Illegal Migration Bill

Briefing for Peers – Second Reading

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Summary

The Illegal Migration Bill undermines access to justice, unjustifiably removes the essential judicial scrutiny of executive action by independent judges, and sets out a framework of operation that is incompatible with the Human Rights Act 1998 (HRA). The Bill, if enacted, will undermine fundamental principles that form the bedrock of the United Kingdom's constitutional order[1]. It will undermine the notions of the rule of law and the separation of powers.

The Home Secretary was unable to make a Statement of Compatibility under section 19(1)(b) HRA when she laid the Bill for its second reading and nor can Lord Murray of Blidworth do so now before this House.

In summary, the Bar Council concerns focus on:

1. **The ouster clauses that restrict judicial scrutiny and undermine the rule of law** – the government proposes that its failures to comply with its obligations in national and international law should go unchecked. As a result, the constitutional principles of the rule of law and the separation of powers are both infringed.

2. **The provisions which remove respect for human rights and/or mandate non-compliance or breach of those rights** – the Bill will compel the government to act in ways that are likely to violate the human rights of some of those to whom the provisions are applied. Designing primary legislation to violate fundamental human rights offends the constitutional principle of the rule of law.

3. **The extension of immigration detention powers and the corresponding limitations on judicial protection of liberty** – the existing powers of the Home Secretary are expanded whilst judicial protection of liberty is concomitantly restricted contrary to the constitutional principle of the separation of powers.

[1] See *R(National Council for Civil Liberties) v Secretary of State for the Home Department* [2019] EWHC 2057 (Admin), [2020] 1 WLR 243 at §91, per Singh LJ and Holgate J "Although this country does not have a written constitution, it certainly does have constitutional principles"; see also *In R(Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at §40, per Lady Hale and Lord Reed, referring to "constitutional principles developed by the common law".

Explanation

The rule of law ensures that laws made by Parliament are given effect in the way intended and that the government can be held to account when it fails to give them such effect. It ensures that we do not rely solely on the goodwill of the government and/or its competence but can hold it to account for failure to give effect to the laws enacted by Parliament. Lord Bingham identified eight features (principles) of the rule of law[2]. These he summarised as[3]:

> *"…that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts…"*

The Bar Council's March 2023 briefing noted that numerous aspects of the Bill were likely to breach the European Convention on Human Rights ('ECHR'/'Convention'), including in relation to modern slavery, unaccompanied children and detention.[4] The Bar Council continues to hold that view. The Government has conceded that the Bill is likely to be incompatible with the Convention.[5]

By section 3 HRA, courts are required "so far as it is possible to do so" to read and give effect to legislation in a way which is compatible with rights under the Convention. However, Clause 1(5) seeks to disapply section 3. Section 3 is not a power to disregard the plain words of legislation, but a duty, where there are two possible meanings, to prefer that which is compatible with human rights. By reference to Clause 1(5), courts can be urged to construe the provision compatibly with the purpose of the Bill; deterring unlawful immigration (Clause 1(1)). This seeks to set a particular government policy expressed through this legislation above the rule of law – in this instance the government policy of deterring unlawful immigration, including by persons in need of international protection. It sets a dangerous precedent which can be replicated across all areas of government policy. It is inimical to the constitutional principle of the rule of law, and more so where the latter extends to the protection of fundamental rights.

In the Bill, Ministers are given duties or obligations, rather than simply powers, which *mandate* them to act in ways that are in violation of the rule of law; that is compliance by the state with its obligations in international law as well as in national law. The Bill risks breaches of fundamental principles of natural justice; risks violation of civil liberties; and does not afford adequate protection of fundamental human rights. Such risks of breach arise, for example, out of the duties to make arrangements for removal of persons, including refugees and trafficked persons, from the United Kingdom (Clause 2), and also from the provisions to deny access to leave to remain or citizenship to such persons (Clauses 31-34).

The face of the Bill records that the Government has been unable to make a statement of compatibility with the Convention rights as defined in s 1(1) of the HRA. The Bill is written so that Ministers can turn around and defend their actions by saying, "*but Parliament has given me no choice*".

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[2] https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law

[3] See *The Rule of Law* Tom Bingham, London, Penguin, 2011, p. 8.

