

# IMMIGRATION DETENTION: WHO DECIDES?

**TIM BULEY QC**

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## THE ISSUE

- Fundamental oddity of immigration detention system that detention is authorised by *civil servant* (Home Office decision maker) and does not depend for its legality on any oversight by a court
- Essentially paper based process
- Quality of decision making exceptionally poor, “tick-box”, not individualised
- Basic problem exacerbated by issues around accessing courts:
  - Bail, can be sought quickly but (subject to proposed changes) not automatically, and major issues about efficacy
  - High court proceedings take considerable time, often “after the event” review

## TWO PARLIAMENTARY REPORTS

- NB Earlier reports of note:
  - Bingham Centre, “Safeguarding Principles”, 2013
  - Bar Council, “Injustice in Immigration Detention”, 2017
  - Shaw Report “Welfare in detention of vulnerable persons review: progress report”
- Parliamentary reports draw on earlier:
  - Joint Committee on Human Rights, “Immigration Detention”, 30 January 2019
  - Home Affairs Select Committee Report, “Immigration Detention”, 12 March 2019

# RECOMMENDATION 1 (JCHR): INDEPENDENT DECISION MAKING (A)

- Notes moves in this direction by Home Office:
  - “Detention Gate-keepers” since 2016
  - Home office considering introducing “some element of independence” to decision making (para 36) by e.g. introducing Independent Monitoring Board Members into case progression panels
- Not good enough:
  - ... These appear to be independent additions to a fundamentally internal process ...*

# RECOMMENDATION 1 (JCHR): INDEPENDENT DECISION MAKING (B)

- *Conclusion (described in introduction as “key recommendation”:*  
38. *We believe that decision making about detention should be independent. Independent decision making will ensure that the initial decision to deprive a person of their liberty is robust and fully justified. The power to detain should not be wielded by the Department which is charged with removals and deportations. We recommend that alongside the Home Office’s current plans to introduce an independent element into case progression panels, in cases where detention is planned there should be properly independent decision-making. Decisions should be pre-authorized by a person or body fully independent of the Home Office. We anticipate that introducing independent decision-making will help to reduce the significant numbers of vulnerable people being detained each year. ...*
- If taken up, even in part, this recommendation has the potential to fundamentally change the quality of detention decisions and reduce the numbers detained

## RECOMMENDATION 2 (HASC): FACE TO FACE MEETINGS (A)

- Leads to recommendation:

*78. We strongly support Mr Shaw’s recommendation that all “caseworkers involved in detention decisions should visit an IRC either on secondment or as part of their mandatory training” but we believe that is not the same as meeting someone as part of the decision-making process. We recommend that immigration caseworkers involved in the decision-making process to detain an individual should meet that individual at least once, in person, prior to finalising the detention decision or/and within one week of their detention.*

# RECOMMENDATION 2 (HASC): FACE TO FACE MEETINGS (B)

- Paragraph 77 HASC Report:

*77. It is shocking that, other than asylum interviews, there is no face to face contact between immigration decision makers and the detainee during the initial decision to detain. We believe this contributes to the cavalier attitude towards detention decisions. Had decision-makers ever met Paulette Wilson before deciding that she should be detained, it might have made them more likely to spot the injustice in her case or realise that there was a problem. It is a basic tenet of our legal system that when judges take the decision to detain, that person is brought before the court. Therefore it is extremely troubling that in the immigration and asylum system people can be deprived of their liberty through an entirely paper-based exercise by officials where no one involved in the decision ever interviews the potential detainee. ...*

# RECOMMENDATION 3 (JCHR AND HASC): COURT AUTHORISATION OF DETENTION (A)

- JCHR:

*Whether detentions are planned or unplanned, immigration detainees should not have fewer safeguards than those applicable in the criminal justice system. The decision on whether to continue detention should be made by a judge and should be made promptly. However, immigration detainees need sufficient time to get advice and gather evidence before such a hearing. A period of 36 hours may be too short for this. We recommend that a judicial decision should be required for any detention beyond 72 hours.*

- HASC also drew on the analogy with criminal law as well as research *inter alia* by the Bingham Centre, leading to the following recommendation:

*38. The initial detention decision should be made by the Home Office but reviewed within 72 hours by a judge. This would be in line with other areas of UK law, for example in the UK criminal justice system, where an upper limit for detention without charge exists.*

# RECOMMENDATION 3 (JCHR AND HASC): COURT AUTHORISATION OF DETENTION (B)

- NB This is not a recommendation for an early or automatic bail hearing. The HASC is critical of mere bail hearings, quoting the Bingham Centre:

*36 ... Research commissioned by the Bar Council noted that under UK law, an immigration bail application does not provide for a review of the lawfulness of detention:*

*[ ... ] the most prompt and accessible way to secure release is via a bail application to the First-tier Tribunal's Immigration and Asylum Chamber. This is not an independent or automatic review of the lawfulness of detention. ...*

# RECOMMENDATION 3 (JCHR AND HASC): COURT AUTHORISATION OF DETENTION (C)

- Benefits:
  - Independent decision by court
  - Prompt hearing (NB Article 5 ECHR)
  - Pre-authorisation by court in foreign national offender cases?
  - Home Office must justify detention, on merits, not resist bail application
- Problems?
  - Timing – is 72 hours too soon, expect too much of applicant?
  - Disclosure
  - Need for legal aid
  - Removal of High Court oversight?

# Questions?

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**Thank you for listening**

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**4 June 2019**

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