

Illegal Migration Bill – Briefing on Detention

24th March 2023

Outline of the key provisions in the Bill

This bill hugely expands detention powers that go beyond people whose claims are deemed inadmissible. Alongside the new duty to remove, clause 11 gives the Home Secretary the power to detain anyone covered by the four conditions in clause 2.¹ Crucially this includes children, whether with family or on their own. Given that many of those who are captured by clause 2 will be refugees having left places such as Afghanistan and Syria, it means that tens of thousands of refugees will be liable to being detained. Clause 8 also extends detention powers to any family members, if that family member does not have permission to be in the UK.

There is no time limit for how long someone can be detained for. The time limits that currently exist for separated children (24 hours), children in families (72 hours) and pregnant women (72 hours) do not apply to those covered by this bill. **This in effect allows for the indefinite detention of children.** Clause 12 states that a person (any age) can be detained anywhere the Home Secretary 'considers appropriate', giving much wider discretion on where people can be detained. Clause 14 disapplies the safeguard of the duty to consult the Independent Family Returns Panel when a child is going to be removed or detained.

- **Power to challenge detention severely restricted**

Under clause 12, the Home Secretary will have an significantly expanded power to decide what a reasonable length of detention is while, at the same time, the ability for people to challenge their detention has been severely decreased across the totality of statutory immigration powers, effecting people not just under this bill.

Crucially, clause 12 changes long-established common-law principles² so that decisions on reasonable periods of detention and imminence of removal is now much more weighted towards the opinion of the Home Secretary, and far less the view of the courts. The bill allows the Home Secretary to detain someone for as long as they consider to be “reasonably necessary” even if removal can no longer be carried out. This means people can be indefinitely detained even if an agreement for their removal isn’t in place. This is in direct conflict with the Hardial Singh principles³, most prominently with principle three: *‘(iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;’*.

• ¹ Clause 2: They enter the UK in breach of immigration rules, they arrived on or after 7 March 2023, They didn’t travel directly from the country they’re seeking protection from; and they require leave to remain in the UK but don’t have it

² Overturning the common law principle established in R(A) v SSHD [2007] EWCA Civ 804

³ These principles can be used in both public and private law. They are applied in both judicial reviews applications challenging the lawfulness of detention, and in false imprisonment claims. There are four principles: *(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.* [What are the Hardial Singh principles? - Free Movement](#)

- **Immigration Bail**

Under Clause 13, people will be detained under the immigration powers for at least 28 days without the opportunity to apply for bail at the First Tier Tribunal (currently, they can apply for bail within 8 days). There will be almost no ability to challenge a decision to detain by way of judicial review⁴ during this time. Ability to apply for a writ of *habeas corpus* during this period is a way for the government to argue compliance with Article 5 of ECHR.⁵ However this is normally used in incredibly rare cases for immigration detention and does not normally function as a challenge for unlawful detention. Even after that 28 days there is no certainty that people will be granted bail (it can be a very complicated and lengthy process). **This will leave men, women and children facing indefinite detention in the UK.**

What are these provisions likely to mean in practice?

- **Removal of court scrutiny**

This bill significantly expands the power of immigration detention across the entire system. The overriding of common law principles combined with the removal of basic human rights protection is very worrying. Crucially, this bill restricts the jurisdiction of the courts to review the lawfulness of a government decision to detain or to refuse bail and changes the understanding of whether detention can be argued as 'proportionate' in the courts. In addition, the severe restriction for the courts to intervene in detention for the first 28 days undermines people's right to access to justice. Importantly if people can be lawfully detained without the Home Office thoroughly pursuing removal, the entire point of detention in the UK is completely altered, **moving from a system that is in place to facilitate removal to a system that is locking people up and taking away their rights purely as a supposed deterrent.**

- **Indefinite detention of children and lack of safeguards**

It is deeply concerning that under this bill, families, pregnant women and separated children can be detained indefinitely. The disapplication of the vital safeguard to consult the Family Returns Panel when decisions on detention and removal of families and children are made, goes against the duty of care the Secretary of State has under Section 55 of the Borders Citizenship and Immigration Act 2009⁶ to safeguard and promote the welfare of children in the UK while making immigration decisions.

Furthermore, the new discretionary powers will allow the Home Secretary to decide where people can be detained and potentially circumvent and undermine the existing safeguarding mechanisms, like the Adults and Risk policy⁷ which ensures that people who are vulnerable are not being detained.

- **Increase in detention capacity and the costs**

The Migration and Economic Development Partnership (MEDP) with Rwanda is the only removal agreement in place the UK has that includes third-country nationals.⁸ The legal and practical challenges faced by that scheme are well documented, and even if it does become operational, it will not be possible to remove to Rwanda all people who fall within Clause 2.¹¹ In the absence of return agreements and the vast expansion of detention powers, the detention capacity will have to significantly increase. However, the bill provides no detail on where thousands of people will be detained. If everyone who crossed the Channel last year had been detained for 28 days, then on 4 September 9,161 people would have been detained. This is four times the current detention capacity in the UK. It

⁴ Unless the challenge relates to grounds of bad faith or is made in such a procedurally defective way as to amount to a fundamental breach of the principles of natural justice.

⁵ Right to liberty and security [Human Rights Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁶ [Every child matters: statutory guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

⁷ [Adults at risk in immigration detention - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

⁸ (i.e. not that country's own nationals)

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would also be very expensive, our analysis shows that in the first three years of this bill, between £3.8bn and £4bn will have been spent on detaining up to 257,101 people⁹

Key principles on detention

- People seeking asylum and refugees should never be detained, other than for very short periods where detention is necessary to confirm someone's identity and undertake security checks.
- Once people have had their asylum claims determined and they are found not to be a refugee, then detention should only take place as a last resort and should be for the shortest possible amount of time when there is a prospect of immediate removal from the UK.
- The Bill seeks to expand powers to detain and significantly limits judicial oversight of the decision of who can be detained, where and for how long. The expansive power which the Home Secretary can wield risks detaining vulnerable people, survivors of trafficking and torture, pregnant women and children for at least 28 days without any independent oversight and opportunity of legal remedy.
- The proposals carried in the Bill will significantly undermine the UK's standing on the international arena, will lead to significant deterioration of human right protections and undermine the rule of law.

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⁹ [Refugee-Council-Asylum-Bill-impact-assesement.pdf \(refugeecouncil.org.uk\)](#)

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