Detention and Travel Documentation

When will it be lawful to detain for the purpose of removal despite there being inadequate travel documentation for removal?

Introduction:

1. These notes accompany a short presentation to be delivered at the AGM of the Association of Visitors to Immigration Detainees (AVID) on Saturday, 29th March. The presentation will focus on the recent judgment of the High Court in *A & Ors v Secretary of State for the Home Department* [2008] EWHC 142 (Admin)[1].

2. Whether it is lawful to detain someone for the purpose of removing them, despite the fact that there is inadequate travel documentation to enforce a removal, will depend upon the facts in any individual case. *A & Ors v Secretary of State for the Home Department* provides a useful casestudy of the relevant issues. These notes provide information about this case; and also provide some general information relevant to detention and travel documentation.

Whether detention is lawful?

3. Lawyers often analyse the question of lawfulness as involving two issues, which may be broadly summarised as follows:
   - is there a power in law to detain?
   - is the detention itself reasonable?

4. In UK law – which now incorporates Article 5 of the European Convention on Human Rights – there are fairly broad powers to detain immigrants for two purposes. Firstly, to prevent illegal entry. Secondly, to remove those who are not entitled to be here. The first purpose may include detaining an immigrant for the purpose of investigating his or her claim to be entitled to enter the country. In most cases of immigration detention (though not all), there will likely be a power to detain.

[1] A copy of the judgment is available at http://www.bailii.org/ew/cases/EWHC/Admin/2008/142.html

5. However, just because there is a general power in law to detain, does not mean that it is reasonable or lawful to exercise that power. Decisions to detain must be taken having regard to certain policies and guidance; and policies and guidance also govern how detention is managed. These policies include factors that must be considered as relevant to whether a person should be detained, or whether his or her detention should continue. Many of those factors relate to the personal circumstances of the individual. Some point in favour or detention; some against. A failure to have regard to any of these policies may mean detention is not reasonable. Generally, the policies also give an indication of when it will be reasonable (or proportionate) to detain and when not.

6. Whether or not detention can be said to be unlawful, there may still be a possibility of bail.

Travel documentation:

7. As explained above, one lawful purpose for detaining an immigrant is to remove him or her from the country if he or she has no entitlement to be here. This may be because he or she never had any entitlement, the entitlement has passed or it has been taken away.

8. Travel documentation, therefore, may be an important issue in connection with detention because it is usually a prerequisite for removal. If there is no travel documentation available, this calls into question the lawfulness of any detention that is for the purpose of removal.

9. However, the following points should be noted:

    a) Those who destroy, or get rid of, their travel documents before claiming asylum may be criminally prosecuted and, if found guilty, may be sentenced for up to 2 years imprisonment[2].

[2] See section 2, Asylum and Immigration (Treatment of Claimants, etc.) Act 2006. However, it is not an offence to destroy or get rid of invalid or forged documents. The offence is only committed if the asylum-seeker had a valid travel document for some part of their journey to the UK; and fails to present

b) Those who refuse or fail to cooperate with efforts to obtain travel documents on which they can be removed may be criminally prosecuted and, if found guilty, may be sentenced for up to 2 years imprisonment[3].

c) Refusing or failing to cooperate with efforts to obtain travel documents for removal may result in someone's detention being significantly extended even if they are not criminally prosecuted.

10. Difficulties obtaining travel documentation may be caused by the individual's refusal to cooperate. They may also arise despite full cooperation on the part of the individual.

A & Ors v SSHD [2008] EWHC 142 (Admin):

11. This case concerned four Algerian nationals, each of whom had convictions in the UK for which they had served periods of imprisonment. They were each facing deportation to Algeria, and by the time of the case coming before Mitting J in January 2008 had spent various and lengthy (in excess of 12 months) periods of time in immigration detention. The case before Mitting J was an application seeking to secure their release from detention.

12. The result was that Mitting J found the detention of each of the four to be unlawful and ordered their release on bail, albeit subject to stringent contact management conditions including a 12-hour curfew and electronic tagging. (Although the currently available judgment indicates that Mitting

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the document and has no reasonable excuse for failing to present the document. This distinction (between valid and invalid documents) was made by the Lord Chief Justice in *Soe Thet v DPP* [2006] EWHC 2701. The judgment is available at http://www.bailii.org/ew/cases/EWHC/Admin/2006/2701.rtf

[3] See section 35, Asylum and Immigration (Treatment of Claimants, etc.) Act 2006. It appears that there have been few prosecutions under this provision, which is set out in very broad terms. It is Home Office policy that they will not contact the relevant consular or other national authorities about an asylum-seeker unless and until his or her claim has been refused (unless he or she has consented to contact being made at this time); and nobody should be required to undergo an interview or contact these authorities themselves before refusal. The situation is more contentious post-refusal, where an appeal is outstanding or a fresh claim has been made.

J found that the detention of one was lawful; since the judgment was published, his detention too was found to be unlawful by the same judge and in the same proceedings following disclosure of further information from the Border and Immigration Agency file.)

