

IMMIGRATION DETENTION AND COVID-19:

Policy, Home Office Practice and Tactical Considerations

TIM BULEY QC

COVID-19 AND DETENTION

- Covid-19 is critically relevant to legality of detention for two freestanding reasons:
 - Removal will likely be impossible in the short to medium term and uncertain in the medium to longer term
 - All detainees are at higher risk of contracting Covid-19 by reason of the “congregate” setting of detention centres. This will be of particular significance for detainees whose underlying health conditions makes Covid-19 more than

PRE-EXISTING HOME OFFICE POLICY (1): ENFORCEMENT INSTRUCTIONS AND GUIDANCE 55

- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804785/Chapter-55-detention-v26.0ext.pdf
- Presumption in favour of release for all detainees
- More detailed guidance on detention of foreign national offenders (FNOs)
- EIG 55.10 (which used to deal with vulnerable individuals) abolished and replaced with Adults at Risk Guidance
- Relevance of EIG 55 to legality:
 - Can inform *Hardial Singh* assessment
 - Query breach of policy makes detention unlawful on *Lumba* analysis?

PRE-EXISTING HOME OFFICE POLICY (2): ENFORCEMENT INSTRUCTIONS AND GUIDANCE 55

- From guidance on detaining FNOs:
 - “Imminence” defined for FNOs “where a travel document exists, removal direction are set, there are not outstanding legal barriers and removal is likely to take place in the next four weeks” (EIG 55.3.2.4)
 - “Risk of Harm” – EIG 55.3.2.6
 - Note emphasis on professional risk assessment (NOMS etc)
 - Overall risk, EIG 55.3.2.10
 - Release “medium” and low EIG 55.3.2.11

PRE-EXISTING HOME OFFICE POLICY (3): ADULTS AT RISK POLICY

- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721237/Adults_at_risk_in_immigration_detention_-_statutory_guidance_2_.pdf
- Presumption of release for those vulnerable within meaning of policy (NB separate from general presumption of release)
- Vulnerable adult has a “condition” or experienced “traumatic event” “that would be likely to render them particularly vulnerable to harm ... in detention”
- Presumption in favour of release greater according to quality of *evidence*, not seriousness of condition or likely harm:
 - Level 1, self-declaration
 - Level 2, professional evidence of vulnerability
 - Level 3, professional evidence specifies that detention “is likely to cause harm”
- Presumption can be overridden by “immigration factors”. Precious little guidance on how balance should be struck

PRE-EXISTING HOME OFFICE POLICY (4): ADULTS AT RISK POLICY, CASEWORKER GUIDANCE

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784634/adults-at-risk-policy-v5.0ext.pdf

Further guidance on how immigration factors will interact with presumption of release:

- Level 1, suitable for “consideration for detention” where “the date of removal can be forecast with some certainty” and is a “reasonable timescale”
- Level 2, consider for detention *only* where “the date of removal is fixed, or can be fixed quickly”, or “level of public protection ... that would justify detention” or risk of non-compliance
- Level 3, “considered for detention” either “removal has been set for a date in the immediate future” and all other arrangements set, or:

the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence, or there is a serious relevant national security issue or the individual presents a current public protection concern.

- NB underlined words considered by Johnson J in *Bello* case, 4 year sentence a gateway but does not justify if not accompanied by serious public protection *risk*
- For level 3, “very unlikely that compliance issues, on their own, would warrant detention of individuals falling into this category”

COVID-19 POLICY (1): VULNERABLE PERSONS

Published policy (referred to in *Detention Action*) about application of AAR policy to those with Covid-19.

- Must assess where person is at risk under AAR policy, any health condition may make more vulnerable
- List of high risk conditions here: <https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults>

- Where present:

The AAR policy sets out a number of indicators of risk which cover the risk factors set out in PHE's guidance. Where these specific risk factors are identified (see further below), individuals should be considered and assessed as an Adult at Risk Level 3.

- Policy is clear but not being applied in practice (e.g *Bello* case, policy ignored and existence denied before interim relief judge Chamberlain J, [2020] EWHC 950 (Admin))
- Less clear what you do in a non-high risk situation

COVID-19 POLICY (2): REMOVABILITY

- *Detention Action* judgment records policy as follows (para 5):
 - ... *With a view to minimising the number of persons held in detention, the Secretary of State has decided that she will not exercise her power to bring into detention persons liable to removal from the UK to countries where removal is not possible by reason of COVID-19 (presently some 50 or so countries), unless the person concerned is considered to present a high risk of harm to the public.*
- But:
 - On face, applies only to new detention, not existing detainees. Arguably irrational
 - Not updated. Last version of list 22 March. EG Nigeria closed airports on 26 March, does not appear to be added
 - Ceased 10 April, apparently not replaced
- EG *Bello* case, treated as irrelevant though Nigeria airports closed
- In my evidence to Home Affairs Select Committee on 7 May I suggested that absence of policy or guidance about difficulties in removal major lacuna in Home Office policy suite

PRESSURE POINTS

- Significant numbers of detainees released (in DA, 736 of 1200, many released since)
- Home Office says it is now only detaining high risk offenders. Plainly right if one takes seriously the above policies that should be the case.
- In practice therefore challenges are likely to revolve around following issues:
 - Failures to apply policies, perhaps because not disseminated
 - Failure to recognise *cumulative* effects of policies
 - Errors in assessment of risk / harm, conflation of past offending with risk (*NB* see para 169 in *R (BA) v SSHD* [2011] EWHC 2748 (Admin), per Elizabeth Laing QC (now J), and see Johnson J in *Bello*)
 - Over optimistic assessments of prospects of return. *NB* Richards LJ in *R (MH) v SSHD* [2010] EWCA Civ 1112, *sufficient* prospect to justify detention (para 76).
 - Problems over release address

TACTICAL ISSUES

- Bail – some indication that very high success rates for bail, so go for bail alongside any claim for unlawful detention
- Interim relief or final hearing? Seek both in the alternative
- Release address – arrange in advance if possible.
- Costs issues

Questions?

Thank you for listening

© Copyright Landmark Chambers 2020

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

Follow us

🐦 @Landmark_LC
🌐 Landmark Chambers