

ID and others and unlawful detention: the issues explained

Mark Scott and **Harriet Wistrich** consider the important decision of the Court of Appeal in *ID and others v The Home Office* [2005] EWCA Civ 38. Mark Scott examines the issue of damages for unlawful detention by the Immigration Service, and Harriet Wistrich offers advice to practitioners who might want to make a third-party intervention.

Damages for unlawful detention by the Immigration Service

Introduction

Damages for unlawful administrative detention by the Immigration Service has traditionally been a neglected area of practice. The powers of detention for the purposes of immigration control contained in Immigration Act (IA) 1971 Schs 2 and 3 (as amended) are, on the face of the legislation, very wide-ranging, and those subjected to administrative detention have been widely thought of as being without remedies.

The central issue before the Court of Appeal in *ID* was whether an immigrant was entitled to damages for an unlawful exercise by an immigration officer of a power to detain and, if so, what was the correct procedure for bringing such a claim.

The claimants were a Czech family of Roma ethnic origin; they were released on temporary admission having been detained in the UK and issued private law proceedings in the county court claiming, among other matters, that their detention amounted to false imprisonment and/or a breach of article 5 of the European Convention on Human Rights.

The defendant Home Office applied for summary judgment/to strike out the claim on both procedural and substantive grounds. Although this application was initially struck out by a district judge, the Home Office's appeal to a county court judge was successful. The claimants' appealed to the Court of Appeal to have their claims reinstated.

Procedural exclusivity: Judicial review or private law proceedings?

The Court of Appeal gave short shrift to the Home Office's procedural argument that the claim

should be struck out as it had been brought by way of private law proceedings in the county court rather than by way of public law judicial review proceedings in the Administrative Court. The court emphasised that the relevant question under the Civil Procedure Rules (CPR) was not whether 'the right procedure' had been adopted but whether the forum used deprived a party of the opportunity of having its case heard justly. The Court of Appeal held that in a damages case such as *ID*, private law proceedings were most appropriate given that the Administrative Court had no jurisdiction to hear an action for damages alone; there were no facilities in the Administrative Court for a jury (which a party had an entitlement to request, subject to limited exceptions, in an action for false imprisonment (County Courts Act 1984 s66(3)(b) and Supreme Court Act 1981 s69(1)(b)); and a contested action such as this, which required cross-examination, was more conveniently dealt with outside the Administrative Court list.

However, the Court of Appeal did indicate that, although the claim had been rightly issued in the county court as it involved a claim for racial discrimination for which the county court had exclusive jurisdiction, there were issues concerning whether the power to detain had been exercised lawfully which were of a 'public law' nature and would benefit from being tried by a judge with Administrative Court expertise. The solution that the court proposed was that the trial should be presided over by a High Court judge with Administrative Court experience, sitting as a judge in the county court.

Is there a distinction to be drawn between a case where there is a statutory power to detain and

one where this power is wrongfully exercised?

In argument before the Court of Appeal, it was common ground that if there was 'no power' to detain, in the sense that the statute did not authorise the detention, then an individual so detained would be entitled to damages for false imprisonment. However, the Home Office sought to draw a distinction between this and the issue that arose in *ID*, namely, that where there was a statutory power to detain whether an improper use of this could give rise to a claim in damages against the Home Office.

The Court of Appeal concluded that there was no proper distinction to be drawn between a detention that was unlawful because there was no statutory power and a detention that was unlawful when an immigration officer wrongly exercised his/her discretion to detain, for example, by failing to take account of relevant internal policy or another relevant consideration, as in both cases the immigration officer had 'no power' to authorise the detention.

Can the Home Office be liable for the tort of false imprisonment when the detention is carried out by a private contractor?

The Home Office sought to argue that although an immigration officer (and the Home Office which has vicarious liability) had authorised the detentions of the *D* family it was not liable for false imprisonment for the detention as the physical detainer was a private contractor. The Court of Appeal again dealt with this matter quickly. It concluded that the detentions were caused by the immigration officers who authorised them and, although this authority protected the private contractor which detained, it did not protect the immigration officer if the giving of his/her authority was an unlawful act.

Are immigration officers immune from suit for the tort of false imprisonment?

The Home Office sought to argue that foreign nationals fell into a special category and that it had

not been intended by parliament that an immigrant detained under the IA 1971 should have a remedy in damages for the tort of false imprisonment. The Court of Appeal rejected these arguments. It emphasised the particular importance that the law attached to the liberty of the person and that it was beyond doubt that the rule of law extended not simply to British nationals but also to immigrants subject to administrative detention. The Court of Appeal further concluded that there was nothing to suggest that parliament intended to create immunity from suit to an immigration officer for the tort of false imprisonment and that it would be entirely wrong that someone who had been wrongly detained by the executive should not be entitled to compensation as of right.

Conclusion

Practitioners should be aware that clients whose detention has been wrongly authorised or continued by an immigration officer may have a remedy in damages for false imprisonment.

Third-party intervention into ID

The Court of Appeal, when considering the case of *ID*, received evidence by way of a third-party intervention from Bail for Immigration Detainees (BID) and Immigration Law Practitioners' Association (ILPA). The rest of this article explores the reasoning, process, content and ultimate impact of having made an intervention.

Why make an intervention?

The implications of the county court judgment were clearly extremely far-reaching for immigration detainees: essentially no private law remedy would be available where an immigration detainee was unlawfully detained. In other words, a false imprisonment remedy would be unavailable to any person unlawfully detained under the IA 1971. There were real fears that should the Court of Appeal uphold the judgment, access to justice for those people who are the most marginalised and under attack in society would be even more limited.

