

# DETENTION UNDER THE IMMIGRATION ACTS

Law and Practice

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OXFORD  
UNIVERSITY PRESS

OXFORD  
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom,

Oxford University Press is a department of the University of Oxford.  
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First Edition published in 2015

Impression: 1

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Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2014950939

ISBN: 978-0-19-871413-2

Printed and bound by  
Lightning Source UK Ltd

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# 1

## THE SCOPE OF THE BOOK

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|----------------------------|------|--|------|
| A. The Purpose of the Book | 1.01 | B. Overview of the Different Parts of the Book | 1.03 |
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### A. The Purpose of the Book

In December 1983, Woolf J (as he then was) declared that there were implicit limits on the Secretary of State's power to detain immigrants pending deportation.<sup>1</sup> These limits, known as the *Hardial Singh* principles, have subsequently been applied in over 230 reported judgments. Several times as many cases have been settled—in the nine months from 1 July 2012 to 31 March 2013, for example, the Home Office paid out £4 million in compensation to persons detained under immigration powers.<sup>2</sup> The vast amount of case-law in this area has obliged the courts to consider and refine the common law, not just the *Hardial Singh* principles themselves but other areas too, such as the law of legitimate expectation and the tort of false imprisonment. **1.01**

Despite the fast growth in litigation in this area, no book to date has explored comprehensively and in detail all aspects of the law of immigration detention. The aim of this book is to fill that gap. It is intended to assist experts and novices alike. The established law is summarized in a comprehensive and (it is hoped) readable way. Where there are unresolved issues, the arguments on either side are set out with analysis by the authors. The book takes no position on the vexed political debates about the use of administrative powers of detention in the immigration context. **1.02**

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<sup>1</sup> *R (Hardial Singh) v Governor of Durham Prison* [1984] 1 WLR 704.

<sup>2</sup> Response to Freedom of Information Act request made on behalf of the authors, dated 28 August 2013, stating: 'Since July 2012 we have been reporting internally on compensation payments, including ex-gratia payments for unlawful detention claims. From 1 July 2012 until 31 March 2013 we paid £4,089,342 and from 1st April 2013 until May 2013 we paid £509,750.'

## B. Overview of the Different Parts of the Book

- 1.03** The following Parts of the book are structured as follows:
- (1) Part II—The definitions of detention and imprisonment;
  - (2) Part III—Liability to detention;
  - (3) Part IV—Limitations on the power to detain;
  - (4) Part V—Locations and conditions of detention;
  - (5) Part VI—Remedies against detention.
- 1.04** To succeed in a claim for unlawful detention, a claimant must first prove that they were detained. The onus then passes on to the defendant to prove that the detention was lawful.
- 1.05** Part II is concerned with what a claimant must prove—i.e. imprisonment (if the claim is in tort); or ‘deprivation of liberty’ (if the claim is under Article 5 of the European Convention on Human Rights (‘ECHR’)).
- 1.06** Chapter 2 looks at the respective definitions of ‘imprisonment’ and ‘deprivation of liberty’. The two concepts are not synonymous.<sup>3</sup> It is possible that someone may have been deprived of their liberty, for the purposes of Article 5, without having suffered ‘imprisonment’ under the common law.<sup>4</sup> The reverse is also true—i.e. someone may be ‘imprisoned’ for the purposes of the tort, even though they have not been ‘deprived of their liberty’ under Article 5 of the ECHR. For example, in the case of *Austin v Commissioner of Police of the Metropolis* the Court of Appeal held that the claimants were ‘imprisoned’ for the purposes of the tort of false imprisonment even though there had been no deprivation of liberty within the meaning of Article 5(1).<sup>5</sup>
- 1.07** Chapter 3 applies the concepts of ‘imprisonment’ and ‘deprivation of liberty’ to situations where there might be dispute about whether a claimant had been detained. Specifically, it focuses on the following three questions:
- (1) Can temporary admission, or a restriction order, or bail ever amount to a deprivation of liberty and/or imprisonment?
  - (2) When will the treatment of an individual by border control officers amount to a deprivation of liberty and/or imprisonment?

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<sup>3</sup> See *HL v United Kingdom* (2004) 40 EHRR 761 at [90].

<sup>4</sup> *HL v United Kingdom* (2004) 40 EHRR 761 at [90].