[4] See the Bar Council's Briefing for MPs – Second Reading, March 2023: https://www.barcouncil.org.uk/uploads/assets/b1b0adfa-75fc-4745-9fc555820b7f62fa/Bar-Council-briefing-Illegal-Migration-Bill-Second-Reading-Mar-2023.pdf .

[5] "In a letter to MPs, seen by the BBC, the Home Secretary said there was "more than a 50% chance" that the legislation was incompatible with the ECHR": https://www.bbc.co.uk/news/uk-politics-64875591 .

The Explanatory Notes state (paragraph 294) that the Bill is "capable of being applied compatibly with human rights". In the case of the duty to remove (Clause 2), this is dependent on the government making adequate provision for exceptions in regulations under Clause 3(7) (read with clause 2(11)) and thereafter on how those exceptions are applied. Such regulations are subject to the negative resolution procedure (Clause 63(4) and (5)). These regulations have not been laid in draft before Parliament; the House has no way of determining their adequacy. Significantly, UNHCR has already identified in terms that the Bill is not compatible with the Refugee Convention[6].

In the case of citizenship, whether the Bill is applied compatibly with human rights will depend on the exercise of Ministerial discretion (Clause 35). Similarly, for decisions to exercise the power to remove unaccompanied children (Clause 3(4)) and for powers to detain unaccompanied children (paragraph 16(2)(f) of the Immigration Act 1971, inserted by Clause 10(1)), whereby immigration officers as well as Ministers can be given discretionary powers. But the rule of law requires, as set out in Lord Bingham's *second principle*, that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion. That fundamental rights should be determined by the exercise of discretion is inimical to the very rule of law itself.

These measures in and of themselves limit the extent to which government can be held to account, but the Bill goes further and restricts challenges to government when it has acted contrary to the way Parliament intended, as set out below (in the section on Ouster Clauses).

Moreover, the scope for unlawful actions to do harm is increased by the restrictions on the power of the courts to impose interim measures that freeze the position while the lawfulness of a particular action is determined. Clause 52, a late addition to the Bill, prohibits a UK court in cases where its scrutiny has not been ousted, from granting an interim remedy that has the effect of preventing or delaying the removal of the person from the United Kingdom. Such provision is, again, inimical to the constitutional principle of the separation of powers. There is no evidence whatsoever of the need to trim judicial authority and limit the constitutional protection afforded by judicial review in this way. The Bar Council has previously deprecated attempts to depict the judiciary and members of the legal profession as overstepping their mark or acting as "enemies of the people" and urged the then Attorney General to do the same.

Without power to impose interim measures when confronted by legal proceedings challenging the lawfulness of removal, either the court does not act to prevent a potential breach or it will have to hasten to a final decision on the lawfulness of an act on the basis of available, often insufficient, evidence. This would put enormous pressure on the courts and lawyers to conclude proceedings in timescales which can be dictated by government.

When the European Court of Human Rights grants an interim measure under its rules of procedure (for example asking the UK not to remove someone until it has determined the application before it), Clause 53 provides that a Minister has discretion to decide whether or not to disapply the duty to remove. This boils down to a discretion afforded to a Minister as to whether to comply with the UK's international obligations. Insofar as the Bill is indeed "capable" of being applied compatibly with human rights, as matters stand, it is up to the Minister whether it is or not.

[6] https://www.unhcr.org/uk/uk-asylum-and-policy#:~:text=Illegal%20Migration%20Bill&text=UNHCR%20expressed%20profound%20concern%20in,Bill%20with%20the%20UK%20Government.

In violation of the principle of accessibility, and as far as possible intelligibility, clarity and predictability of the law, the Bill contains numerous provisions retrospective to 7 March 2023 (see e.g. Clause 2, duty to make arrangements for removal; Clause 3, power to make arrangements for the removal of an unaccompanied child; Clauses 21-28, the application of protections for victims of modern slavery; Clauses 29 to 34 ineligibility for leave or citizenship; and the Home Office powers under Clause 15 to accommodate unaccompanied children who would otherwise have been supported under the Children Act 1989).

Meanwhile, as to accessibility of the law, the complexity of the legislation and the lack of Keeling Schedules means that parliamentarians and many commentators struggle to know what laws they are passing, a problem exacerbated by the limited time afforded for adequate scrutiny.

