WHITE PAPER – "FAIRER, FAIRER, FASTER – A MODERN APPROACH TO IMMIGRATION AND ASYLUM"

ISSUES RELATING TO DETENTION

JUSTICE RESPONSE

Introduction

We refer to JUSTICE's earlier response to the Government's proposals for reform to the asylum and appellate process, which dealt primarily with the proposed single appeal, and procedural changes to the initial decision-making process and appellate structure. This additional response deals with issues relating to immigration detention, in particular the detention of asylum seekers. It covers three main areas: the criteria for detention and their application, judicial review of the decision to detain and the length of detention.

Criteria for detention and their application

We stress the need to create a detention regime which complies with the UK's international obligations, most importantly those outlined in the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). A copy of an Advice prepared by Nicholas Blake QC in April 1998, in which he outlines measures which the UK needs to adopt to ensure compliance with these obligations, is attached. Once the Human Rights Act enters into force, each decision to detain will need to be justifiable in terms of Article 5 ECHR. This means that the criteria and guidelines for detention will need to be sufficiently precise to avoid all risk of arbitrariness. The need for clarity and precision in the law in this area has recently been underlined in the European Court of Justice's decision on *Steel and others v the United Kingdom (67/1997/851/1058).*

The criteria which are outlined at paragraph 12.3 are, at the moment, too vague. For example, it is unclear what constitutes a "reasonable belief" that an individual will fail to keep the terms of temporary admission or temporary release. It is also unclear what clarifying the "basis of [a] claim" involves. As it is arguable that no claim can be clarified until it is the subject of a final decision, all asylum seekers arriving in the UK could potentially be detained under this criterion. Such a wide provision to detain would be open to challenge under the Human Rights Act as being in breach of Article 5(1)(f) ECHR, which only permits detention on arrival in order to prevent unlawful entry (see paragraphs 12–14 of Nicholas Blake QC's Advice for more detail). Clear criteria to detain should be backed up with detailed, published instructions to officials.

We welcome the proposal, outlined at paragraph 12.7, to give reasons for detention in all cases at the time detention is first authorised and at monthly intervals thereafter. However, we are concerned about the plan to use standard checklists, similar to the magistrates' court bail checklist, to give initial reasons. The magistrates' court checklist applies to people who have been charged with a criminal offence. For that reason they are liable to be detained and it may be sufficient to use a checklist to indicate the appropriateness of bail. Asylum seekers arriving in the UK, on the other hand, are not liable to be detained unless it is necessary to prevent them entering the UK unlawfully. The grounds for detention therefore need to be set out and argued in any judicial proceedings. Any pro forma should therefore provide case-specific reasons for believing that the individual fulfils one or more of the detention criteria, rather than the tick boxes in the magistrates' court checklist. We await

clarification about the proposed format and detail of the reasons that will subsequently be issued at monthly intervals.

The criteria for detention should be more precise and should comply with the ECHR and other relevant international law requirements. They should be set out in the immigration rules and be accompanied by detailed, publicly available instructions to assist immigration officers and/or the reviewing authority to decide whether detention is appropriate in an individual case. Reasons for detention should be detailed and case-specific, and served promptly on the detainee.

Judicial review of the decision to detain

We understand that the government intends that immigration detainees should automatically have two hearings at which the legality of their detention will be reviewed, and that these should take place 7 days after the initial detention has been authorised, and then 28 days later. We also understand that the Home Office considers that there is a presumption in favour of temporary admission on arrival which needs to be rebutted in order to detain, whereas after the decision to detain has been taken, there will no longer be a presumption in favour of liberty, as in the Bail Act. We have four concerns about the proposals in the White Paper:

1. The timing of review hearings We suggest that review hearings should take place on a rolling basis at 7 days, and then at 28 day intervals. There should also be a mechanism allowing detainees to delay the review hearing (for example, if they are unable to obtain a relevant document or a legal representative) or request an earlier hearing.

2. The jurisdiction of the reviewing authority It is essential that the judicial hearing should deal with the question of whether detention should have been authorised in the first place (in other words why the presumption of temporary admission did not apply), rather than only the question of whether the asylum seeker should remain in detention or be released on conditions.

3. Bail conditions, in particular sureties If the judicial authority has jurisdiction to look at whether detention should have been authorised in the first place, and the decision is taken to release the detainee, then sureties should not be required of a person who ought not to have been detained. If, however, the authority finds that the initial decision to detain was lawful, but that continued detention is unnecessary, it may wish to impose conditions on release. In our view, strict reporting requirements are more realistic than sureties, particularly large amounts, which it is unrealistic to expect a recently arrived asylum seeker to be able to meet.

4. Legal advice and representation In acknowledgement of the importance of the decision to deprive immigrants and asylum seekers of their right to liberty, there should be a right to legal advice to help prepare for the review hearing, and to legal representation at the appeal hearing. Legal aid provision should be extended to cover the provision of this advice and representation (see paragraph 10 in Nicholas Blake QC's Advice).

Both the legality of the decision to detain and the legality of continued detention should be subject to judicial review. Conditions on release may be appropriate in some cases, although it is unrealistic to expect newly arrived asylum seekers to meet sureties. The legality of continued detention should be reviewed at 28 day intervals and detainees should have a right to legal advice and representation and legal aid, where appropriate.

Length of detention

Although the ECHR lays no absolute time limit on detention, there should be a general principle that detention should be continued only for as long as is strictly necessary. We recognise that there are problems with setting an absolute maximum period of detention. We suggest, however, that authorisation to detain should only be given for limited periods of time. For example, initial authorisation to detain could last for a maximum of 7 days, after which the court could authorise further limited periods of detention (for example, 28 days), at the end of which the detainee would need to be brought before the court again.

Authorisation to detain should only be given for a limited period of time. As an alternative to a time limit on the total period of detention, the court could authorise a limited period of detention, which would be subject to further review.

JUSTICE
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