

## **Immigration ‘spot-checks’ – a legal introduction**

*The information in this guide is of a general nature and should not be relied upon in place of legal advice appropriate to individual circumstances*

1. The recent immigration “spot-checks” at train stations around London have raised widespread concern of discriminatory practice and allegations of racial profiling by immigration officers. In an attempt to justify these operations, the Home Office have announced that these raids are “intelligence led” and that immigration officers are not targeting individual racial groups.
2. The extent to which individual questioning by either immigration officers or police officers is lawful will depend on the individual circumstances of each encounter. To be clear: neither police officers nor immigration officers are entitled in law to stop individuals purely on the basis of their race, nationality or accent. Such treatment is in breach of both police and Home Office policy and may amount to direct discrimination and/or harassment contrary to the Equality Act 2010.
3. It is important to note that police officers and immigration officers have different powers of stop and search and arrest.

### **Police officers**

4. Police officers are entitled to stop and search individuals on the street pursuant to a variety of powers including s1 of Police and Criminal Evidence Act 1984. If an individual is stopped on the street they cannot be compelled to answer questions about any aspect of their identity or otherwise. If they are arrested, in due course they may be interviewed under caution, to which any failure to answer questions may be used against them in any subsequent criminal proceedings. In those circumstances they are strongly advised to exercise their right to seek legal advice.

5. There is no police power to arrest or detain someone in order to ascertain a person's immigration status. Police officers are entitled to arrest individuals if they reasonably believe that that person may have committed an immigration offence. Offences include section 28A read with s.24 and s.24A of the Immigration Act 1971 (as amended by the Immigration and Asylum Act 1999). Section 28A Immigration Act 1971 provides that an officer may "*arrest without warrant a person...whom he has reasonable grounds for suspecting has committed or attempted to commit [an offence under s.24 or s.24A of the Immigration Act 1971].*" Sections 24 and 24A Immigration Act 1971 are concerned with the offences of overstaying, obtaining leave by deception and related immigration offences.
  
6. If an individual is detained, the burden is on the police officers to prove the legality of that detention. Police officers would be required to prove that prior to arrest they had reasonable grounds to suspect that the individual had committed an immigration offence. This would require them to show that they not only had a genuine belief that the individual had committed such an offence, but also that their belief had a 'reasonable' basis. Suspicion will not be 'reasonable' if it is based on an individual's race, nationality or accent and if it does, may amount to discrimination contrary to the Equality Act 2010.

#### Immigration officers

7. Immigration officers have powers to detain; however to do so lawfully they also must have reasonable grounds to do so. Any individual who is detained is advised to urgently seek good quality immigration advice. If they are arrested by an immigration officer in respect of a criminal offence, they are urged to seek good quality criminal advice.
  
8. The stop of individuals by immigration officers on the street is governed by separate guidance to that of detention or arrest. It will typically involve questioning and the checking of databases in order to carry out checks on an individual's identity. Often these operations will be undertaken in conjunction with police forces.

9. If an individual is being stopped or questioned by an immigration officer on the street, they are not compelled to answer questions and are under no obligation to do so. An immigration officer may describe a refusal to answer questions as an '*adverse reaction to an immigration presence*' which may then be used to justify further questioning. Either way, this will not give rise to a power of arrest or detention by immigration officers unless there are additional and lawful grounds to do so.
  
10. The power to stop and question individuals about their immigration status (or 'conduct examinations') under the Immigration Act 1971 is expressed to be exercisable at port of entry. Paragraph 2 of Schedule 2 Immigration Act 1971 authorises immigration officers to examine individuals to determine their immigration status on arrival. The Home Office rely on the case of Baljinder Singh v Hammond<sup>1</sup> to justify questioning individuals outside the port of entry i.e. on the street. In that case the Divisional Court held that the immigration officer was entitled to conduct an examination away from the port of entry, providing that there was some basis for suspecting that the individual was not lawfully in the United Kingdom. The extent to which this is a proper interpretation of the law is questionable.
  
11. The relevant guidance at paragraph 31.19.3 of Chapter 31 of the Home Office Enforcement Instructions and Guidance in respect of stopping and questioning individuals in relation to their immigration status provides the following:

*Before seeking to question someone, an IO will need to have information in his possession which suggests that the person may be of immigration interest (that is there are doubts about that person's leave status). Under these circumstances the IO may lawfully seek to stop that person with a view to asking them consensual questions about their identity and leave status away from the point of entry to the UK and after the date when that person first entered the UK. The information in the IO's possession should be sufficient to constitute a reasonable suspicion that that particular person may be an immigration offender. Any IO stopping and questioning*

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<sup>1</sup> [1987] 1 WLR 283.

*an individual will need to be in a position to justify the reasons why they considered that threshold to be satisfied in that particular case. Any questioning must be consensual. The paragraph 2 power to examine does not include a power to compel someone to stop or to require someone to comply with that examination. Should a person seek to exercise their right not to answer questions and leave, there is no power to arrest that person purely on suspicion of committing an immigration offence.*

12. The Enforcement Instructions and Guidance also provides a list of possible behaviour which may give rise to a 'reasonable suspicion' as follows:
  - *Hanging back from the barriers. Where the individual moves in such a way as to allow others past his position for no apparent reason upon spotting the presence of IOs.*
  - *Reversing direction or walking away. A sudden or unexplained change in direction and/or pace which is not running but generally quicker than they were walking. This could explain a desire to exit the area without drawing the same attention that running would.*
  - *Seeking to limit interaction and/or confrontation with someone perceived to be a threat.*
  
13. A referral from a police officer will not give rise to a reasonable suspicion unless there is further intelligence which may indicate that the individual is an '*immigration offender*'.

### Discrimination

14. Section 13 of the Equality Act provides that race discrimination takes place when one person (A) treats another (B) less favourably than A treats or would treat others, and the reason for the treatment is B's race.
  
15. Discrimination can take the form of direct discrimination, indirect discrimination, victimisation or harassment. The forms of discrimination which are primarily relevant here are direct discrimination and harassment. Immigration officers are exempt from the Equality Act in the exercise of various immigration functions;

however such an exemption does not apply to the exercise of 'reasonable suspicion' in respect of whether an individual has committed an immigration offence.

16. If there is any suggestion that an individual is being stopped or questioned by either police or immigration officers purely on account of their race, nationality or accent this may amount to either direct discrimination or harassment contrary to the Equality Act. The then House of Lords accepted in R (European Roma Rights Centre) v Immigration Officer at Prague Airport<sup>2</sup> that direct discrimination cannot be justified, even if the basis for the assumption about a particular individual may have a reasonable factual grounding. Individuals must be judged on their individual circumstances and assumptions cannot be made about them because they belong to any particular ethnic group.
  
17. The Home Office has recently settled a discrimination claim brought by a British woman of Croatian descent who was represented by Bhatt Murphy solicitors. The claimant was stopped and surrounded in South London by Metropolitan police officers during a 'spot-check' and threatened with arrest. She was then referred to a Home Office immigration officer for an immigration check which confirmed her to be British. It was the Claimant's case that the only explanation for her prolonged stop was that she did not have a British accent, which amounted to discrimination and harassment. The claim against the Home Office was settled in return for the payment of damages and without an admission of liability. The claim against the Commissioner of the Police for the Metropolis is ongoing. This case illustrates that individuals who are victims of unlawful stops and questioning by either immigration officers or police officers can take legal action to enforce their rights. Individuals who think that they may have been unlawfully targeted should seek legal advice in respect of any remedies that may be available to them.

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<sup>2</sup> [2004] UKHL 55