As a result, the Bill is not consistent with the constitutional principles of the rule of law and the separation of powers. Moreover, it follows that, by design, the Bill will "bake in" unlawful government action on a mass scale.

The Bar Council does not consider that this "unlawfulness by design" is compatible with the constitutional principle of the rule of law. It is part of constitutional principles that the law forbids the exercise of state power in an arbitrary, oppressive or abusive manner; and that principle "*cannot be set aside on utilitarian grounds as a means to further an end*".[7] A law which – in the correct opinion of its promoter – is likely to require unlawful acts to be committed by the state, is an arbitrary, oppressive and abusive law. If this Bill passes into law, the courts are very unlikely to consider that these foundational constitutional principles could alter the government's intended operation of the Act. That is because the courts will assume that Parliament decided to trade them off in pursuit of the statutory purpose in Clause 1(1).

Further, a Bill which breaches the UK's existing international obligations cannot credibly be endorsed by Parliament consistently with the rule of law.

With respect to detention the Bar Council considers it disappointing that after almost a decade of serious concerns about harm caused by the overuse of immigration detention, in particular of vulnerable people, legislation should be drawn up so as to expressly increase the detention of those groups. In the view of the Bar Council, this is an obviously retrograde step and is of grave concern.

It is striking that the present proposals are made in the context of the repeated serious concerns raised about the adequacy of the current protections for vulnerable groups, such as those revealed in the Review by Sir Stephen Shaw[8] ordered by the Rt. Hon. Theresa May MP.

[7] Lord Justice Laws in *A v Home Secretary* [2004] EWCA Civ 1123 at §§ 248 and 252: https://www.bailii.org/ew/cases/EWCA/Civ/2004/1123.html.

[8] *Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office* by Stephen Shaw Cm 9186.

The Bill

(1) Ouster clauses that restrict judicial scrutiny and undermine the rule of law

Review by the courts provides essential constitutional protection and must itself be protected. As stated in the Supreme Court "there is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review"[9]. Further, as stated in the Court of Appeal, "[T]here is a public interest in bringing judicial scrutiny and remedies to bear on improper acts and decisions of public bodies"[10].

The way in which the duties and powers are framed, the difficulty of finding lawyers to take a case within the tight timescales imposed by the Bill, and retrospective provision, all work to restrict the ability of individuals to challenge government action or inaction under the Bill. So too do clauses confining the scope of review by the courts to public law principles, as in Clause 11(5) where the Secretary of State becomes the arbiter of the period "reasonably necessary" to make arrangements for a person's release.

The restrictions in Clause 52 on the powers of domestic courts to impose interim measures, described above, are an ouster of the supervision of the courts contrary to the principle of the separation of powers. So too is ministerial discretion to disregard interim measures imposed by the European Court of Human Rights (Clause 53). Both undermine essential judicial supervision of executive power. The Bill goes further and expressly ousts a range of challenges that would otherwise have been available. Express ouster clauses mean that government cannot be called to account even when it has acted contrary to the way Parliament intended.

Parliament has long regarded ouster clauses with suspicion and understood the ability of ousters in the area of immigration to set dangerous precedents. The Asylum and Immigration (Treatment of Claimants, etc.) Bill 2004 as introduced contained an ouster of the supervisory powers of the higher courts even where a decision of a tribunal was a nullity because it was ultra vires, contained an error of law, or was in breach of natural justice[11]. Faced with former Lord Chancellors, including from its own benches, lined up to speak against the clause in Lords' Committee, the government of the day withdrew it[12].

The ouster clauses in the Bill are:

- *Clause 12:* Ousts judicial review of unlawful detention for the first 28 days of detention save where the Secretary of State or an immigration officer is alleged to have acted in bad faith or to have committed a fundamental breach of the principles of natural justice. In cases where the Secretary of State or officer has got the facts wrong (e.g., the person turns out to be a British citizen) or the law wrong, the only remedy will be the ancient writ of *habeas corpus* or, in Scotland, where that writ does not run, an application for suspension and liberation. The Clause extends the current eight-day ouster of the bail jurisdiction of the First-tier tribunal, extending the period during which the First-tier Tribunal is unable to grant bail when a person is detained for the

