

Immigration and Social Security Coordination (EU Withdrawal) Bill

**House of Commons
Committee Stage
26 February 2019**

Introduction

The Equality and Human Rights Commission (the Commission) has been given powers by parliament to advise on the equality and human rights implications of laws and proposed laws. This briefing provides our advice for parliamentarians on the Immigration and Social Security Coordination (EU Withdrawal) Bill.

If passed, this Bill will bring many more people within the scope of evolving UK immigration law by ending the right to free movement for EEA nationals and repealing associated provision under retained EU law.¹ This proposed legislation therefore provides an important opportunity for parliament to consider widely and consistently expressed concerns about the treatment of those subject to immigration control. This briefing will focus on concerns around the UK's system of indefinite immigration detention.

Commission's Recommendations

We recommend that the Bill be amended to:

- **End indefinite immigration detention** by creating a 28 day time limit, with further detention only possible where there is a material change in an individual's circumstances (**New Clause 5 [NC5]**);

¹ The Bill will preserve the special status of Irish nationals under UK immigration law.

- **Ensure detention is used as a measure of last resort** by establishing clear, statutory criteria for detention which reflect the requirements of human rights law and ensuring that in cases where there are clear practical or legal barriers to removal, bail is only exceptionally refused (**New Clauses 6 [NC6]** and **7 [NC7]**);
- **Introduce independent decision-making** by requiring judicial authorisation for detention in excess of 96 hours and ensuring the Home Office shares relevant documentation in a timely fashion before bail hearings (**New Clauses 6 [NC6]** and **7 [NC7]**); and
- Support **New Clause 8 [NC 8]** which provides for the above provisions to come into force three months after the Bill is passed.

The legal framework

The UK's immigration system, including law, policy and practice must comply with human rights obligations enshrined in UK law by the Human Rights Act 1998. The UK is further party to a number of human rights treaties which are legally binding under international law.

The right to liberty

Article 5 of the European Convention on Human Rights (ECHR) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protect the right to liberty. Article 5 requires that immigration detention be restricted to circumstances where it is closely connected to the purpose of preventing unauthorised entry or facilitating removal.² According to the *Hardial Singh* principles, which constrain the use of detention for immigration purposes, detention must be for a period that is reasonable in all the circumstances.³ The Home Secretary is required to act with 'all reasonable expedition' to this end.⁴ If it becomes apparent that the purpose of the power cannot be effected within a reasonable period, detention should end.⁵

² Article 5(1)(f). Deprivation of Liberty is allowed for immigration purposes where the purpose of detention is to prevent "the unauthorised entry into the country" of a person or where "action is being taken with a view to deportation or extradition".

³ *R (Hardial Singh) v Governor of Durham Prisoner* [1983] EWHC 1 (QB).

⁴ *Ibid.* paragraph 8.

⁵ *Ibid.* paragraph 7.

The Article 5 ECHR prohibition on arbitrary loss of liberty requires that immigration detention is carried out in good faith and that conditions are appropriate bearing in mind an immigration rather than a criminal justice context.⁶ Further, where an individual is deprived of their liberty they shall be entitled to ‘take proceedings by which the lawfulness of detention shall be decided speedily by a court.’⁷

The European Court of Human Rights has ruled that neither the lack of a time limit nor the absence of comprehensive provision for automatic bail render our system of indefinite immigration detention incompatible with Article 5 ECHR.⁸ However, the duration of detention and the extent to which the Secretary of State has exercised reasonable diligence to effect removal expeditiously are central considerations in determining the lawfulness of detention under Article 5 ECHR.⁹ The availability of judicial remedy is also relevant to an assessment of whether detention is arbitrary for the purposes of Article 5.¹⁰ A lack of procedural safeguards in the UK immigration system creates the conditions for human rights violations to occur in practice, as evidenced by a number of cases where breaches of the rights protected by the Human Rights Act have been identified.¹¹

Freedom from torture, inhuman and degrading treatment

Article 3 of the ECHR, Articles 2, 3 and 16 of the UN Convention against Torture (CAT) and Article 7 of the ICCPR prohibit torture and other forms of cruel, inhuman or degrading treatment or punishment. Article 11 of the CAT requires the UK to keep under systematic review arrangements for the custody and treatment of persons subject to detention with a view to preventing torture or other forms of cruel, inhuman or degrading treatment or punishment.¹²

⁶ *Saadi v UK* (Application no. 13229/03), paragraph 74.

⁷ ECHR, Article 5(4).

⁸ *J.N. v UK* (Application no. 37289/12). A violation of Article 5 was, however, found in the individual case.

⁹ *R v. Governor of Durham Prison, ex parte Hardial Singh*, [1984] WLR 704.

¹⁰ *J.N. v UK* (Application no. 37289/12), paragraph 83-96.

