailed information on obtaining legal advice.

59. However, it is noted that there are currently substantial changes being made to legal aid. Generally, these are considered by lawyers and other independent commentators as likely to reduce the availability and quality of legal aid services (including the Parliamentary specialist committee responsible for reviewing such matters[57]). There are specific proposals for providing legal aid services for detainees. These are not discussed at length here. However, it is noted that the government plans to enter into block contracts with specific legal suppliers to provide services in detention centres. This will mean that a detainee who needs legal advice or representation will be obliged to seek this from a nominated legal advisor or firm. There will be an exception if the individual had a lawyer before his or her detention, in which case that lawyer can be retained. Otherwise, the detainee will not be free to chose his or her own lawyer.

Fast track detention:

60. Fast track detention is used to process some asylum claims and appeals. Fast tracking simply means that the claim or appeal is accelerated (i.e. subject to a very much faster timescale to other claims or appeals). There is still some limited fast tracking of initial claims and decisions at Oakington. However, most fast tracking is now for the claims and appeals that pass through what is sometimes referred to as the detained super fast

[57] The Constitutional Affairs Committee is made up of Members of Parliament. It has recently published its report on the government's legal aid plans. The report is highly critical of the government's plans. A short newspaper article about the report is available at http://business.timesonline.co.uk/tol/business/law/article1728814.ece.

track. Detainees in this process are held at Harmondsworth (for men) and Yarl's Wood (for women).

61. These notes do not address fast track cases. However, it is merely noted that those detained in the fast track process remain entitled to apply for bail – or to seek any of the other legal or complaints remedies that are highlighted in these notes. It should, nevertheless, be noted that there are specific Home Office policies relating to fast track cases[58].

Detention and removal:

62. Many people experience detention at the end of the asylum process – i.e. immediately before removal. The immigration service frequently detains individuals when they are ready to remove so as to hold the person and ensure the removal. Some individual's are detained following raids. Others are detained when they go to report (or sign on).

63. It is beyond the scope of these notes to discuss challenges against removal. However, it is noted that those who are detained often face difficulty in obtaining a lawyer. Moreover, even if they have a lawyer or can find one, there may be difficulties in any legal challenge being made.

64. The Home Office and judiciary have recently changed their practices relating to challenges to removal. It should be noted that the time between removal directions being notified (often at the time of detention) and the removal being carried out may now be very short – even shorter than previously. Often there may be no more than two working days between detention and removal. Therefore, a lawyer will have difficulty in considering whether there is any justified legal challenge that can be brought.

[58] Paragraph 38.4 of Chapter 38 of the OEM sets out some of the specific policy which relates to fast track cases.

65. The following may be useful advice for anyone who is at risk of removal:

a. A person who does not report as required will increase the chance that a decision is made to detain him or her, and reduce the chances of bail being granted if he or she is detained.

b. If a person is worried that he or she may be detained for removal when going to report, it may be helpful if a friend goes with the person (the friend does not need to enter the reporting centre). Alternatively, it may be helpful for the person to arrange with a friend to telephone after completing his or her reporting (signing on).

c. If the person has a lawyer, it would be useful for the friend to know who the lawyer is and how to contact the lawyer. It may also be helpful if the lawyer knows the friend (at least by name), and is aware that the friend will call if there are concerns that the person has been detained.

d. For a lawyer to make a proper assessment of whether removal can be challenged, the lawyer will need to see relevant case papers. These will normally include:

- any reasons for refusal letter
- determinations of any appeals
- the evidence that was presented to the Home Office or on the appeal (particularly evidence, such as statements, interview records and personal documents) that is about the individual (any general country information that was relied upon may not be necessary, though could be useful).

e. The lawyer will need to be able to assess what decisions have been made in the past, and on what evidence. Only then will the lawyer

be able to make a considered assessment of whether any legal challenge to removal has a real chance of success; or if a fresh claim can be made (for which there will need to be new evidence).

f. If a person does not have a lawyer, it is very important that he or she keeps case papers in a safe place, and that the place is accessible so that a friend or some other person can get these to a new lawyer quickly.

Conclusion:

66. These notes cover a range of issues. It is not intended that all of these issues will be covered in the workshop.

67. The workshop and ILPA's participation is provided as part of ILPA's information service for refugee and migrant community organisations and others, including NGO's, providing support and assistance to refugees and migrants. More information on this service is available on ILPA's website at http://www.ilpa.org.uk by selecting the info service link on the website. Appended is an information sheet providing some information about this project.

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