

# **A Difficult Journey?**

## **Immigration Enforcement in Northern Ireland**

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### **At a glance**

This article is based on the findings of an investigation into immigration detention practices by the UK authorities in Northern Ireland which is uniquely situated, having a geographical 'border' with the rest of the UK and a land border with the separate jurisdiction of Ireland. The investigation was carried out by the Northern Ireland Human Rights Commission, a non-departmental public body created by the Northern Ireland Act 1998 and a national human rights institution with United Nations accreditation.<sup>1</sup> This article summarises the methodology of the research and the key findings. In particular, the investigation found that there was too much discretion available to enforcement officials, which leads to individual human rights being compromised on a daily basis.

### **Introduction**

Much has been written on the implications of immigration and nationality law for those seeking to enter or remain in the UK and on how compatible those laws are with international human rights standards. In the UK, as in many other European countries, persons found to be in the country undocumented

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<sup>1</sup> The report of the investigation is published as Latif N and Martynowicz A (2009) *Our Hidden Borders: The UK Border Agency's Powers of Detention* NIHRC, Belfast.

will face a period of detention before a final decision is made to give them temporary release, some type of leave to remain in the UK or to remove them from the UK. In Northern Ireland that period of detention is spent in a police custody suite under the auspices of the Police Service of Northern Ireland (PSNI) before transportation to an immigration detention facility in Great Britain. For the purposes of immigration enforcement, Northern Ireland is unique in its physical separation from the rest of the UK and the fact that it is the only part of the UK to share a land border with another EU state, Ireland. This uniqueness was fundamental to the investigation's findings. First, it has led to what is known in Northern Ireland as 'Operation Gull' – a regular operation carried out by immigration officers of the UK Border Agency (UKBA) at Northern Ireland ports including Belfast City Airport, Belfast International Airport, Belfast City Docks and Larne Docks. This operation involves UKBA staff being stationed at the ports and asking incoming passengers from selected flights and ferry crossings for identification in order to verify their immigration status in the UK. Mostly, domestic flights (from other parts of the UK) are monitored and, therefore, not all passengers will be carrying passports, given that a photographic driving licence is a sufficient form of identification for most airlines operating domestic flights. Second, it has led to a particularly unique interpretation of s10 of the Immigration, Nationality and Asylum Act 1999. These two issues are the main subject of this article and are examined in light of the UK's obligations under the European Convention on Human Rights (ECHR) and other international human rights treaties to which the UK is a party. Before going on to discuss the findings, the article outlines the methodology of the investigation.

## **Methodology**

The investigation was conducted by means of interviews with the following persons and organisations: key immigration service managers and immigration officers responsible for immigration services in Northern Ireland; the agencies responsible for escorting detainees; and immigration detainees including asylum applicants and others with experience of applying for asylum. Investigators also observed 'Operation

Gull' over one weekend when immigration officers conducted the operation at Belfast City Airport and Belfast Docks. All detainees, including those detected at Belfast Docks, were brought to the airport for further questioning. Investigators were allowed to observe immigration officers questioning passengers. As a follow up to this operation, investigators were given the opportunity to interview persons who had been detained at the Docks and at the Airport.

Semi-structured interviews were held in private with detainees arrested during the operations, with prior consent obtained. The investigators interviewed 21 detainees from both traditional enforcement visits and Operation Gull. The interviews were conducted using the same schedule, with questions stemming from four broad areas of concern of which a sample is provided below:

1. The detainee was asked what had happened to him and asked to describe his interaction so far with immigration officers.
2. Each was asked if he had been informed of his human rights, particularly in relation to legal advice.
3. The detainee was asked about the conditions in the custody suite.
4. The detainee was asked if he understood what had happened to him and if he had been provided with information about what was going to happen to him.

Contemporaneous notes were made of each interview and typed up after each session.

Confidential semi-structured interviews were conducted with immigration staff. The investigators' requests to tape these interviews were refused by all but one member of staff. Therefore, contemporaneous notes were made of each interview and typed up after each session. The staff interviewed included the inspector, chief immigration officers, immigration officers, assistant immigration officers, and police officers seconded from the PSNI.

## **Findings**

Overall, the investigation found that immigration enforcement officials operate with too much discretion available to them and that this has led to a situation where individual human rights are compromised on a daily basis. This is a consequence of the inadequacy of the current law on immigration enforcement activity in relation to the UK's domestic and international human rights commitments, a situation compounded by the lack of appropriate independent oversight and scrutiny of immigration enforcement activity in the UK. The investigation examined the extent to which the right of individuals under arts 5 (the right to liberty) and 6 (the right to a fair trial) of the ECHR, are protected by current law and practice. Other rights are of course engaged by immigration enforcement activity. However, the deprivation of liberty and the safeguards in terms of legal representation were the primary impetus for the investigation and the right to legal representation is the subject of much debate and concern among legal practitioners in Northern Ireland.