[9] Per Lord Dyson in *R(Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1AC 663 at §122.
[10] *Land Securities PLC v Fladgate Fielder* [2009] EWCA Civ 1402, [2010] CH 467, per Lord Justice Etherton at §70.
[11] Clause 10 in the Bill as introduced in another place, see https://publications.parliament.uk/pa/cm200304/cmbills/005/2004005.pdf ; clause 14 in the Bill as introduced in the Lords.
[12] https://hansard.parliament.uk/Lords/2004-05-04/debates/50f251e4-e9c9-4ea5-b68a-95b7a05aeb68/AsylumAndImmigration(TreatmentOfClaimantsEtc)Bill

examination of their claim to 28 days. For those 28 days, the government's decision on whether a person with good grounds for release (for example on the grounds of their physical or mental health), will be final.

- *Clause 49*: decisions of the Upper Tribunal on whether the Secretary of State was right to consider an application 'clearly unfounded', or that an applicant has failed to show compelling reason for appealing outside the stringent seven working days' time limit (Clause 48(1)(a)), or to show compelling reason for failing to raise a particular matter within eight days (Clause 47(6) read with Clauses 41(7) and 42(7))) cannot be appealed or be the subject of review (save in very narrow circumstances such as the Tribunal acting in bad faith) even if the tribunal has made an error or exceeded its powers. Any remedy is within the sole gift of the government.

Thus, for example, if the Secretary of State is not persuaded that she has made a mistake of fact in dealing with a case (Clause 42(2)(b)) or that the appellant is at risk of serious and irreversible harm (Clause 41(2)(b)) and certifies any contention that she had made a mistake as clearly unfounded (Clause 41(3) or 42(3)), and then the Upper Tribunal makes a mistake in refusing permission to appeal her decision, its decision cannot be impugned before any court.

The margin for the Upper Tribunal to make an error of law is large given the tight time limits imposed on it (variously seven and 23 working days, Clause 48) with restrictions on the Tribunal's powers to extend time (Clause 48(4)) and that the Tribunal has power to grant permission to appeal only if it considers there is "compelling evidence" of error. Despite this, there is no redress. As in a game of snakes and ladders, the person must go back to the beginning and try to persuade the Secretary of State to put right the mistake that she has made.

Clause 51 makes similar provision to Clause 49 in respect of appeals to the Special Immigration Appeals Commission. The margin for error exists in those cases also and the appellant does not know the case against them which relies on closed evidence.

Thus, the government proposes on the face of the Bill that its failures to comply with its obligations in national and international law should go unchecked. Efforts to uphold the rule of law and to prevent breaches of fundamental rights in the face of these measures look set to put the tribunal and court systems under tremendous pressure which they are currently ill-placed to withstand. As a result, the constitutional principles of the rule of law and the separation of powers are both infringed.

(2) Human rights: non-compliance by design

Clause 1(2)(a) and Clause 2 of the Bill impose an absolute duty on the Home Secretary to make arrangements to remove those arriving "in breach of immigration control", save where very narrow exceptions apply.

The Bill will compel the government to act in ways that are likely to violate the human rights of some of those to whom the provisions are applied. For example,

a. By removing a person to a third country which lacks medical treatment necessary to sustain their life, which would result in their death, a consideration excluded under

Clause 38(7)[13]. Such a removal would violate Article 3 ECHR[14] but under the Bill would not dis-apply the duty to remove.

b. Where the Home Office accepts that there are reasonable grounds to believe that a person is a victim of modern slavery, the Bill requires their removal from the UK even though the trafficking status determination process is still outstanding, i.e., a "conclusive grounds" decision has not as yet been made, see Clause 21). There are exceptions where a person is assisting a public authority in relation to their trafficking; however, these would not apply where a person has already given all of the information they have or are too scared to volunteer information. The duty to remove would still apply. This would likely violate Article 4 ECHR.[15]

c. The person in (b), while awaiting their removal, would receive no support for their recovery or protection in the UK. This would amount to a distinct violation of Article 4 ECHR.

Each and every violation of human rights occasioned by this Bill would be unlawful since it would contravene section 6 HRA. This provides that, "*It is unlawful for a public authority to act in a way which is incompatible with a Convention right*." The disapplication of section 3 of the HRA by Clause 1(5) of the Bill means that it will be very difficult, if not impossible, to apply the offensive provisions of the Bill in an ECHR-compliant way. That is because orthodox principles of statutory construction focus closely on the statutory words; and the statutory purpose in Clause 1(1) could not be clearer.