13. In brief, the relevant facts of each case were as follows:

a) A entered the UK on a stolen French passport, had given a false name to the UK authorities and had, it seems, absconded after making an asylum claim. He later received convictions for robbery and handling stolen goods and was sentenced to 42 months' imprisonment. He was released on licence, then recalled to prison for breach of his licence conditions. He was again released, but was detained in May 2006 under immigration powers and served with a notice of intention to deport. He appealed, and the AIT dismissed his appeal in July 2006. A completed biodata forms and supplied 4 passport-sized photographs in September 2006; however he was then told that he would need to supply fingerprints and complete Algerian forms. The Algerian form was provided in October 2006, and arrangements to take his fingerprints were made in November 2006. He completed the form and gave the fingerprints. Thereafter the completed application (form and fingerprints) was sent to the Algerian authorities promptly. However, in March 2007, the Algerian authorities advised that their investigations into A's identity had proved unsuccessful. A was informed of this in May 2007. In July 2007, A applied to make a voluntary assisted return. Several applications for bail were opposed by the Border and Immigration Agency; and bail was consistently refused by the Asylum and Immigration Tribunal. The basis for this was said to be lack of cooperation on A's part, which it was said could be inferred from the fact that the information provided by A had not been sufficient for the Algerian authorities.

b) B appears to have entered the UK illegally in the 1990's and left voluntarily having been convicted and served a short period of imprisonment for assault and criminal damage. He re-entered on a stolen French passport in 2005, and was arrested seeking to obtain a National Insurance number (NINO) to provide his employer. He was prosecuted for using false documents and sentenced to 12 months' imprisonment. He was due for release in July 2006, but it appears he was then detained under immigration powers. He appealed against a notice of intention to deport, which appeal was finally dismissed in January 2007. An application had, meantime, been made to the Algerian authorities (including the relevant Algerian form, the biodata form, fingerprints and passport-sized photographs) in March 2006. When he was arrested for the most recent offence, the police had seized documents that purported to be his Algerian identity card, birth certificate and other personal documents (Mitting J decided that it must simply be unknown whether these documents were or were not authentic). The police had destroyed these documents. The only other step taken was to resubmit the March 2006 application to the Algerian authorities in December 2007.

c) MA entered and worked in the UK illegally. He was arrested in 2005 on suspicion of immigration offences and required to report. It appears that he absconded. In March 2006 he was arrested for theft, which led to his prosecution, conviction and receiving a 12 months' prison sentence. When due for release he was immediately detained under immigration powers; and served with a notice of intention to deport in November 2006. He appealed, which appeal was finally dismissed in April 2007. He was interviewed concerning travel documentation in February 2007, but in July 2007 the Algerian authorities informed the Border and Immigration Agency that they had been unable to substantiate his identity. He had dishonestly given inconsistent information about his family and their whereabouts. A further application was made

to the Algerian authorities in December 2007, after he had provided further information about his family and applied for a voluntary assisted return in August 2007. The evidence of the Home Office was that it might take a further 6 to 12 months from December 2007 to obtain documentation from the Algerian authorities. However, it was disclosed after the hearing before Mitting J that the Algerian authorities had already informed the Home Office that they were unable to progress the matter despite the further information.

d) ME entered the UK under a false name and on a forged French ID document. In 2006, he was sentenced to 12 months' imprisonment for theft offences; and he was detained under immigration powers immediately that he became eligible for release. Prior to that he had been give notice of intention to deport, against which he appealed. His appeal was finally dismissed on November 2006. In October 2006 he was interviewed for the purpose of obtaining travel documentation; and an application was submitted immediately thereafter to the Algerian authorities. Around this time his mother, in Algeria, died; and he made several requests thereafter to be able to return to Algeria. The Algerian authorities first informed the Home Office that they had been unable to identify ME in February 2007. There followed several interviews with the Algerian Embassy, but the Algerian position did not change.

14. Mitting J considered that the relevant question in respect of each of these Algerians was 'When does the Home Secretary expect to be able to remove and what is the basis for that expectation?'. The answer in each of these cases was that, there being no obvious outstanding steps to be taken, there was simply not basis for having any expectation about when removal would be possible. In those circumstances, the detention had become unlawful.

15. It is noteworthy that the case of MA was treated differently at the hearing. Plainly, Mitting J took the view that MA's dishonesty about his family's whereabouts was something that may have caused the difficulties reported by the Algerian authorities in trying to identify him. Mitting J was satisfied that a further 6 months' detention from the time of the renewed application to the Algerian authorities was lawful, though stated that 12 months' further detention might reach the point of unlawfulness. However, this approach fell away when it was revealed that the Algerian authorities had already considered the new application and were unable or unwilling to progress the matter.

Habeas Corpus project:

16. The case of *A & Ors v Secretary of State for the Home Department* was brought by lawyers acting through the Habaes Corpus project. This project was set up by a barrister, Alex Goodman, at 4-5 Gray's Inn Square and works with Bail for Immigration Detainees (BID). Further information about the project is available from the Medical Justice website at www.medicaljustice.org.uk.

17. Information about referral to the project will be available at the AVID AGM. There is also an email address for the project: bid.hcp@googlemail.com. However, it should be noted that email correspondence is monitored by a volunteer, and on only one day per week. Currently, the project focuses on those who have been in immigration detention for a minimum of 12 months. The project is currently considering whether to expand its remit to cover particularly vulnerable groups (e.g. pregnant women, those with significant mental health illness) whether or not the 12 months' threshold is met.

Conclusion:

18. The information here is provided by the Immigration Law Practitioners' Association (ILPA). ILPA is not involved in the Habeas Corpus project. General information on a range of immigration matters is available on the ILPA website (www.ilpa.org.uk) in the "info service" section; and anyone

who would like to receive this information by email on a monthly basis would be very welcome to contact steve.symonds@ilpa.org.uk.

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