## **Current law and practice**

In the UK, immigration and asylum have tended to be treated as a distinct and largely inseparable area of policy by successive governments, and seen to require one single stream of legislative and policy provisions. Immigration law has tended, therefore, to apply to migrants seeking entry to the UK at domestic ports, to those either perceived to be or proven to be immigration offenders, as well as to asylum seekers.

A total of 12 immigration bills have reached the statute books since the basic framework was laid down in the Immigration Act 1971. The most recent of these is the Borders, Citizenship and Immigration Act 2009. At the time of writing, the Immigration Simplification Bill is planned for the Parliamentary timetable in 2009/2010. In addition, a number of legislative provisions relating to civil proceedings and, indeed, criminal law (including counter-terrorism measures) are also routinely applied to

immigration detainees, particularly at the point of arrest and initial custody.<sup>2</sup>

## **Protection from arbitrary detention**

Most notable among the protections against arbitrary treatment is the provision under art 5(1)(f) of the ECHR which allows for the deprivation of liberty for reasons related to immigration. Article 5 states that 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. Article 5(1)(f) then qualifies the right as: 'the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.

However, there exists a significant volume of case law at domestic level and at the European Court of Human Rights (ECtHR) that directs states on the reasonable periods of, and treatment during, detention on immigration authority. Nicholas Blake and Raza Hussain have summarised the case law of the ECtHR as recognising that the process of examining those who are seeking entry to another country involves incidental and necessary interference with liberty at port.<sup>3</sup> They go on to point out that this process of questioning, rather than detention by the authorities, is governed by Article 2, Protocol 4 rather than by art 5 of the ECHR. Article 2, Protocol 4, states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

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<sup>2</sup> In recent years, legislation on criminal justice and counter-terrorism have quite deliberately had serious implications for immigration and asylum, raising further concerns as to compatibility with human rights protections for those within UK territory.

<sup>3</sup> Blake N and Hussain R (2003) *Immigration, Asylum and Human Rights* Oxford University Press, Oxford, at pp 114–162.

2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of 'ordre public', for the prevention of crime, for the protection of rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.'

However, where the conditions of confinement reach a certain level of severity by being of undue length or disproportionate, the ECtHR will consider there to have been a deprivation of liberty under art 5 of the ECHR. This is illustrated in the case of *Amuur v France*<sup>4</sup> where the Court viewed that holding an asylum seeker for 20 days in the international zone of an airport, where he was subjected to constant police surveillance, without legal or social assistance, amounted to a deprivation of liberty in breach of the ECHR.

More recently, the High Court, in the case of three Algerian nationals, who had been held for over a year at Colnbrook Immigration Removal Centre, ruled that the detention had been unlawful because there was no prospect of their removal to Algeria within a reasonable time.<sup>5</sup>

The domestic legislation gives clear provision to immigration officers to detain individuals at port and beyond, for the purposes of immigration control and for locating, arresting and removing certain categories of migrants already in the UK.<sup>6</sup>

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<sup>4</sup> *Amuur v France* (1996) 22 EHRR 533.

<sup>5</sup> *A and others v Secretary of State for the Home Department* [2008] EWHC 142 (Admin).

<sup>6</sup> The Immigration Act 1971 provides the basic framework for detention but see also the Immigration, Asylum and Nationality Act 2006 and the Borders Act 2007.

However, there are very stark practical implications which those powers have for individuals in Northern Ireland who, for a variety of reasons, become subject to them. The investigation revealed that UKBA officials go beyond the necessary and incidental interference with liberty and that there is over-zealousness by immigration officers in putting removal directions in place. The practicalities of immigration control in Northern Ireland very much engage a deprivation of liberty often for lengthy periods, and certainly go beyond the point of officials' attempts to simply establish identity and clarify immigration status.

## **Section 10 cases**

As mentioned above, the Immigration and Asylum Act of 1999 has a particular use in Northern Ireland. Section 10 authorises the removal of an individual under the following circumstances:

- '(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if –
  - (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;
  - (b) he has obtained leave to remain by deception; or
  - (c) directions ("the first directions") have been given for the removal, under this section, of a person ("the other person") to whose family he belongs.'

When the UK Government first consulted on the provisions to be contained in the Immigration and Asylum Act in its 1998 White Paper, *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum*, it stated that, while regrettable, the power to detain must be retained in the interests of maintaining an effective immigration control. However, the White Paper gave a commitment that detention would only be used as a last resort and that it would, most usually, only be appropriate in order to:

- to effect removal

- initially to establish a person's true identity on the basis of their claim; or
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.

That commitment is restated in the Home Office's Enforcement Instructions and Guidance, which asserts that, 'In all cases detention must be used sparingly, and for the shortest period necessary'.<sup>7</sup>

Even under the terms of the White Paper and the subsequent Enforcement Instructions and Guidance, the circumstances under which detention is deemed 'appropriate' are extremely broad and left very much to the discretion of the immigration officer who makes the recommendation to the chief immigration officer for detention to be authorised. In criminal proceedings, for example, an individual would not normally be detained for anywhere between a number of hours to a number of days on the basis of a police officer simply having 'a reason to believe' that the person would otherwise abscond. It is notable that neither the White Paper nor the legislation requires substantive evidence to support the immigration officer's belief.