<sup>5</sup> *Austin v Commissioner of Police of the Metropolis* [2008] AC 600 at [87]. See also the analysis of Tugendhat J at first instance—*Austin v Commissioner of Police of the Metropolis* [2005] EWHC 480 (QB) at [45] and [71].

- (3) When will stopping and questioning an individual about their immigration status away from ports of entry amount to a deprivation of liberty and/or imprisonment?

Parts III and IV explore the two matters which the defendant must prove in order to establish that detention under immigration powers was lawful: **1.08**

- (1) the detainee was/is 'liable to detention'—i.e. there was a statutory provision which makes/made provision for their detention;<sup>6</sup> and  
(2) the use of detention was/is lawful in all the circumstances—i.e. detention did not and does not offend against any of the relevant legal principles.

The distinction between (1) and (2) has been described, by the House of Lords in *R (Khadir) v Secretary of State for the Home Department*,<sup>7</sup> as a distinction between the 'existence' of a power to detain and the 'exercise' of the power to detain. On the analysis in *Khadir*,<sup>8</sup> the power to detain an illegal alien pending deportation 'exists' so long as the Secretary of State remains 'intent on' deporting them and there is 'some prospect'<sup>9</sup> of achieving this, even if it would not, in all the circumstances, be lawful to exercise that power. If those conditions are fulfilled, the power of detention pending deportation will continue to exist until the subject of that power arrives at the final destination to which they were to be deported.<sup>10</sup> **1.09**

This distinction between the 'existence' and the 'exercise' of the power to detain is perhaps best illustrated by an example. Consider the position of X, an illegal **1.10**

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<sup>6</sup> If there was, in the past, a Royal prerogative to detain aliens, that power has long been supplanted and replaced by statute—see *R (Soblen) v Governor of Brixton Prison* [1963] 2 QB 243 at 300–301 per Lord Denning and *R (Ali) v the Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208 at [27]–[31] per Lord Hope.

<sup>7</sup> [2005] UKHL 39; [2005] 1 AC 207 at [33].

<sup>8</sup> However, the power to detain lapses if the person to be deported succeeds on appeal and the time limit for the Secretary of State to appeal lapses—*R (Gomes) v Secretary of State for the Home Department* [2014] EWHC 1169 (Admin). See paragraphs 7.07 and 7.09.

<sup>9</sup> *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39; [2006] 1 AC 207 at [32] per Lord Brown. The House of Lords was forced to add the gloss that there be 'some prospect' of removal, in order to be consistent with the Privy Council's decision in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97. In *Tan Te Lam*, an appeal from the Court of Appeal of Hong Kong, the Privy Council had found that there was no power to detain Vietnamese boat people because there was no prospect of their being returned to Vietnam in light of the position of the Vietnamese authorities on such returns. As Lord Brown suggested in *Khadir* at [33], *Tan Te Lam* is probably best viewed now as an application of the *Hardial Singh* principles—i.e. detention was unreasonable, and hence unlawful, because there was no real prospect of removal *within a reasonable period of time*. Certainly, since *Khadir*, the courts have tended to accept that there was 'some prospect' of removal even when there have been significant obstacles to removal that might never be overcome, see e.g. *R (MS, AR & FW) v Secretary of State for the Home Department* [2009] EWCA Civ 1310; [2010] INLR 489 at [27], [44], and [51]. The authors are not aware of any reported case, other than *Tan Te Lam*, where it has been successfully argued that there was no prospect of removal and hence no power to detain.

<sup>10</sup> *R (Salimi) v Secretary of State for the Home Department & Independent Police Complaints Commission* [2012] EWCA Civ 422 at [15].

entrant from country Y. Assume that there is some prospect of removal to ‘Y’ but that it is unlikely to happen for many years. Assume that X poses no risk of absconding and no risk to the public. On the analysis in *Khadir*, there ‘exists’ a power<sup>11</sup> to detain X but it would be unlawful to ‘exercise’ that power.<sup>12</sup>

