

## Exploring calls for time limits on immigration detention

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**Immigration analysis: Kezia Tobin, barrister at Goldsmith Chambers, discusses the recent calls for time limits on immigration detention amid a rise in its use.**

### Original news

Migration Observatory briefing analyses immigration detention in the UK, [LNB News 29/05/2019 15](#)

*The Migration Observatory at the University of Oxford has released a briefing on immigration detention in the UK. The briefing discusses the capacity of the UK's detention estate—including the number of detainees, their characteristics, and lengths of detention. It also looks at the detention of children and the total costs of operating the estate.*

### What is the current Home Office policy on time-limits for immigration detention, how long has this policy been in place and how is it enforced?

The UK is currently the only European country without any time limit on immigration detention. Despite the overwhelming evidence which has been in the public domain for many years about the intrinsically harmful effects of indefinite detention, the government has persistently resisted imposing a cap. Instead the use of immigration detention has steadily risen, including since 2010 in the climate of the 'hostile environment'. In 1993, there was a capacity to detain 250 people at any one time. By its peak in 2015, the detention estate could detain almost 5,000.

Most powers to detain come from the [Immigration Act 1971 \(IA 1971\)](#), although amendments to those powers have been brought in subsequent to that, such as with the coming into force of the [UK Borders Act 2007](#). The formalisation of the use of specified detention centres or immigration removal centres (IRCs) came about under the [Immigration and Asylum Act 1999](#). It was arguably that point which marked a shift in the approach to the use of detention in the UK. No longer was it just an exceptional measure used in times of crisis—instead it became a standard administrative mechanism that formed part of the makeup of the immigration and asylum system.

Until 2010, even families with young children could be detained without time limit. The Conservative-Liberal Democrat coalition government put a stop to that, imposing a time limit on the detention of children of 72 hours, with the possibility to extend to up to a week with specific ministerial approval. Some other restrictions exist, such as that relating to the detention of pregnant women and, at least in theory, those with vulnerabilities associated with trauma and poor mental health. The reality, however, is that detention itself creates a state of mental vulnerability and significant numbers of torture survivors still end up in immigration detention each year.

### What are the legal issues, if any, for those in immigration detention for a sustained period of time?

Two of the biggest problems with immigration detention are the facts that, unlike in the criminal justice system, there is no automatic right to legal advice and, until 2018, there was no automatic judicial oversight of its use.

While those detained in police custody through the criminal justice system must be brought before a judge within 24 hours (extendable to 36 in certain circumstances), for those detained under [IA 1971](#) powers there is no such oversight. The right to automatic bail hearings which was introduced in 2018 was a step towards remedying that but falls far short. For starters, it only kicks in after four months, meaning that individuals can

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still be detained up to that point (a long time to be deprived of one's liberty) with no independent oversight. It also does not apply to foreign national prisoners detained under immigration powers beyond the expiry of their criminal sentences, yet they form a significant proportion of people held in immigration detention for longer periods of time.

The statistics confirm that it is an ineffective remedy in any event. Only 4% of those brought before the tribunal are granted bail, despite the fact that over 50% of those detained eventually end up being released back into the community rather than removed. Unlike in the criminal justice system, many are not legally represented in their bail hearings and have not received advice about what conditions they need to satisfy or what evidence they need to provide in order to get bail. In practice, the onus remains on those detained to demonstrate why they should be released, rather than on the Home Office, who should be required to demonstrate why detention is necessary.

On top of the legal issues posed, there are widespread concerns about the impact that detention, particularly when it is indefinite, has on mental health. It seems that there is consensus among medical professionals that it has significant and long-lasting harmful effects, even if only used for a relatively short time. In 2017, the British Medical Association called for the use of immigration detention to be phased out entirely, in favour of a 'more humane' form of enforcement.

### **What is considered 'excessive' when considering time spent in detention?**

Although common law principles set out the framework through which the legality of detention must be assessed, the courts have struggled to pinpoint a specific cut-off point, after which detention would be regarded as excessive or unlawful.

The core principles of bail are derived from the case of *R v Governor of Durham Prison, ex p Singh* [\[1984\] 1 All ER 983](#), known as the '*Hardial Singh* principles'. There are four key principles:

- the Secretary of State must intend to remove/deport and can only detain for that purpose
- detention can only be effected for a time that is reasonable in all the circumstances of that case
- if it becomes apparent to the Secretary of State before that reasonable period comes to an end that removal cannot be effected within a reasonable time, the power to detain should not be exercised
- the Secretary of State should act with diligence and expedition to effect removal

These principles do not seek to define what is reasonable or what is excessive. What could be regarded as legitimate and proportionate will vary from case to case depending on the circumstances.

The current [bail guidance for judges](#), implemented in January 2018, states that detention for a period of three months should be regarded as substantial, and six months a long time. Imperative considerations of public safety, it says, may be necessary to justify detention in excess of six months.

[Directive 2008/115/EC](#) on common standards and procedures in Member States for returning illegally staying third-country nationals sought to impose a time limit of six months, extendable to 18 months only in particular circumstances where there is non-cooperation by the person detained but the UK opted out.

It is important to bear in mind the overarching aim of detention, which should be to facilitate removal, and to question whether detention is really necessary to that end. The evidence suggests it is not. Equally important to note is the overwhelming evidence about its harmful effects on a person's mental health, regardless of the time spent detained.

### **What are your views on a 28-day time limit on immigration detention and do you see any issues with this proposal?**

The proposal to time-limit immigration detention is undoubtedly welcome. It is high time that the UK stopped detaining people for administrative reasons for weeks, months, or (shockingly) even years. Imposing a 28-

day limit would significantly improve matters and bring the UK more in line with its European neighbours. It may even incentivise the Home Office to act more promptly in its casework decision making. But the imposition of the 28-day limit will not solve all the problems. There is a concern that having that cap in place would give legitimacy to any period of administrative detention up until that point, and that it could result in some being detained for weeks who would previously only have been detained for days. The evidence points to real concerns about the use of detention overall, as well as to its inefficiency.

The Home Office maintains that detention is a necessary tool when in fact the numbers tell a different story. For example, even by official Home Office figures, only 5% of those with reporting restrictions abscond. Many detainees are even detained at the point of complying with their reporting conditions. Following the end to the indefinite detention of children with their families, a study in 2018 revealed that 1300 families had been successfully removed from the UK since April 2016. Only 19 families had been detained over the course of 11 months and of those 19, only four were in fact removed. This surely raises serious questions about the Home Office's contention that detention is necessary in order to effect removal.

### **Given the current state of affairs in the Home Office, how likely is it that the 28-day limit will be adhered to?**

The Home Office has a poor track record when it comes to applying its own policies clearly and thoroughly. Take their adults at risk policy, despite the implementation of which many vulnerable adults continue to be detained (eg *VM v UK* (No 2) [\[2019\] ECHR 62824/16](#), [\[2019\] All ER \(D\) 102 \(May\)](#)). But even if the limit is imposed and adhered to, the risk remains that the Home Office will continue to detain as a matter of course, rather than as a last resort. There are numerous tried and tested alternatives to immigration detention and the focus should be on increasing reliance on them rather than endorsing a carte blanche use of detention for up to a month.

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