Information made available to the investigators by the UKBA, shows that s10 of the Immigration, Nationality and Asylum Act 1999 is frequently used by immigration officers to detain people under Operation Gull in Northern Ireland. In particular, it appears to be used to remove individuals with valid UK entry on the grounds that they entered by deception – the deception being that they actually intended to travel on to the Republic of Ireland. Immigration officers insisted that to remove people on this basis was a valid interpretation of the legislation. It was suggested that the visa entry form required individuals to disclose whether they had any relatives in another EU state, and that where an immigration officer discovered that the passenger had relatives in the Republic of Ireland, it could be assumed that they had not disclosed this information despite the requirement. The immigration officers thought it

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<sup>7</sup> Enforcement Instructions and Guidance, Chapter 55 on 'Detention and Temporary Release'.



reasonable that individuals be removed on that basis. Notably, however, the relevant application form (VAF1) asks specifically about family ties in the UK, not any other EU state or, more specifically, the Republic of Ireland.

Detecting people, who fall under s10, permits the immigration officer a considerable degree of discretion. Having seen a passport with valid UK entry, the immigration officer must make an immediate decision as to whether this is sufficient. Immigration officers could not elaborate on what would motivate them not to accept a valid visa stamp, acknowledging that 'suspicion' was a key factor. During the Operation Gull observed, a number of passengers who were foreign nationals were stopped and simply let go precisely because they had valid UK visas. These passengers included a number of Indonesians, a Philippine woman and a Nigerian man.

When asked specifically about 'section 10 cases', immigration officers could recount instances where individuals with UK visas were stopped and, when their bags were checked, it would emerge that they were intending to visit family in the Republic of Ireland. In one example, a man had come to Belfast having spent a week in London. His bags were checked to reveal dresses and food and further questioning revealed that he had a wife and children living in Dublin.

Removal on this basis amounts to taking punitive measures against an individual before they have broken the law. Indeed, in the case of s10 as it is used in Operation Gull, even if a person were to attempt to move on to the Republic of Ireland, they would breach immigration rules of the Republic of Ireland, not those of the UK. Operation Gull essentially appears to be a form of internal immigration control and double-checking of the validity of an already-issued UK entry visa, but this was not the rationale advanced by any of the UKBA personnel interviewed, including senior officials.

## **Racial profiling**

No discussion of immigration control at ports would be complete without a close examination of whether racial profiling

takes place and the extent to which legislation permits it. Racial profiling occurs when 'race' or ethnicity is used by government officials as a basis for suspicion in investigations that essentially do not have a target suspect. In other words, the agency is not looking for any one person in particular, but a 'type' of person. The term is usually applicable to law enforcement officials but is not exclusive to their activities. Racial profiling is a practice incompatible with international human rights standards. It is considered to be a discredited way of law enforcement. Under art 2(1)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD):

'Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.'

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) prohibits discrimination on any grounds and guarantees all individuals equal and effective protection of the law.<sup>8</sup> Collective action against a group people because of their ethnicity has been considered a violation of art 3 of the ECHR (prohibition of torture, inhuman or degrading treatment or punishment).

The Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 do not make it unlawful for immigration officers to discriminate on the basis of nationality or ethnic or national origin, when authorised to do so by a Minister (under a Ministerial Authorisation). Home Office sources state that Ministerial Authorisations are based on intelligence or statistics that provide evidence of threats to immigration controls.<sup>9</sup> None of the UKBA staff in Northern Ireland were aware of a

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<sup>8</sup> At the time of writing, an individual complaint had been lodged with the Human Rights Committee against the racial profiling practice of Spanish law enforcement officials. See *Rosalind Williams Lecraft v Spain*.

<sup>9</sup> Woodfield, Kandy *et al* *Exploring the decision making of Immigration Officers: A research study examining non-EEA passenger stops and refusals at UK ports* Home Office Online Report 2007.

Ministerial Authorisation being in place during the course of the investigation's fieldwork. That would suggest that any targeting of particular people on the basis of nationality or ethnic or national origin by immigration officers, during that period, was not in accordance with domestic legislation.

The investigators' observation of Operation Gull at Belfast City Airport and the interviews with detainees raised serious concerns about racial profiling. All disembarking passengers were stopped and many of those interviewed by the investigators said that they saw immigration officers ask all passengers for some form of identification. However, not all detainees had been stopped as they were disembarking a flight or ferry crossing. In one situation, a detainee claimed that he was singled out from the waiting area in the ferry terminal because of his ethnicity. He was detained in the first instance at Belfast Docks while travelling with his girlfriend, and stopped for questioning while trying to purchase a ticket for the ferry crossing. He claimed that only people visibly from minority ethnic communities were being stopped and that perhaps the immigration officers did not think those from a minority ethnic background could be Irish.