- 1.11 Some authorities have questioned whether, post-*Anisminic*,<sup>13</sup> a legitimate distinction can be drawn between the ‘existence’ and the ‘exercise’ of the power to detain.<sup>14</sup> However, those authorities are concerned with liability for false imprisonment and/or unlawful detention, where the distinction between condition (1) and condition (2) in paragraph 1.08 is unimportant—those who commit public law errors in exercising a statutory power to detain have committed the same tort, and the same human rights violation, as those who had no statutory power to detain in the first place.<sup>15</sup> There are, nonetheless, at least in theory, some contexts where the distinction between the existence and exercise of the power to detain is or could be helpful.<sup>16</sup> For example, there is an important distinction, in practice, between being granted temporary admission and being granted leave to remain. Those with temporary admission may have many more restrictions imposed on their liberty.<sup>17</sup> Only persons who are ‘liable to detention’ may be subject to temporary admission.<sup>18</sup> Thus, it can be very important to determine whether there exists a power to detain someone, even in circumstances where there is no prospect of that power being exercised.<sup>19</sup>

<sup>11</sup> The relevant provision is paragraph 16(2) of Schedule 2 to the Immigration Act 1971. See paragraph 7.03.

<sup>12</sup> Because it would breach the third *Hardial Singh* principle—see paragraphs 8.49–8.75. For the sake of completeness risk to the public is referred to in this example but see the discussion at paragraph 8.70 as to whether risk to the public is a relevant factor in detention for the purposes of removal, as opposed to detention for the purposes of deportation.

<sup>13</sup> In *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 the House of Lords held that decisions which are vitiated by public law errors are ‘outside the jurisdiction’ of decision makers.

<sup>14</sup> In *ID v Secretary of State for the Home Department* [2005] EWCA Civ 38; [2006] 1 WLR 1003 at [111] Brooke LJ suggested that an immigration officer who failed to have regard to a material consideration when exercising his powers of detention will have had ‘no power’ to detain that person because that is ‘what the doctrine of ultra vires is all about’. In *R (Lumba & Mighty) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 at [188] Lord Walker suggested that the ‘wide general principle of not deviating from the statutory purpose is of such fundamental importance that it can be seen as going to the existence of the power, rather than merely to its exercise’. If that were right then the first *Hardial Singh* principle would be something that went to the existence, rather than the exercise of the power to detain.

<sup>15</sup> *R (Francis) v Secretary of State for the Home Department* [2014] EWCA Civ 718 at [43].

<sup>16</sup> *R (Francis) v Secretary of State for the Home Department* [2014] EWCA Civ 718 at [42]–[43].

<sup>17</sup> See *R (MS, AR & FW) v Secretary of State for the Home Department* [2009] EWCA Civ 1310; [2010] INLR 489 at [2] where Sedley LJ vividly describes persons subject to temporary admission as existing in a ‘half-world’. In theory, the conditions attached to temporary admission may be capable of amounting to deprivation of liberty for the purposes of Article 5 ECHR and/or imprisonment for the purposes of the tort of false imprisonment—see paragraphs 3.04–3.07.

<sup>18</sup> See paragraph 21 of Schedule 2 to the Immigration Act 1971.

<sup>19</sup> *R (Francis) v Secretary of State for the Home Department* [2014] EWCA Civ 718 at [43].

In any event, whether one uses the terminology of ‘existence’ and ‘exercise’ or not, **1.12** it is convenient, for the purposes of this book, to have separate analyses of:

- (1) the particular statutory provisions in the Immigration Acts which authorize detention; and
- (2) the general principles which the courts have established as to how such statutory provisions should be exercised.

Part III of this book is concerned with the analysis of paragraph 1.08(1)—what **1.13** the House of Lords in *Khadir* would call the ‘existence’ of the statutory power to detain for immigration purposes. In the words of the Immigration Acts, Part III is concerned with who is ‘liable to detention’. It examines the statutory provisions from which all powers of immigration detention stem as they define who is ‘liable to detention’.<sup>20</sup> Chapter 4 examines each of the statutory sources of the power to detain in turn. It does not consider the amendments to be made by the Immigration Act 2014 because, at the time of writing, those had not yet come into force. Chapters 5 to 7 look at the question of who is liable to detention from the perspective of the individual. Three categories of persons, separated according to their immigration status, are examined in turn. In each case, the chapter looks at when they may be liable to detention under immigration powers. Chapter 5 is concerned with British nationals. There is no statutory power to remove or deport a British national so it is debatable when, if ever, a British national may be detained under immigration powers. Chapter 5 examines some situations where a British national might arguably be liable to detention under the Immigration Acts—e.g. where there is doubt about their British nationality. Chapter 6 looks at the situation of persons who are covered by the Immigration (European Economic Area) Regulations 2006. Chapter 7 is concerned with everyone else. It looks in turn at each of the situations where an alien may be liable to detention, i.e.:

- (1) because their immigration status is being examined;
- (2) because they may be removable;
- (3) because they may be deportable;
- (4) because someone in their family falls within one of the three categories above.

