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CHALLENGING DETENTION OF IMMIGRATION DETAINEES IN PRISON

Introduction

1. Legal challenges to immigration detention have, for obvious reasons, focussed on the fact rather than the conditions of detention. For those who are opposed in principle to the use of detention the aim of improving conditions can sometimes seem problematic – as is the concept of the "healthy prison" when it comes to detention in prisons. However with people being detained for increasingly longer periods (we now see periods of 4 and 5 years) it becomes more crucial to challenge unlawful conditions.
2. This event's focus is on the use of prisons but it is important to remember the serious deficiencies of IRCs. Notwithstanding the more relaxed regime they are in some respects they worse than prisons – for example in use of segregation and force (e.g. last week's Harmondsworth report on use of restraints on dying detainees), and care of those with mental illness (there have been 4 cases where the conditions of detention for the mentally ill in IRCs has been held to breach article 3).
3. The briefing by BID provides a very analysis of the serious issues that arise for immigration detainees held in prisons. There are some other problems arising from the fact that Detention Centre Rules (DCR) 2011 do not apply to prisons – e.g. the requirement to forward a report under Rule 35 DCR that should trigger a review of detention where there is concerns over the detainee's health or that they are a victim of torture.[1]

The policy and current practice

4. The statutory framework allows those detained under the Immigration Act to be held in such places as the Home Secretary may direct[2], and such places include "any…prison". The circumstances in which detainees will be held in prison is contained in policy.

[1] This may raise issues over the change of policy referred to below as whether there has been due regard to equality duties (in respect of those with disabilities) in detaining all time served FNPs in prisons.

[2] Para 18 Sch 2, and para 2(4) Sch 3 IA 1971 – such directions are contained in the Immigration (Place of Detention) Direction 2011 which includes police cells, the 10 detention centres, prisons or hospitals

5. A fundamental change in the policy on when immigration detainees will be held in prisons was made by amendments to Chapter 55 Enforcement Instructions and Guidance (EIG – the current version of the policy is available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/) in January 2012.
6. Before this the policy of contained in EIG 55 was as summarised in Prison Service Instruction (PSI) 52/2011 para 2.68 (which confusingly has not been amended) namely "[i]mmigration detainees should only remain or be moved into prison establishments when they present specific risk factors that indicate they pose a serious risk of harm to the public or to the good order of an Immigration Removal Centre, including the safety of staff and other detainees, which cannot be managed within the regime applied in Immigration Removal Centres". The previous policy did include a cap on the numbers of ex-FNPs who could be held in IRCs for control reasons.
7. This reference to a need for an individualised assessment of a security or control justification for holding a detainee in prison was clearly a defensible policy. The courts would hold that detainees had been unlawfully held in prison where there had not been such an assessment.[3]
8. The change in policy[4] (against the background that it had long been policy that a limited number of detainees would also need to be held in prison because of security and control considerations) effectively stated that foreign national prisoners (FNPs) who had served their sentence would not be moved to IRCs until all the places in prisons available for use by the Home Office had been filled. Transfer then would be based on length of time served as a detainee in a prison.
9. The amended policy referred to a Service Level Agreement (SLA) between the Home Office and Ministry of Justice regarding the number of available places in prison accommodation. The current SLA has not been disclosed but it appears from Home Office correspondence that under it there are 600 places available in the prison estate for immigration detainees.
10. This correspondence[5] also confirmed a decision in Autumn 2012 to halt all transfers to IRCs of FNPs who had completed their prison sentences until then numbers of such

[3] E.g. R (Ahmed and another) v Home Secretary [2007] EWHC 1300 Admin
[4] In version 13 of EIG Chapter 55 which came into effect on 24 January 2012 – the current version of Chapter 55 is version 18
[5] Dated 20 May 2013

detainees in prisons reached 1000. The exception would be transfers for the purposes of removal and court appearances. This was due to concerns over "capacity issues" in the IRCs, and due to concerns that IRCs should not hold too large a proportion of ex-FNPs. As in practice ex-FNPs who are released and re-detained may go to IRCs it seems the real focus of the policy is to detain FNPs at the end of the sentence.

11. There is therefore apparently a difference between the allocated number of places available for immigration detainees in prisons under the SLA and the practice to use up to 1000 places.
12. The National Asylum Stakeholder Forum (NASF) has been given information that there were 959 ex-FNPs in prisons on 25 November 2013 (up from 638 from the previous November). In response to a pre-litigation letter on this issue in December 2013 the Home Office confirmed that transfers from prisons to IRCs for ex-FNPs was limited to those "who have removal directions in place as we have not used all the bed spaces available to us in the NOMS estate."