Another account concerns an individual at Belfast Docks, standing in the queue for the check-in desk when he saw two men stop a group of four people in the waiting room area. He recounted that the four were of South Asian origin and that others in the area were not stopped. The same individual then saw a woman of African origin being stopped and taken out of public view for questioning. This particular individual challenged the two men who were stopping individuals and was told that the stops were random and that they were police officers exercising powers under the Terrorism Act 2000. When he suggested they were only stopping people who were not White, he was told that they had also stopped some Romanian people. While essentially conceding that foreign nationals were being targeted, the 'police officer' tried to justify this on the grounds of executing a counter-terrorism exercise. However, the 'stop and search' powers under the Terrorism Act 2000 are only to be used where there is evidence of a specific terrorist threat. This particular incident is an example of the conflation of migration and criminality whereby legislative provisions

relating to criminal activity are used to enforce, and indeed to justify, immigration control.

A legal practitioner, interviewed as part of the investigation, recounted that when he had been disembarking a flight at Belfast City Airport, he had seen immigration officers asking only Black and minority ethnic individuals for identification. Unfortunately, given the limited access to Operation Gull, the investigators were unable to confirm unequivocally whether certain people are deliberately targeted for initial checks. An equal concern is the set of factors which determine whether the immigration officer will continue with further questioning. At the end of the Operation Gull observed by the investigators, the chief immigration officer instructed immigration officers that they could stop work. One immigration officer commented that it was frustrating when they had to stop for the day and 'watch people who may be of interest' just walk by. This officer did not elaborate further on which people, exactly, 'would be of interest'.

The immigration officer, having asked for identification, then has to make a decision as to whether further questioning of the passenger is required. In the interviews with immigration officers, the investigators asked how, for example, might a driving licence be sufficient for some passengers while others may be asked to produce a passport; and if a passenger was unable to produce a passport why was he or she questioned further in order to clarify his immigration status. One immigration officer explained that he would exchange a few words with all incoming passengers and that, in so doing, he would know if a driving licence was sufficient. He explained that the passenger's accent was an important factor. Another immigration officer explained that it was a matter of 'feel' more than anything else, elaborating that if the person was born in the UK, usually a driving licence would be 'ok', unless there was a 'feeling' that something was not quite right. This included, a document which 'doesn't feel right, the appearance doesn't match and the person is behaving suspiciously'. In such situations, the immigration officer explained that an additional form of identification would be requested. In the officer's experience, given that most people usually have another form of identification it did not prove

difficult to check. Looking through the passenger's bags was another option to ascertain the person's reasons for being in Northern Ireland.

Most of the immigration officers indicated that there was no uniform process or 'formula' for carrying out immigration enforcement under Operation Gull. An assistant immigration officer claimed that it was the 'person' and that 'the person themselves [who] can give it away with eye contact and how they appear'. Another officer felt that it involved a 'common sense approach' – if someone refused to show an additional form of identification, or if there were doubts as to the authenticity of the documents, it would have to be explained to the passenger that failure to answer questions is an offence. By contrast, another immigration officer said that if a passenger responded with hostility to a request for another form of identification and made a lot of 'fuss', that would often satisfy him that the person's immigration status was secure in the UK. The logic seemed to be that only a person with secure status would have the confidence to respond in this way. When asked if particular nationalities were ever targeted or raised cause for concern, one immigration officer stated that Nigeria had a very high level of forged documents and that every single Nigerian passport is therefore checked for forgery. The immigration officer explained that even if a Nigerian passport had a valid visa stamp, it would still be checked. An assistant immigration officer viewed Operation Gull as a positive measure because it was a means of detecting people engaged in benefit fraud. He commented that the system was being abused by 'several nationalities'. When asked if particular nationalities had been identified, the assistant immigration officer said, 'Yes definitely' but added in contradiction, 'But [I] don't want to generalise like that'.

In general, immigration officers could not articulate, or provide in written form, a standard process for conducting Operation Gull. As a means of avoiding discrimination on grounds of ethnic origin, many thought it sufficient that they could confirm that all passengers were initially stopped. When probed further on how they decided if additional questioning and investigation were required, answers became more ambiguous and, in some cases as cited above, immigration officers appeared to

contradict one another in their approach. Through access to Operation Gull records collated by the UKBA, in the period between April and June 2007, immigration officers stopped a total of 202 people for further enquiries. Of these, 47 were of Nigerian nationality, 19 were Chinese and 15 were from the Philippines. The incoming flights that were targeted appeared to be almost exclusively those from London airports, where there is likely to be a higher number of passengers from minority ethnic backgrounds in comparison to airports north of London.