The Bar Council observes that the above consequences arise, in the main, due to the absolute (or near absolute) nature of the duty to remove a person in Clause 2(1). Were that duty to be expressed as a power rather than a duty (i.e. by substituting "may" for "must" in the first line of Clause 2(1)), the power to remove could only be exercised lawfully in accordance with section 6 HRA; and none of the above constitutional problems would arise. Two such examples of such a provision are to be found in section 94B of the Nationality Immigration and Asylum Act 2002[16]and section 32 of the UK Borders Act 2007 mandating the deportation of certain foreign national offenders but only subject to the Human Rights exceptions[17].

Such "unlawfulness by design" is gravely exacerbated by the extremely limited scope for the person to challenge the measure in court before it is applied to them. At a systemic level, the only remedy for such unlawfulness will be declarations of incompatibility,[18] and remedial measures that Parliament/the Home Secretary may pass in due course,[19] both of which would only occur after much delay or, failing that, an individual application to the European Court of Human Rights.

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[13] The clause seeks to define 'serious irreversible harm' (as the basis of a residual suspensive claim) and in so doing sub-clause (7) provides an example of harm *unlikely* to satisfy that test "Any pain or distress resulting from a medical treatment that is available to P in the United Kingdom not being available to P in the relevant country or territory."
[14] See, for example, *AM (Zimbabwe) v Home Secretary* [2020] UKSC 17 (press summary: https://www.supremecourt.uk/cases/docs/uksc-2018-0048-press-summary.pdf).
[15] For an outline of the applicable principles, see *R (TDT) v Home Secretary* [2018] EWCA Civ 1395 at §§ 13-18, particularly § 16: https://www.bailii.org/ew/cases/EWCA/Civ/2018/1395.html .
[16] https://www.legislation.gov.uk/ukpga/2002/41/section/94B.
[17] Section 33 UK Borders Act 2007
[18] Under section 4 of the HRA.
[19] Under section 10 of the HRA.

As a result, designing primary legislation to violate fundamental human rights offends the constitutional principle of the rule of law.

(3) The extension of immigration detention powers and the corresponding limitations on judicial protection of liberty

The expansion of detention powers as currently proposed by the Bill is in the Bar Council's view alarming. The existing powers of the Home Secretary are expanded whilst judicial protection of liberty is concomitantly restricted contrary to the constitutional principle of the separation of powers.

The courts have always protected the right to liberty and the freedom from arbitrary detention[20]. Judicial control over detention is a cornerstone of the rule of law. Various aspects of this fundamental right are protected by the writ of Habeas Corpus, criminal offences concerning interference with liberty, the tort of false imprisonment (a civil claim), and Article 5 ECHR (the right to liberty and security). The role of the courts, and of the High Court in particular, in reviewing the lawfulness of detention (including on *Hardial Singh* principles, see below) is critical to maintaining the rule of law and is fully in accordance with the role of the judiciary under the constitutional principle of the separation of powers. As regards detention, the Bill infringes this principle.

Clause 11 (giving the Home Secretary power to detain for a period she considers necessary) will apply to all migrants and not merely those who have arrived by boat. Indeed, the new power applies even to those who have arrived lawfully.

This is a power of a kind that might be expected to be deployed in extremis on a wartime footing. As currently drawn up, it would apply to a person who arrived lawfully on a Skilled Worker visa and had lived in the United Kingdom entirely lawfully until the moment before they were detained. In the context of the extended and vexed historical debates over whether suspected terrorists could lawfully be detained for 90 days, it is surprising that the proposal to give the Home Secretary a power to detain a person who may pose no risk to the public at all for as long a period as she considers appropriate has received so little press scrutiny to date.

The purpose of these new provisions is, in general: (i) expressly to remove protections for children, pregnant women, and other vulnerable groups; and (ii) expressly to insulate the extensive detention powers of the Secretary of State from the scrutiny of the courts, thus upsetting the constitutional principle of the separation of powers.