Part IV of this book is concerned with the analysis of paragraph 1.08(2)—what the **1.14** House of Lords in *Khadir* would call the ‘exercise’ of that power. In other words, it examines the limitations which have been imposed on the power of immigration detention by the ‘justice of the common law’<sup>21</sup> or international instruments. In other words, Part IV considers the restrictions on statutory powers of detention

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<sup>20</sup> Section 67 of the Nationality, Immigration and Asylum Act 2002 provides that someone is liable to detention, even if they cannot be detained because of difficulties in removing them. See paragraphs 1.08–1.12 for a discussion of ‘liability’ to detention and the distinction between the existence and the exercise of the power to detain.

<sup>21</sup> *Secretary of State for the Home Department v Abdi; Khalaf v Secretary of State for the Home Department* [2011] EWCA Civ 242 at [7].

which are not explicit on the face of the statute but are inferred by the courts to be Parliament's intention.<sup>22</sup>

- 1.15** Chapter 8 looks at the most well established of the limitations on immigration detention—i.e. the *Hardial Singh* principles. It starts with the original judgment in *R (Hardial Singh) v Governor of Durham Prison*<sup>23</sup> and then looks at how that judgment has been interpreted in subsequent cases. It examines in detail the various issues which the courts have considered when applying those principles.
- 1.16** Chapter 9 explores another kind of common law limitation on immigration detention: the requirement that discretionary<sup>24</sup> powers of detention must be exercised in accordance with established principles of public law. It examines the different kinds of public law errors that may be relevant in this context, and considers the Supreme Court's approach to whether or not an error of law is 'material' to a decision to detain.
- 1.17** Administrative powers of immigration detention in the United Kingdom are widely drawn, and the detailed regulation of their exercise is largely by way of published policy. Chapters 10 to 13 examine key provisions of the Secretary of State's published policies on immigration detention, focussing in particular on the circumstances in which a breach of, or a failure to properly apply or have regard to, a policy, might render detention unlawful. Chapter 10 looks at the general principles in the Secretary of State's policy on immigration detention. Chapter 11 examines particular categories of alien who are generally considered unsuitable for detention and usually only detained in exceptional circumstances. Chapter 12 considers the detention of unaccompanied children and families with children. Chapter 13 looks at the Secretary of State's policies in relation to the Detained Fast Track.
- 1.18** Chapters 14 to 16 are concerned with the limitations imposed by international law. Chapter 14 explores when EU law may limit the Secretary of State's powers of detention. Chapter 15 examines the limitations which come from the ECHR, in particular Articles 3, 5, and 8. We argue that Article 5 is potentially more helpful to claimants than has so far been recognized. Chapter 16 considers the effect of other international instruments on the power to detain.
- 1.19** Part V is concerned with the location and conditions of immigration detention. It looks at where a person may be detained under immigration powers, and the regulation of places of detention.

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<sup>22</sup> *R (Francis) v Secretary of State for the Home Department* [2014] EWCA Civ 718 at [45].

<sup>23</sup> [1984] 1 WLR 704.

<sup>24</sup> Most immigration detention is 'discretionary'. However, on the current state of the authorities, detention under paragraph 2(1) of Schedule 3 to IA 1971 is mandatory because it provides that someone recommended for deportation 'shall be detained' unless the Secretary of State directs otherwise—see paragraphs 9.02 to 9.06.



Part VI of the book is concerned with the remedies against detention. Chapter 18 considers the different methods by which a detainee might secure their release without establishing before the courts that their detention was unlawful. Chapter 19 examines the different ways in which a claim that detention was unlawful might be litigated, and looks at a number of issues of particular relevance to practitioners in this field. Chapter 20 considers the courts' approach to damages for false imprisonment and/or breach of Articles 3, 5, and 8 of the ECHR. We suggest that a breach of Article 5 should generally sound in substantial damages, even when only nominal damages are available at common law. Appendix I provides summaries of a number of decisions of the domestic courts on the quantum of damages for false imprisonment as a result of unlawful detention under the Immigration Acts and more broadly. **1.20**

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