The aim of the intervention was to show how, despite express government policy limiting and excluding immigration detention for vulnerable groups including children, torture survivors and people with serious mental and physical illnesses, there was evidence of widespread failure to adhere to this policy in practice.

The process of intervening

Initially the plan was for an intervention by the Refugee Children's Consortium, an unincorporated organisation of children's charities and other voluntary organisations set up to ensure that the rights of refugee children are respected in accordance with relevant domestic, regional and international standards.

To make a third-party intervention in the Court of Appeal, it is first necessary to make an application for permission to intervene. The application must be made in compliance with CPR Part 52 and include a fee for £100. It is helpful when preparing for the intervention to make contact with the case lawyer at the Court of Appeal who can advise about timing and factors that might influence how such an application will be received. Usually the significant factor will be whether the two parties consent to the intervention. A serious consideration for the interveners is whether there will be any risk that costs could be incurred as a result of their intervention; the key factor here is the amount of the court's time taken up by considering the evidence of the intervention.

The original idea was to get consent both for the intervention itself and to obtain a pre-emptive costs order. The appellants in the case (*ID and others*) were, of course, happy to support the intervention since its effect would be, essentially, to bolster the appeal. However, the respondent (the Home Office) was not willing to provide an indication about whether it consented until it was able to see the proposed intervention in full.

As instructions were received only about two months before the hearing, it was difficult to pro-

duce the proposed intervention in the short timescale provided.

Without a guarantee in relation to costs protection, many of the larger organisations that were members of the Refugee Children's Consortium were unable to intervene formally, as the consortium was an unincorporated association which would leave all its constituent members potentially liable for any costs order against it. In the event, only two organisations were prepared to put their name to the intervention, BID and ILPA, although both on the condition that if the application for a pre-emptive costs order was rejected when the application for permission was considered, they would have to withdraw.

The content of the intervention

The aim of the intervention was to produce evidence to show the factual repercussions arising from detention under the IA 1971. To this end, the aim was to produce evidence showing:

- the physical conditions of detention and the impact of immigration detention;
- the practical and deleterious effects of procedural exclusivity in the sense of a detained person being compelled to apply for judicial review in immigration detention cases; and
- the lack of effective redress for hypothetical legal wrongs in relation to immigration detention.

BID produced an extremely detailed witness statement highlighting the difficulty for immigration detainees in accessing effective legal representation and the ability to apply for bail, and highlighting the practical obstacles for accessing legal advice and representation, particularly for those detained in prisons. The evidence also aimed to show the impact of detention on vulnerable groups, including torture victims, those with physical and mental illnesses and children.

To illustrate the problems and show the widespread failure of protection in accordance with government policy, a series of case studies was produced showing examples of people who had been detained in contraven-

tion of government policy. Additionally, appended to the statement were a number of HM Inspectorate reports, statistics and research studies further illustrating such abuse of policy.

Evidence from ILPA was directed primarily towards the issue of the lack of access to legal representation for detainees and produced evidence of a submission to the Home Affairs Select Committee by the Association of Visitors to Immigration Detainees. Additionally, ILPA was able to produce two medical reports, one by Dr Christina Pourgourides, an expert on the impact of detention on the mental health of detainees and one by two psychotherapists working with the Medical Foundation for the Care of Victims of Torture highlighting the impact of detention on children.

Finally, a letter from the United Nations High Commissioner for Refugees (UNHCR) was also produced setting out concerns in relation to the breach of international covenants in respect of the detention of children.

Modifying the application

This proposed intervention was forwarded to the Home Office for its consideration. The Treasury Solicitor replied that it would not consent as it would not have time to investigate the factual submissions made and produce evidence, if available, to counter them.

The application for permission was considered by the presiding judge, Lord Justice Brooke, who granted permission 'because of the importance of the issues raised', but in recognition of the difficulties for the Home Office created by such a late intervention, required a more limited format. Essentially, all the case studies and medical opinion had to be removed from the intervention but the statements from BID and ILPA and the UNHCR letter, together with factual material of a more undisputed nature (for example, the HM Inspectorate reports) were allowed to remain. It was also agreed to keep any oral submissions to an absolute minimum in order to avoid any risk of

costs implications for the interveners.

Third-party intervention: the cost

Aside from the risk of a costs order against the interveners, the process of making a third-party intervention, the value of the pro bono work by solicitors, counsel (Richard Hermer, Nadine Finch and Richard Gordon QC) and experts, was probably in excess of £30,000. Added to this was the work of BID and ILPA in preparing statements and gathering evidence and of the psychiatrists and psychotherapists who produced reports.

Impact of intervention

Despite the costs, in light of the judgment it was an extremely worthwhile exercise. In the words of Lord Justice Brooke:

I know that the Home Office is concerned with the practical implications of a decision of this kind. The evidence of the interveners showed, however, that when the Home Office determined to embark on the policy of using powers of administrative detention on a far larger scale than hitherto, the practical implementation of that policy threw up very understandable concerns in individual cases ... so long as detention, which may cause significant suffering, can be directed by executive decision and an order of a court (or court-like body) is not required, the language and the philosophy of human rights law, and the common law's emphatic reassertion in recent years of the importance of constitutional rights, drive inexorably, in my judgment, to the conclusion I have reached.

■ Mark Scott is a partner at Bhatt Murphy solicitors, London N1. Harriet Wistrich is a solicitor at Birnberg Peirce and Partners, London NW1.

ID and others and unlawful detention: the issues explained

PRACTICE AND PROCEDURE