



Law Society
of Scotland

Written Submission

Immigration Detention Inquiry

April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Immigration and Asylum Law sub-committee welcomes the opportunity to consider and respond to the Home Affairs Committee's immigration detention inquiry. The sub-committee has the following comments to put forward for consideration.

Whether detention should be time limited.

In its response to the United Nation's Universal Periodic Review recommendation that the UK stop the practice of arresting migrants for unspecified periods, the UK Government gave two main justifications for resisting a time limit. Their first justification was that an individual's detention remains under regular review by the government, and their second was that individuals can apply for release on immigration bail and can challenge the lawfulness of their detention in the courts.¹

The first of the government's justifications for resisting a time limit – ongoing review of detention by the Home Office – has already been addressed in oral evidence to your committee.² In relation to the second justification – that detainees can apply for release on bail - we think that the government's approach over-emphasises the role of individual detainees in applying for release, and does not take sufficient account of the barriers to release (see our further comments below). Following on from this, we think that the government should take more responsibility for facilitating release, including by time-limiting detention. International comparators demonstrate that alternatives are available (see our further comments below).

¹ Ministry of Justice, *United Nations Universal Periodic Review – UK, British Overseas Territories and Crown Dependencies – Response to the recommendations received on 4 May 2017* (29 August 2017)

² Home Affairs Committee, Evidence Session with Bail for Immigration Detainees (BiD), Women for Refugee Women, Medical Justice (20 March 2018)

Barriers to release from detention

We agree that it is very important that detainees have the opportunity to apply for immigration bail. We also recognise the findings of research into immigration bail hearings at the First Tier Tribunal (Immigration and Asylum Chamber) which has demonstrated that, in practice, bail hearings have considerable limitations as a route to release.³ In the case of a detainee with pre-existing mental health problems on entering detention, the Court of Appeal recently identified that there was no mechanism which would enable him to effectively challenge his detention, and they found that the Home Office had discriminated against him on by failing to make reasonable adjustments under the Equality Act 2010.⁴ It was the Secretary of State's critical failure to make anticipatory adjustments to ensure that procedures were in place to avoid a mentally ill detainee being unjustifiably disadvantaged.

In that case, Beatson LJ referred to a "lacuna" in the system. While in other detention contexts there were regular reviews on the lawfulness of detention, in immigration detention only a bail application could initiate an independent review of the detention. Mentally ill detainees lacked the ability to initiate that process and are therefore unjustifiably discriminated against pursuant to the Equality Act 2010. Importantly, the Court held that the Secretary of State's duties under section 153(2) of the Immigration and Asylum Act 1999 to make provision with respect to the safety, control, activities, discipline and control of detainees were sufficiently wide to incorporate a system to assist mentally ill detainees in making representations against their detention.

In that case, the Appellant proposed three main adjustments to cure this problem:

1. The appointment of specific "mental health advocates" to make representations on behalf of the detainee;
2. That a detainee's capacity should be assessed at the beginning of their detention; and
3. That regular and independent reviews should be carried out without a detainee's prompting.

The Secretary of State's arguments in opposition were:

1. She had no power to appoint specific mental health 'advocates' for mentally ill detainees;
2. It would breach the detainee's confidentiality; and
3. The cost would be excessive.

Each of these submissions were rejected summarily by the Court as "entirely unfounded".

³ See, for example, *Bail for Immigration Detainees, A Nice Judge on a Good Day: immigration bail and the right to liberty* (2010) and *Bail for Immigration Detainees, The Liberty Deficit: long-term detention & bail decision making* (2012)

⁴ *VC v SSHD* [2018] EWCA Civ 57

While recent changes affecting detainees recognised as vulnerable should improve their situation, we think it is essential to ensure that all detainees can engage effectively with bail processes. Currently, detainees' ability to engage with those processes depends on a range of factors including access to legal advice and representation and access to a wider support network – including access to personal guarantors/cautioners.

As identified in VC, an initial assessment of a detainee should be required at the beginning of their detention; and the proposed system of mental health 'advocates' to assist detainees to make representations on their behalf would, in our view, be beneficial in providing a detainee with the opportunity to make representations which they may not ordinarily have the ability or capacity to do.

Recent research into bail hearings at the First Tier Tribunal (Immigration and Asylum Chamber) in Scotland identified that support in the form of guarantors/cautioners (who could provide a personal guarantee in support of the detainee) increased the prospects of release.⁵ The Immigration Act 2016 has signalled a possible move away from financial guarantees, which is to be welcomed. However, the Scottish research also showed that of those released from immigration detention in Scotland, just over half were bailed to addresses in England and Wales, and there is anecdotal evidence of people resident in Scotland being detained in Immigration Removal Centres in England and Wales. Where detainees are held in removal centres which are distant from their homes, their ability to access support networks is inevitably compromised. The different legal aid systems in England and Wales on the one hand and Scotland on the other add to the complexities which detainees face in accessing support.

Another significant barrier in a detainee's release from detention arises from the statutory provisions in the Immigration Act 1971 as amended by the Immigration Act 2014. In particular, paragraph 22(4) of Schedule 2 of the Immigration Act 1971 now provides, in certain circumstances, that the Secretary of State can refuse to consent to bail granted by an immigration judge. In *Roszkowski v Secretary of State for the Home Department*, the Court of Appeal held that Parliament's intention in enacting the relevant provisions had intended "an official in the Home Office...[to have the] power to prevent the implementation of the decision of the First-tier Tribunal".⁶

This is deeply concerning. A statutory provision which entitles a member of the executive to overrule a decision of the judiciary (because that official does not agree with it) is not in keeping with the principles of the rule of law.⁷ It is a basic principle of the rule of law that a decision of a court is binding as between the parties and that decisions and actions of the executive are reviewable at the instance of an interested

⁵ Susannah Paul and Daniel Ferguson, *Glasgow University Settlement – Find a Solution Report 2016: Immigration Bail Observation Project Scotland (IBOPS)* (2017), and Immigration Bail Observation Project Scotland, *Guide to supporting detainees in immigration bail hearings in Scotland* (February 2017)

⁶ *Roszkowski v Secretary of State for the Home Department* [2017] EWCA Civ 1893 at [54]

⁷ *Evans v Attorney General* [2015] AC 1787 at [51]

citizen.⁸ The current immigration bail system does not “guarantee independent judicial oversight” contrary to the statement of the Home Office.⁹

How a time-limit might be applied in practice

The introduction of regular review in Schedule 10 of the Immigration Act 2016 is a step in the right direction but we think the four monthly review of detention is too infrequent and there are too many limitations on its scope (for example, the review not taking place when removal is contemplated within the next 14 days).

In addition, it is important to note that the automatic review provisions in the Immigration Act 2016 do not apply to those subject to deportation or who have national security cases. There is likely to be a significant number of detainees who will probably continue to be detained longer than is necessary.

In relation to the processes which could be used to apply a time limit in practice, there are international comparators to draw on. The Netherlands, for example, reduced its reliance on immigration detention significantly between 2011 and 2015.¹⁰

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⁸ *Evans v Attorney General* [2015] AC 1787 at [52]

⁹ Home Office, *Immigration Act 2016 Factsheet – Immigration Bail: automatic referrals* (July 2016)

¹⁰ Global Detention Project, *Netherlands Immigration Detention Profile*, (November 2016)