The majority of those stopped for further enquiry and/or subsequently detained over that period are likely to have been identified as belonging to an ethnic or national minority. There may, of course, be reasonable explanations for such trends, the most notable being that those stopped and detained under Operation Gull reflect a UK-wide pattern of nationalities detected by UKBA staff and found to be immigration offenders or failed asylum seekers. That trend can, in turn, be used further to suggest that particular nationalities are more likely to breach the terms of their immigration stay in the UK and to then justify the deliberate targeting by immigration officers. Justification of such trends in this manner is extremely problematic given the very obvious danger that they become self-fulfilling. If non-White passengers are disproportionately targeted then it is somewhat obvious that they would become disproportionately represented in the statistics on immigration 'offenders'. Indeed, the notion that police officers are justified in targeting Black and minority ethnic males, in exercising their stop and search powers, on the grounds that this group represents a disproportionate percentage of those convicted for criminal offences in comparison to their representation in the overall population, is largely discredited by this investigation. The inconsistencies in decision-making in this way are extremely problematic and are due in large part to the wide discretionary powers available to immigration officers. The deprivation of liberty is therefore arbitrary and of particular concern is the extent to which pre-conceptions about certain nationalities are used to determine whether someone is stopped for further examination or targeted for an enforcement visit.

## Article 6 ECHR – The right to a fair trial

A major concern with immigration enforcement, in general, and Operation Gull, in particular, has been the stage at which detained persons are able to speak to a legal practitioner. It is at a port in Northern Ireland that a decision will be made to ultimately remove a person from the UK. Once a passenger is taken aside for further questioning, he is likely to be fingerprinted, subjected to fairly rigorous questioning, his belongings are likely to be searched and, indeed, relatives and friends may also be contacted by the immigration officer to 'confirm' the passenger's story. At this point, the passenger essentially becomes a detainee although it is suggested by the UKBA that this is a voluntary process. The comparison with an interview that might take place between a police officer and a suspect in a criminal investigation is not a disingenuous one.

It was, however, established by the EctHR, in *Maaouia v France*<sup>10</sup>, that art 6 of the ECHR is not applicable in the field of immigration. In that case, the Court concluded that decisions regarding the entry, stay and deportation of aliens did not concern the determination of an applicant's civil rights or obligations of a criminal charge against him, within the meaning of art 6(1) of the Convention. Resting on individuals' rights under art 6(1) of the ECHR are the further rights enshrined under art 6(3), regarding time and facilities to prepare for the defence and, before that, to be informed of the nature and cause of the accusation in a language the individual understands. While conceding the point with regards to the applicability of art 6 in the field of immigration, commentators have gone on to assert that, under common law, the right of access to the appellate authorities (ie in immigration and asylum tribunals) is regarded as a fundamental or basic constitutional right, akin to the common law right of access to the courts.<sup>11</sup>

In addition, there are a number of procedural rights guaranteed under art 5 of the ECHR, including the right to be informed of

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<sup>10</sup> *Maaouia v France* [2001] 33 EHRR 22.

<sup>11</sup> Blake N and Hussain R (2003) *Immigration, Asylum and Human Rights* Oxford University Press, Oxford at p 215.

the reasons for detention in a language understood by the detainee, as well as the right to have the lawfulness of one's detention decided by a court. These procedural rights are fundamental to the terms of this investigation and it is the standards of common law and the procedural rights guaranteed under art 5 against which domestic legislation and practice are evaluated, as well as the requirements of art 6 ECHR.

The logical corollary of the comparison with the common law provision of the right to a fair trial would suggest strongly that a right to interpretation and, indeed, legal representation is equally guaranteed under common law. The High Court decision in *R (on the application of (1) Predrag Karas (2) Stanislava Miladinovic) v The Secretary of State*<sup>12</sup> involved a Croatian couple who were to be removed from the UK without being given the right to access legal advice. Mr Justice Munby stated that access to legal advice is one of the fundamental rights enjoyed by every citizen under the common law. Domestic legislation and policy appear to have addressed that right unsatisfactorily. The various legislative provisions relating specifically to immigration do not contain a right to legal advice at the point of being detained by an immigration officer.

As a result of its findings, the Northern Ireland Human Rights Commission has recommended that the right to timely legal advice must be protected in the immigration field. There is no such protection in current domestic legislation and the Codes of Practice under the Police and Criminal Evidence Act 1984 (and its Northern Ireland equivalent the Police and Criminal Evidence (NI) Order 1989) which guarantee such provision do not appear to apply to immigration detainees. During observations, detainees were visibly upset and/or angry, generally confused about the legal basis of what was happening and uncertain of the implications of what was being asked. The general negativity of the experience was magnified for those with valid UK visas. Two people interviewed, who had UK visit visas and who were detained in a police custody suite pending removal, continually asked if they had done anything illegal. Another

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<sup>12</sup> *R (on the application of (1) Predrag Karas (2) Stanislava Miladinovic) v The Secretary of State for the Home Department* [2006] EWHC 747 (Admin).



common question from detainees in this category was, understandably, 'is Belfast not in the UK?'. The uncertainty and confusion was further exacerbated by the fact that some detainees could not communicate easily in the English language, had been travelling for a long time, were physically tired, and felt humiliated at being in a custody suite when they had not participated in any criminal activity.