There has been an annual review by the Independent Chief Inspector of Borders and Immigration of the 'Adults at Risk' policy since 2018 On the same day that the most recent report[21] was published, raising serious concerns about the system (under Rule 35 of the Detention Centre Rules 2001 (SI 2001/238) for identifying those at risk of harm (described by the chief inspector, David Neal, as "*ineffective*"), the Home Secretary abolished the annual inspections.

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[20] Blackstone described the right to personal liberty as an "absolute right inherent in every Englishman", see *Blackstone's Commentaries on the Laws of England* (4th edition, John Murray, 1876), 100; see also the Lord Chief Justice (Lord Bingham) in *Re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599, 603 on the fundamental importance of detention being under the authority of law and lawfully exercised.

[21] https://www.gov.uk/government/publications/third-annual-inspection-of-adults-at-risk-immigration-detention-june-to-september-2022.

Moreover, the Brook House Inquiry, into very serious abuses in that detention centre, has completed its work and is expected to report in late summer. The Bar Council considers that it would be wise to await the outcome of that Inquiry before considering whether the Home Secretary should be afforded yet more extensive detention powers, subject to even less judicial scrutiny when there are serious repeated and longstanding concerns about the conditions and treatment of those detained. Indeed, the Bar Council historically has supported a maximum time limit on detention when this was last debated in Parliament[22]. The UK is an outlier in Europe in not having such a limit.

Clause 10 – Powers of detention

Clause 10 creates new powers to detain where an immigration officer suspects a person falls within Clause 2, and suspects that a person is subject to the removal duty in Clause 2, where the duty exists, or where the duty *would* exist but for the fact that the person is an unaccompanied child. The power also applies to family members of such persons. The power is to detain pending consideration of whether such persons are removable and/or the duty applies, and pending removal or release.

Significant limitations on the detention of certain vulnerable individuals that previously applied will not apply to this power. The power is expressly not subject to:

- The limitations on detention of *unaccompanied minors* in paragraph 18B of Schedule 2 to the Immigration Act 1971 (1971Act);
- The limitations on detention of *families* in s147 of the Immigration and Asylum Act 1999;
- The limitations on detention of *pregnant women* in s60(8) of the Immigration Act 2016.

The new powers also remove any discretion to detain under paragraph 16(2) of Schedule 2 to the 1971 Act where those protection provisions would apply if the new powers were to be available.

It is notable that powers to detain the individuals who might be subject to the Clause 2 removal already exist. The new powers are not intended to permit detention of those who otherwise could not be detained; the purpose appears expressly to avoid the protections referred to above (as well as common law limitations on unreasonable detention referred to below).

There is a real likelihood of detention of children and families raising issues under Article 5 ECHR (right to liberty and security), as well as potentially Article 8 ECHR (right to respect for family life and private life) and conceivably Article 3 ECHR (prohibition of torture and inhuman and degrading treatment or punishment).

The Bar Council considers it unlikely that these provisions in the Bill comply with the United Kingdom's obligations under the United Nations 1989 Convention on the Rights of the Child (UNCRC) (in particular Article 37, which provides that "*detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*"). It is troubling and surprising that Parliament should be considering a detention power that could potentially offend the UNCRC.

[22] https://www.barcouncil.org.uk/uploads/assets/b1b0adfa-75fc-4745-9fc555820b7f62fa/Bar-Council-briefing-Illegal-Migration-Bill-Second-Reading-Mar-2023.pdf

Clause 11 – Period for which persons may be detained

Clause 11 codifies the second and third of the so-called *Hardial Singh*[23] principles. These are:

> (ii) that detention is only lawful for a period that is reasonable in all the circumstances, and
> (iii) that detention ceases to be lawful where it is apparent that removal within a reasonable period will not be possible.