¹¹ See e.g. *R(BC) v SSHD* [2011] EWHC 2748 Article 3, alternatively, article 8, rights were breached by his detention; *R (on the Application of MD) v SSHD* [2014] EWHC 2249 (Admin); *R (on the application of MDA by his litigation friend the Official Solicitor) v SSHD, EHRC intervening* [2017] EWHC (Admin) 2132; *In R (on the Application of HA (Nigeria)) v SSHD* [2012] EWHC 979 (Admin); *ARF v SSHD* [2017] EWHC 10 (QB).

¹² Combined effect of CAT Articles 11 and 16.

The courts have found several violations of Article 3 of the ECHR in the immigration detention estate, in addition to breaches of Article 8 of the ECHR, which protects the right to respect for family life including personal autonomy, dignity, physical and psychological integrity.¹³ These violations commonly relate to a failure to identify or respond to the needs of people with serious mental health conditions, including cases where health is allowed to deteriorate severely in detention.¹⁴

End indefinite immigration detention

Commission's recommendation

Support New Clause 5 requiring a 28 day time limit.

Why is this amendment needed?

The Commission is concerned that the use of long-term immigration detention, particularly for individuals without any realistic prospect of removal, may be leading to violations of Article 9 ICCPR and Article 5 of the ECHR in practice. The UN Committee Against Torture (UNCAT) has further concluded that the absence of a limit for immigration detention and failure to prevent cases of de facto indefinite detention may represent a violation of Articles 2, 3, 11 and 16 of CAT.¹⁵ **New Clause 5** responds to these concerns by creating a 28 day time limit for everyone held in immigration detention. Re-detention would only be possible after this time where the Home Secretary is satisfied there has been a

¹³ As part of his first review, Stephen Shaw commissioned Jeremy Johnson QC to assess recent cases in which the domestic courts had found the Home Office to be in breach of Article 3 of the ECHR in respect of individual detainees. In *R(BC) v SSHD [2011] EWHC 2748* Article 3, alternatively, article 8, rights were breached by his detention. In *R(S) v SSHD [2011] EWHC 2120*, the court reflected on the relationship between Articles 3 and 8 as considered in *Bensaid*, where the European Court of Human Rights made it clear that even if the treatment of a person with a mental health condition did not cross the Article 3 threshold it might nonetheless breach Article 8 (though finding no breach on the facts). See Stephen Shaw (2016), [Review into the welfare in detention of vulnerable persons](#).

¹⁴ These include: *R (on the Application of MD) v SSHD [2014] EWHC 2249* (Admin); *R (on the application of MDA by his litigation friend the Official Solicitor) v SSHD, EHRC intervening [2017] EWHC (Admin) 2132*; In *R (on the Application of HA (Nigeria)) v SSHD [2012] EWHC 979* (Admin); *ARF v SSHD [2017] EWHC 10* (QB).

¹⁵ UN Committee Against Torture, [Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session \(6-31 May 2013\)](#).

material change in an individual's circumstances and even then only when the statutory criteria for detention (considered below) are met.

Longstanding Home Office policy commitments to ensure that detention is used for 'the shortest period necessary' have not provided adequate protection against protracted loss of liberty.¹⁶ In the year ending September 2018, 25,061 individuals entered the immigration detention estate.¹⁷ Over a third of those who left detention during this period had been held for more than 28 days, and around 20% for over 2 months.¹⁸ 224 people leaving detention during this period had been held for over a year.¹⁹ A 2018 HMIP report into Harmondsworth Immigration Removal Centre identified one man that had been detained for over 4.5 years.²⁰ International human rights bodies, including UNCAT and the UN Human Rights Committee, have repeatedly raised concerns about such protracted periods of detention.²¹

In his 2018 'Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons', Stephen Shaw expressed concern about the length and scale of immigration detention.²² He noted, in particular, that the Home Office's case progression processes (considered further below) were contributing to unnecessarily long periods of detention,²³ and concluded that where detention was reviewed at three months: 'the presumption of liberty seemed in practice to have been replaced by a presumption to maintain detention on the basis that more information was needed'.²⁴

¹⁶ Immigration Enforcement Guidance, [Offender Management, paragraph 55.1.3](#).

¹⁷ Home Office, [National Statistics: How many people are detained or returned?](#), published 29 November 2018.

¹⁸ Ibid. Of the 26,440 people held in the detention estate in the year ending September 2018, 8,900 were held for longer than a month, 5,182 for more than 2 months.

¹⁹ Ibid.

²⁰ HM Chief Inspector of Prisons, [Harmondsworth immigration removal centre – persistent failings in safety and respect](#).

²¹ UN Committee Against Torture, [Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session \(6-31 May 2013\)](#). UN Human Rights Committee (2015), [Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland](#).

²² Stephen Shaw, [Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons: a follow-up report to the Home Office, paragraph 4.83](#).