During the interview process with an immigration officer, a detainee is given a copy of the interview record and asked to sign it. Most detainees are also given various forms: IS91R, which explains the reasons for detention and gives an explanation of bail rights and the IS151A which is the notice given to a person liable to removal. In addition, the IS101 gives the opportunity for voluntary departure. Under the Home Office Enforcement Instructions and Guidance, persons liable for removal are to be given 72 hours to access legal advice and challenge the removal decision. However, by signing the form IS101, the detainee concedes to being removed immediately without seeking legal advice or waiting for the outcome of any representations being made on his behalf.

The detainees, to whom the investigators spoke, felt pressurised into signing the documentation including the record of the interview and the IS101. The interview record and all other forms are in the English language, although their content is to be explained by an interpreter if the immigration officer feels that one is needed. One detainee felt that he was 'forced' to sign the papers. Another detainee felt that she was not given sufficient time to read over what she was being asked to sign and so she refused to do so. In general, detainees felt overwhelmed by the process and struggled to understand what was happening. One detainee, an 'overstayer' who had been living in London for a number of years, asked when he would be going to court to challenge the detention. He could not understand why he was being held in Belfast and facing the prospect of being sent to an immigration removal centre in Scotland when he was from London.

Of grave concern was the fact that many detainees believed that by signing the IS101 they would be removed to their home country immediately and, certainly, well within 72 hours.

Detainees who had signed the form did not understand that it was more than likely they would be transported to an immigration removal centre in Great Britain before being removed. Two detainees reported that when they spoke to a solicitor at the custody suite, they were told that they should not have signed the IS101 and now that they had there was little the solicitor could do for them. The interview process is a complex and draining one for the detainee and it is during this process that a decision will be made regarding his or her fate. Once the individual is removed to a custody suite or immigration removal centre, removal directions will already be in place.

The investigators were informed that the detainees were held under caution and not arrested during Operation Gull unless some form of prosecution was to be pursued, in which case seconded officers of the PSNI would make an arrest. However, the decision to pursue a criminal prosecution, rather than administrative removal, rests with the UKBA not the PSNI. The investigators were also informed that the core of immigration officers who carry out Operation Gull are not trained in arrest and, therefore, could not carry out an arrest.<sup>13</sup> The legal position of being interviewed under caution, as opposed to having been arrested, means that individuals are held on a voluntary basis and are free to leave at any time. However, in none of the interviews observed by the investigators were detainees made aware by the immigration officer that they were free to leave, including the individuals who had valid UK visas. Of those interviewed by the investigators in the custody suites following Operation Gull, three had valid UK visas but none were aware that they could have simply left the interview process. Certainly, the investigators were not aware that this was a voluntary process until they were told during an interview with an immigration officer that this was the case. This information was later confirmed by a number of other immigration officers, including a chief immigration officer.

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<sup>13</sup> In discussing the recommendations with the UKBA, the Commission was informed that this situation is to change and that immigration officers carrying out Operation Gull would be arrest trained.

Although detainees are interviewed without having been arrested and are, therefore, free to leave at any time, the way in which immigration officers operate means that detainees cannot reasonably be aware that they are in a voluntary process in which the latter is at liberty to leave at any point. Indeed, detainees can, in some cases, be held for several hours in one location and, watched by uniformed security guards before being transported to another location for questioning – when personal belongings may be taken from them, their baggage searched and detailed personal questions asked. Nothing in the process, from beginning to end, would imply to the detainee that the immigration officer does not have legal powers to force him or her to stay until the questioning is concluded.

Indeed, as already indicated, the atmosphere of the interview process appeared to be markedly similar to that of a criminal investigation. Immigration officers have the power to search bags and, in one interview, investigators observed the immigration officer take a mobile phone from the detainee and offer to answer an incoming call from the detainee's girlfriend. Another detainee also reported that her phone had been taken from her and that the immigration officer had read incoming text messages, the content of which he subsequently used to authorise her detention and removal. In another instance, a Nigerian national reported that the immigration officer had answered a phone call from his wife while pretending to be a taxi driver. Allegedly, the 'taxi driver' claimed to have been sent by the detainee's friends to pick him up from the airport. The 'taxi driver' then asked the detainee's wife to confirm if the detainee was going to Dublin. When she did this, the immigration officer then had sufficient information to have directions for removal put in place. This particular detainee had a valid UK visit visa, but alleged that the immigration officer told him: 'every Black man, that's coming to Belfast, is going to Dublin'.

In another situation, the immigration officers had received a phone call from a ferry company desk to inform them that two Mongolian nationals were waiting to pick up a friend. Both were subsequently detained and questioned by immigration

officers along with another Mongolian male national who had come to the UK on a business visa.