Challenges to the current practice

Use of prisons per se

13. As noted above the statutory framework does allow for detention in prisons. However the use of penal establishments has been criticised by both international and domestic monitoring bodies. The Council of Europe Committee for the Prevention of Torture (CPT), as noted in the BID briefing, in its report into its visit to the UK in 2009 stated[6] "[t]he intention was to avoid holding persons in prison beyond the end of their sentence. However, the delegation met a number of foreign nationals who were being held in prison under the 1971 Immigration Act a considerable time after their sentences had expired (see for example paragraph 46 above). **Such persons, if they are unable to be deported at the end of their sentence, should be transferred to a facility designed to provide conditions of detention and a regime in line with the status of immigration detainees.**"
14. The starting point under the ECHR is that the conditions a detainee is held in will not generally make unlawful detention which is otherwise lawful.[7] However if, for example, the ground of detention is for the treatment of mental illness then detention in a non-

[6] CPT/Inf (2009) 30 at paragraph 82
[7] E.g *Munjaz v UK* [2012] MHLR 351 – although conditions may breach articles 3 or 8.

therapeutic environment will be in breach of article 5(1).[8] The European Court of Human Rights (ECtHR) has also held in the context of immigration detention that for Article 5 to be satisfied there must be "some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention" to avoid arbitrariness.[9] So detention of an unaccompanied minor in adult detention facilities will be unlawful as a breach of article 5.[10]

15. In domestic courts it has been held that detention in a prison in itself is not unlawful absent any evidence that the conditions of detention are unduly harsh.[11]

Current operation of the policy

16. As fully set out in the BID briefing there are clearly many disadvantages in being held in a prison especially in relation to accessing legal advice and the courts and facilities to assist in bail applications.
17. Whilst the Home Office may rationally seek to justify detention in prison for reasons of security and control, the failure of the current policy/practice to give individualised consideration to whether a detainee should be held in the more restrictive conditions of prison appears to an unlawful blanket policy.[12] This unlawful failure to give individualised consideration to whether detention is justified in an IRC would also give rise to a breach of article 5.
18. There is also a concern that the Home Office's policy may be unlawful as it is not properly accessible (see paragraphs 9 -11 and footnote 12).

Individual cases

19. Where individual consideration is given as to whether security and control considerations warrant detention in prison the courts have indicated that it is largely a

[8] *Aerts v Belgium* [1998] 29 EHRR
[9] *Saadi v UK* [2008] 47 EHRR 17
[10] *Mayeka v Belgium* [2006] ECHR 1170 – breaches have also been held in respect of children held in inappropriate conditions with parents – *Popov v France* ECtHR 19/1/2012
[11] *Krasniqi v SSHD* [2011] EWCA Civ 1549 – in one case it was held to breach article 5 (though not to make the detention unlawful) to hold an immigration detainee with convicted prisoners without the detainee's consent - *R (C) v SSHD* [2009] EWHC 1989 (Admin),
[12] E.g *R (Lumba) and others v SSHD* [2011] UKSC 12 para 20 – 3 requirements of a policy are "it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations".

matter of judgment for those with responsibility for the management of IRCs.[13] Relevant considerations will be the nature of the convictions, assessed risk, behaviour in prison/IRC, need for contact with family or legal advisers, health requirements. Also relevant will be the particular regime provided in the prison concerned and whether the detainee is properly treated as unconvicted.

20. Whether article 5 is breached will also depend on the facts. As noted above a breach may be established where there is a clear lack of relationship between the ground and place of detention.[14] Where the authorities provide rational justification for detention in prison related to security and control there is unlikely to be a breach.[15]

Funding for challenges

21. The governments current proposals would effectively halt further challenges by those who fail the residence test to the conditions in which detainees are held (including cases such as the 83 year old handcuffed in hospital highlighted in the Harmondsworth report). This would include funding for challenges to place or conditions of detention for these detain, including to unlawful detention in prison (although there would be funding for challenges to detention itself by way of habeas corpus or judicial review).

Hamish Arnott Bhatt Murphy

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[13] E.g *R (McFarlane) v SSHD* [2010] EWHC 3081 (Admin) para 16, and *C* at note 11 above

[14] See para 13 above – and for example *Musa v Malta* ECtHR App 42337/2012 23/7/2013 where poor conditions for an adult together with the length of detention resulted in a breach of article 5(1), compare with the domestic case of *R(HA(Nigeria)) v SSHD* [2012] EWHC 919 (Admin) where article 5 was not breached by reason of place of detention where a mentally ill detainee was held in segregation in an IRC for a period after a psychiatrist had recommended transfer to hospital.

[15] See *T v SSHD* [2007] EWHC 3074, *R (Rangwani) v SSHD* [2011] EWHC 516 (Admin)