It is a critical feature of the *Hardial Singh* jurisprudence that a court will itself gauge the reasonableness of detention. In contrast to other areas of public law challenge, it is not limited to reviewing the rationality/legality of the Home Secretary's decision. As Keene LJ said in *R(A) v SSHD* [2007] EWCA Civ 804:

> *"It is to my mind a remarkable proposition that the courts should have only a limited role where the liberty of the individual is being curtailed by administrative detention. Classically the courts of this country have intervened by means of habeas corpus and other remedies to ensure that the detention of a person is lawful, and where such detention is only lawful when it endures for a reasonable period, it must be for the court itself to determine whether such a reasonable period has been exceeded."*

The innovation in Clause 12 is that, if enacted, a person may be detained for a period that, "*in the opinion of the Secretary of State*" is reasonably necessary to achieve the stated purpose. The Explanatory Notes say that Clause 12 is intended to overturn the principle in *R(A)* referred to above. If the proposed provisions have the intended effect, they will constrain the court to reviewing the legality of the Home Secretary's judgment, a significant and extraordinary restraint on the Court's ability to protect individual liberty and a matter that offends the constitutional principles of the rule of law and of the separation of powers. The distinct role of the judiciary as a branch of government is undermined. Further, there is no evidence to support the need to limit the power of judges in this way.

The purpose of this appears to be to allow detention to endure in circumstances in which a court would likely conclude that detention can no longer reasonably be justified. As noted above this is an emergency, wartime-style power that is to be applied to all immigration detention, including of those who entered lawfully as e.g., visitors or on intra-company transfers.

Detention would also be permitted to endure where removal was not possible "*for the time being*", which would loosen or break the link between detention and its statutory purpose of facilitating removal. In addition to being a severe reduction in the civil liberties protections of the common law, it is doubtful whether this provision would comply with Article 5 ECHR.

These amendments also place the 'grace period' considered in *AC(Algeria) v SSHD* [2020] 1 WLR 2893 on a statutory footing. This is where a further period of detention may be permitted for the purposes of facilitating release when detention can no longer be justified on *Hardial Singh* principles. However, this 'grace period', itself a controversial proposition (and possibly contrary to Article 5 ECHR), is to be expanded beyond judicial scrutiny so that the period of further detention permissible will also be whatever "*in the opinion of the Secretary of State, is reasonably necessary*".

[23] See *R(Hardial Singh) v Governor of Durham Prison*, [1984] 1 WLR 704.

Clause 12 -Powers to grant immigration bail

Clause 12 introduces a power to grant bail to those detained under the new detention powers both to the Secretary of State and to the First-Tier Tribunal and makes the fact that removal under the new power is under consideration a relevant factor in any decision as to whether bail should be granted. The Bar Council does not consider that there is anything inappropriate in those provisions.

However, Clause 12 as drafted also prevents those detained under the new powers in Clause 10 from seeking bail from the Tribunal for the first 28 days (the current rule is for the first 8 days). Moreover, it also ousts judicial review challenges to detention during that period. The provisions expressly provide that detention in such circumstances will be "*not liable to be questioned or set aside in any court or tribunal*", and that the decisions will be insulated from being unlawful on the ground of a material public law error (contrary to the principle in *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245). This is, in effect, intended to be a warrant to act unlawfully.

In the view of the Bar Council, there is no justification for these drastic restrictions. Judicial oversight of administrative detention is critical to ensuring the lawful and proportionate exercise of detention powers. This is so *a fortiori* where the impact of the Bill may be to drastically increase the number of people held in immigration detention.

While habeas corpus would remain available, that is a remedy rather than a limitation on the power of detention. Further, it does not test whether detention is reasonable. It is likely to be of little or no assistance in circumstances where powers of detention are being expanded so as to be completely insulated from legal challenge. These provisions are particularly concerning when read with the deliberate excision of protections for the most vulnerable detainees referred to above.

The Bar Council is seriously doubtful whether Clause 12 is compatible with Article 5(4) ECHR or Article 37(d) UNCRC. Further, it constitutes an unwarranted interference with the constitutional principles of the rule of law and the separation of powers.

Conclusion

The Illegal Migration Bill undermines the rule of law and ousts the jurisdiction of the courts in key areas leaving the executive able to act without scrutiny (often a hallmark of authoritarianism). It extends detention powers and then limits judicial protection of liberty solely on grounds of immigration status, and corrodes the principle of the liberty of the individual. It clearly risks violating fundamental human rights and has a particularly serious potential impact on the most vulnerable.

The Bar Council considers that the Bill as currently drafted is incompatible with the principles which underly the rule of law. We recognise that it is proper for Parliament to wish to achieve better control of illegal immigration however it is not proper for Parliament to do so by removing judicial oversight, and by ignoring obligations under the Convention.

The Bar Council
May 2023