In the interviews observed by the investigators, immigration officers explained that the interview was being conducted under caution and that the detainee did not have to answer any questions but that if they were answered later, the fact that they had not been answered previously could be used against them. Crucially, detainees were not told they were free to leave at any point during the process. Aside from the status of the detentions at this stage, the situations cited described above raise important concerns about the types of tactics employed by immigration officers to ascertain immigration status and/or the onward travel plans of passengers. The example of the immigration officer posing as a taxi driver can be compared to entrapment tactics employed by police officers in criminal law enforcement. Entrapment, when used by police officers, raises important human rights concerns, particularly in relation to art 6 of the ECHR. Entrapment in itself does not constitute a violation of art 6, but jurisprudence has established that it must be used within certain boundaries. In the House of Lords case of *R v Loosely* the Lords said that the proper approach to take, where a state agent had lured a citizen into committing an offence, was for the court to stop the prosecution as an abuse of process. The Lords said that when a court is considering the limits of acceptable police behaviour in a particular case, a useful guide is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. If the police officers went further than others might have done in a similar position, then the police are to be regarded as artificially creating the crime.<sup>14</sup>

Other allegations were made against immigration officers during the course of the fieldwork interviews. One detainee, with a visit visa, claimed that she had been detained because the immigration officer suspected she had come to the UK to work. The immigration officer is alleged to have said that because it was his birthday he would be nice to her and that if she confessed to this he would not cancel her visa but only

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<sup>14</sup> [2001] UKHL 53.

arrange for her removal. Another detainee claimed he was given the option of being deported to Nigeria or being sent to an immigration camp, which the immigration officer apparently described as 'an awful place ... you are not going to like it there ... Take a lawyer, and you will have to go to the camp'. The detainee claims to have signed the IS101 as a result.

While the actions in these incidents cannot be objectively verified and do not necessarily indicate that the immigration officers artificially created any crime or pressurised anyone into making a 'confession', the accusations themselves raise very real concerns about the accountability of immigration officers. Where such tactics might be used by police officers, 'suspects' are ultimately entitled to an art 6 ECHR compliant fair trial, during which such processes come to light and an independent judge decides on an appropriate outcome. In *R v Loosely*, the Lords held that a prosecution could not follow where inappropriate tactics had been used by police officers. However, given that only some of the procedural protections of art 5 of the ECHR, but not the fair trial provisions of art 6, apply in the immigration field, art 6 is not accorded to immigration detainees and many will be removed without any of these issues coming to light. This has consequences not only for the rights of individuals subjected to immigration procedures, but also for the systemic workings of the UKBA.

In criminal law, the sequence of procedures that must be followed leading up to a conviction and any punitive action will have been clearly established, but this is not the case with immigration procedures. Passengers are routinely stopped and questioned for no discernible reason and immigration officers could not articulate the reasons for subjecting some individuals to further questioning and not others. Once the passenger is taken aside, the lines between a formal interview, an interrogation and the immigration officer's investigation become seriously blurred. The situation could be compared to a police officer using stop and search powers, under s 44 of the Terrorism Act 2000, and then using the power to contact the subject's friends and/or relatives to enquire further about the subject's recent movements and future plans, while in fact posing as someone to whom the friend or relative is more likely to divulge further information to.

In addition, there would appear to be little consistency in the approach of individual immigration officers to the interview process. The quite incredible lengths to which the immigration officer is alleged to have gone through in the case involving the Nigerian male national contrasts starkly to another in which a Sudanese national was also detained on the basis that he had a sister in the Republic of Ireland and would attempt to visit her there. This particular individual told us that he had a friend waiting in the airport to pick him up. The immigration officer could have spoken to his friend in an attempt to verify the detainee's assertion that he had no intention of travelling on to the Republic of Ireland, but did not do so, choosing instead to detain him under s10 of the Immigration, Nationality and Asylum Act 1999, with a view to removing him from the UK.

Immigration officers did not disagree about the need to offer access to legal advice early into the interview process. In fact, the overwhelming majority of those interviewed insisted that access to legal advice was offered immediately and that once an individual was taken aside for further questioning, and before any papers were served, he or she would be offered a solicitor. One immigration officer, however, contradicted this and said that while he thought it appropriate to offer legal advice immediately, the chief immigration officer often preferred to wait until detainees were transported to the police station before making the offer. The immigration officer explained that if the detainee was offered legal representation at the port and confirmed that he wanted it, he would have to be moved to the police station and the interview would have to be tape-recorded. He explained: 'We are not that much of a democracy', and that he would have to do as the chief immigration officer asked in such situations. Indeed, this particular immigration officer's account would seem to tally with the view of the Government's own. When asked, at its examination by the UN Human Rights Committee what the policy for transportation from Northern Ireland to Great Britain meant for securing continuity of legal advice for detained individuals, the Government delegation responded that this was not an issue given that most people were detained at ports and transported immediately on to immigration removal centres in

Great Britain.<sup>15</sup> The Government's response indicates that unless detained at a custody suite, legal advice is not offered anywhere in Northern Ireland but only once detainees arrive at the immigration removal centre in Great Britain and, indeed, that it is of the view that legal advice at any earlier stage is not required. The investigation's findings dispute both these claims and, given the level of discretion and powers available to immigration officers, timely access to independent legal representation is a vital entitlement for the detainee and indeed one that could equally protect the immigration officer from accusations of impropriety.

