

# ILPA information sheet

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## Detention

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This information sheet provides general information about the use of detention by the UK Border Agency. Further information relating to the detention of children by the UK Border Agency is provided in the August 2009 “Detention of Children” information sheet. The UK Border Agency policy on detention is set out in chapter 55 of the enforcement instructions and guidance. This is available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55?view=Binary>

### **Whether detention is lawful**

The UK Border Agency has several statutory powers under which it may detain someone. If none of these powers applies, detention by the UK Border Agency will be unlawful. However, the powers of detention are wide.

Detention by the UK Border Agency must comply with Article 5 of the European Convention on Human Rights. Article 5 provides a right to liberty, and sets out the circumstances in which it is lawful to deprive someone of that right. Article 5 requires that any detention is “*in accordance with a procedure prescribed by law*”. This requires, at a minimum, that the UK Border Agency only detains someone in circumstances that are within the powers it has been given by statute. How much more than this it requires is currently the subject of litigation before the UK Supreme Court in a case called *SK (Zimbabwe) v Secretary of State for the Home Department*. In that case, the Court of Appeal overturned the decision of the High Court that the failure, over a period of 22 months, to conduct 18 of the required monthly reviews of SK’s detention meant the detention was unlawful.

In immigration cases, Article 5 of the European Convention on Human Rights permits detention to be used for two purposes:

- to prevent unlawful entry into the country
- to remove or deport someone from the country

### **Reasons for detention and factors that must be considered**

Detention for either of the two purposes (above) may be lawful. However, detention is not lawful merely because it is for one of these purposes. To be lawful, detention must still be necessary.

When a decision is taken to detain someone (and when that detention is reviewed), the UK Border Agency is required to provide that person with a written notice of the reasons for its decision to detain. The UK Border Agency policy sets out various factors that must be considered before a decision to detain is taken:

- whether the person can be removed from the UK and in what timescale
- whether there is evidence of the person absconding
- the person's immigration history, including whether or not he or she has complied with any immigration conditions (e.g. reporting conditions) or broken any immigration laws (e.g. entering the UK without permission to do so)
- any ties the person may have to the UK, including close relatives and whether the person has a settled address or place of work
- whether there is an outstanding appeal or some other legal process that may result in the person being permitted to stay in the UK
- any risk of the person committing criminal offences, and if so the degree of risk and seriousness of offences
- whether the person is under 18 years of age
- whether the person is a survivor of torture
- the person's physical and mental health

### **Circumstances in which the UK Border Agency detains people**

The UK Border Agency detains people in many different circumstances. The most common circumstances in which people are detained by the UK Border Agency are:

- where an immigration officer at a port of entry to the UK decides it is necessary to interview or investigate whether someone is permitted to enter the UK
- where an immigration officer at a port of entry to the UK decides that someone is not entitled to enter the UK
- where the UK Border Agency decides that a person's asylum claim may be decided quickly
- where someone is found to be in the UK without permission to be in the UK, or to be here in breach of any conditions of permission to be in the UK (e.g. where immigration officers find someone working illegally in the UK)
- where an immigration officer decides that someone in the UK is not entitled to be here
- where someone has been refused permission to stay and the UK Border Agency intends to remove him or her from the UK
- where someone has completed a prison sentence for a criminal offence and the UK Border Agency is considering whether he or she should be deported, or has decided that he or she is to be deported

Each of these circumstances must be for one of the two purposes set out (above) or the detention will be unlawful.

### **Length of detention**

There is no fixed time limit on how long the UK Border Agency may detain someone. However, if the detention ceases to be for one of the two purposes set out (above), the detention will be unlawful. The UK courts have decided that it is not enough that someone is being detained because the UK Border Agency intends to remove or deport him or her. If it will not be possible to do so in a reasonable time (or the UK Border Agency is not taking the necessary steps to ensure this), detention will be unlawful. However, what is a reasonable time will depend on all the circumstances of the case (including the factors listed, above). Many people in immigration detention, will have no idea from one day to the next just how long their detention may last. No court or tribunal automatically reviews a person's detention, though he or she may apply for bail.

In recent years, the numbers of cases in which people are detained for more than 12 months has significantly risen. More information is available at: <http://www.detainedlives.org/>