²³ Ibid. Paragraph 4.83.

²⁴ Ibid. Paragraph 4.84. Shaw recommended that the Home Office: "ensure that all required information, including information on vulnerability and AAR levels, is available and that all panel members are properly prepared on the cases before them." (Recommendation 30).

In addition to broader issues around protracted detention, the Commission is particularly concerned about the impact of indefinite detention, and the consequent uncertainty, on mental health.²⁵ For individuals at heightened risk of harm, including those with protected characteristics, the lack of a time limit on detention may contribute to violations of the prohibition on torture, inhuman and degrading treatment.²⁶ We further note that medical evidence provided to the cross-party Parliamentary Inquiry into Immigration Detention suggests that mental health deteriorates significantly after 28 days in detention.²⁷

A broad range of professional bodies and experts have joined the call for a time limit on immigration detention, including bodies representing the legal and medical professions, a broad range of human rights organisations and two UN Treaty Bodies.²⁸ The call for a 28 day time limit is supported by the UNHCR and was a recommendation of the Parliamentary Inquiry into Immigration Detention in 2015 and the Joint Committee on Human Rights (JCHR) in 2019.²⁹ The JCHR concluded, in particular, that the ‘the lack of a time limit on immigration detention reduces the incentive for the Home Office to progress cases promptly which would reduce both the impact on detainees and detention costs.’³⁰

Ensure detention is used as a measure of last resort

²⁵ The Panorama footage and oral evidence given by former detainees during the Home Affairs Select Committee Inquiry evidence session and evidence sessions conducted by the Parliamentary Inquiry into the Use of Immigration Detention in the UK present stark evidence of the harmful impact of indefinite detention on the mental health of those in detention.

²⁶ Disabled people with mental health conditions and cognitive impairments are likely to be amongst those at heightened risk of harm. Similarly individuals with a history of trauma, including women who have experienced sexual and gender-based violence may be particularly adversely affected by protracted detention.

²⁷ All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, [The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom](#), page 33.

²⁸ British Medical Association (2017), [Locked up, locked out: health and human rights in immigration detention](#). The Bar Council (2017), [Injustice in Immigration Detention: Perspectives from legal professionals](#). Amnesty International (2018), [A Matter of Routine: the use of immigration detention in the UK](#). UN Committee Against Torture, [List of issues prior to submission of the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland](#). UN Human Rights Committee (2015), [Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland](#).

²⁹ All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, [The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom](#), page 33. Joint Committee on Human Rights, [Immigration detention: Sixteenth Report of Session 2017–19](#). JCHR recommended a statutory 28 day time limit which could be extended by a further 28 days in exceptional circumstances and subject to judicial authorisation.

³⁰ Ibid. Paragraph 68.

Commission's recommendation

Support New Clauses 6 and 7 to help ensure detention is a measure of last resort.

Why are these amendments needed?

It is Home Office policy that detention should be 'used sparingly, and for the shortest period necessary'.³¹ Relevant Immigration Enforcement Instructions further provide for 'a presumption in favour of immigration bail' and for 'wherever possible' alternatives to detention to be used.³² Government policy specifically provides that 'it is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process'.³³ Notwithstanding policy commitments aimed at restricting detention to circumstances where removal is imminent and alternatives have been exhausted, only 44% of those leaving detention in the year ending September 2018 were returned from the UK to another country.³⁴ Further, a recent inspection report demonstrates that of 19 families held at Tinsley House Immigration Removal Centre since it re-opened in May 2017, only four were removed.³⁵ These statistics, combined with the widespread use of lengthy detention considered above, raise serious concerns about the initial decision to detain and indicate that detention is not consistently linked to the prospect of removal.

New Clause 6, sub-clause (1) responds to this concern by establishing statutory criteria for the use of detention. Detention would only be available where the Home Secretary is satisfied that removal or deportation will happen 'shortly', detention is 'strictly necessary' to facilitate deportation or removal and detention is proportionate in all the circumstances. This provision embeds Article 5 ECHR requirements that immigration detention: (i) be closely connected to the purpose of

³¹ Immigration Enforcement Guidance, *Offender Management*, paragraph 55.1.3.

³² *Ibid.*

³³ *Ibid.*

³⁴ Home Office, National Statistics: [How many people are detained or returned?](#), published November 2018. "Of those leaving detention, 44% were returned from the UK to another country (compared with 48% in the previous year) and a further 38% received Secretary of State (SoS) bail."

³⁵ HM Chief Inspector of Prisons, [Report on an unannounced inspection of Family detention, Tinsley House Immigration Removal Centre](#).

preventing unlawful entry or facilitating deportation; and (ii) should not exceed the duration necessary for this purpose.