## **Independent oversight and scrutiny**

Not everyone coming into contact with UKBA officials is guaranteed the same treatment. Many factors will influence whether an individual is detained or not, including, resource implications of the detention, the likelihood of obtaining emergency travel documents, the immigration officer's perception of whether the individual will comply with any reporting requirements if given temporary release, the immigration officer's decision to pursue a certain line of questioning and enquiry, as well as the immigration officer's own 'feelings' or 'suspicions' about a person. The factors indicate that the criteria for detention are by no means objective. In relation to Operation Gull in particular, immigration officers who were interviewed throughout the investigation found it difficult to articulate an objective criterion, and accounts of any criterion, insofar as one existed, were not always consistent.

The investigation shows that enforcement operations are complex as, indeed, are the laws that govern them. In addition, the demarcation between the different aspects of an immigration officer's work and the legal authority for it are not always clear. For example, as discussed above, the point at which an individual is being held on a consensual basis, as opposed to being formally detained, is often uncertain. The

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<sup>15</sup> Examination of the UK by the Human Rights Committee 93rd Session 7-8 July 2008, observed by Commission representative.

boundary between an immigration officer asking initial questions and conducting a formal interview for the purposes of putting removal directions in place are similarly blurred. Clarification of that boundary is essential when assessing the extent to which the state complies with the requirements of art 5 of the ECHR and, in particular, in discerning whether individuals are being held on an arbitrary basis or as stated in the ECHR in 'accordance with a procedure prescribed by law'.

Also of importance, is the fact that even while detainees are held in accommodation for which the PSNI has ultimate responsibility, they continue to be held under immigration authority, and immigration officers have the power to enter custody suites to serve papers, re-interview detainees and go on to make enquiries with other people connected with the detainee, particularly when searching for travel documents. Such people might include the individual's solicitor, employer, housemates or relatives. These practices can engage art 3 of the ECHR and the potential for abuse is further heightened by the very fact that immigration officers are permitted to have contact with detainees in isolation, away from public view. These exchanges are not audio-recorded or video-recorded, and an immigration officer may never be required to hand over his written record of the exchange to an independent authority. There are also implications for the art 8 ECHR rights (respect for private and family life) of those other people the immigration officer may feel the need to speak to in relation to an arrest that he or she has made.

Other state actors that have such powers in relation to people held in detention facilities in the UK are police officers and, to some extent, prison officers, both of which are subject to rigorous independent oversight and scrutiny. Given the potential adverse impact on human rights that an immigration officer's actions may have, it is suggested that the current arrangements are unsatisfactory. In particular, there is currently no arrangement for dealing with individual complaints against UKBA staff operating in Northern Ireland. In England and Wales that role falls to the Independent Police Complaints Commission and while the need for this role to be assigned to the Police Ombudsman Northern Ireland has been discussed for some time the practical arrangements have yet to be put in



place. A key recommendation of the investigation is to make those arrangements as a matter of urgency. Similarly the Office of the Chief Inspector of the UKBA, intended to be independent of the Home Office, needs to be properly resourced with a strong and consistent programme of inspections for Northern Ireland. Such oversight is important not just as a means of redressing inappropriate actions for one person but is key to challenging behaviour that has become part of the norm for an entire institution. The investigation found instances of recruits to the UKBA becoming part of the 'culture of disbelief'<sup>16</sup> within a very short space of time. One immigration officer, who had only been in post for some months, commenting on screening interviews for asylum seekers said: 'I like to hear peoples' stories but it's the same thing over again because the word is on the street about what to say...I will let them know [interviewees] they're lying. I'll question them with different questions. I can't do anything about it but I can let them know that I'm not a mug'.

The idea held by immigration officers that they would be lied to routinely and that their efforts were being obstructed by undocumented migrants exploiting the 'system' is a recurring one in the investigation. At the end of the first day of the Operation Gull observed by the investigators no one had been detained. The immigration officer complained that the day had not been much fun and he described his job as being similar to someone who was being paid to clean a park – if by the end of the day the park was not clean, 'questions would be asked'.

Dr Nazia Latif is co-author with Agnieszka Martynowicz of *Our Hidden Borders: The UK Border Agency's Powers of Detention*, NIHRC, 2009

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<sup>16</sup> See Crawley H (2007) *When is a child not a child? Asylum, age disputes and the process of age assessment* ILPA research report.