New Clause 7, sub-clause (5)-(7) would provide statutory requirements around the circumstances in which bail may be refused by the Immigration and Asylum Chamber of the First-tier Tribunal (the Tribunal). Save in exceptional circumstances, bail could only be refused by the Tribunal where removal is practically and legally imminent. Specifically, in addition to meeting the statutory criteria for detention considered above, the Secretary of State must satisfy the Tribunal that: (i) removal directions have been set with removal to take place within 96 hours; (ii) a travel document is available; and (iii) there are no outstanding legal matters to be resolved.

These proposed clauses would offer significant new protection and clarity in a context where immigration law experts argue that further clarity is required to define a 'reasonable period of detention'.³⁶ While Home Office policy limits detention to situations where removal is 'imminent', departmental guidance indicates that this criterion will be met where 'a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks'.³⁷ Meanwhile, guidance provided by the Tribunals judiciary records that 'it is generally accepted that detention for three months would be considered a substantial period and six months a long period. Imperative considerations of public safety may be necessary to justify detention in excess of six months'.³⁸

Notwithstanding the practical barriers to legal advice which immigration detainees experience, in the period from 2012–17 the Home Office paid £21 million in damages for unlawful detention.³⁹ The Commission considers that the stricter, statutory requirements set out at sub-clauses

³⁶ Evidence to the JCHR Inquiry into immigration detention from Bhatt Murphy solicitors, Duncan Lewis solicitors and Garden Court chambers. JCHR, *Immigration detention: Sixteenth Report of Session 2017–19*, paragraph 62.

³⁷ Immigration Enforcement Guidance, *Offender Management*, paragraph 55.3.2.4. The Immigration Act 2016 specifies the factors to be taken into account by a Tribunal judge of the Home Secretary in considering a grant of immigration bail. Schedule 10(3)(2)

³⁸ Tribunals Judiciary (2018), [Guidance on Immigration Bail for Judges of the First-tier Tribunal \(Immigration and Asylum Chamber\)](#).

³⁹ Letter from Sir Peter Rutman KCB, Permanent Secretary, Home Office, to Rt Hon Yvette Cooper, Chair, Home Affairs Select Committee, regarding Immigration Detention, dated 25 June 2018.

(5)-(7) of **New Clause 7** would tie detention more closely to the prospect of removal in line with the requirements of Article 5 ECHR and Article 9 ICCPR and prevent breaches of these rights in practice.

Introduce independent decision-making

Commission's recommendation

Support New Clauses 6 and 7 to increase independent decision-making.

Why are these amendments needed?

The Commission is concerned that the use of long-term immigration detention without a comprehensive requirement for an individual to be brought before a judge may be leading to violations of Article 9 ICCPR and Article 5 of the ECHR in practice. Currently the only requirement for an individual to be brought before a Tribunal during the course of immigration detention is a provision for referral to a tribunal for consideration of bail after four months.⁴⁰ The Commission is concerned that this provision permits protracted detention without judicial involvement. The provision further excludes former offenders, a group particularly likely to face long periods in detention. Whilst an individual can make an application for bail from detention, for those facing barriers to accessing legal advice or representation, such as the experience of trauma, mental health conditions, cognitive impairments and language difficulties, proactively securing a bail hearing is likely to be a significant obstacle to release. There are further a number of concerning statutory barriers to bail. Specifically:

- For those detained while the immigration authorities assess citizenship or leave to enter the UK, the earliest point at which the Tribunal can grant immigration bail is on the ninth day of that person's presence in the UK.⁴¹
- The Tribunal must not grant bail to a detained individual without the consent of the Home Secretary where directions for removal

⁴⁰ Immigration Act 2016, Schedule 10, paragraph 11.

⁴¹ Immigration Act 2016, Schedule 10, paragraph 3(3).

are in force which require removal within 14 days of the bail decision.⁴²

- The First-tier Tribunal must dismiss an application for bail without a hearing where an application is made within 28 days of another bail decision unless the applicant can demonstrate a material change in the person's circumstances.⁴³

New Clause 6, sub-clause (2) and **New Clause 7**, sub-clauses (1)-(3) would prevent detention beyond 96 hours save where the Tribunal has already refused bail or a bail hearing is scheduled. Before 96 hours have elapsed, if an individual has not been released or granted bail, the Secretary of State must arrange a reference to the Tribunal for a bail hearing. An oral bail hearing must then take place within 24 hours (or on the next working day). **New Clause 7**, sub-clause (9) would require the Home Secretary to provide the individual seeking bail or her legal representative with all documents relevant to the decision to detain. Where documents are not provided in this way, they would not be considered by the Tribunal unless the individual seeking bail consents or the Tribunal judges that there was good reason for the delay.⁴⁴ In addition to creating a system of automatic bail for all those in immigration detention on or around 96 hours from the point of first detention, **New Clause 7**, sub-clause (11) would ensure that automatic referral for bail at 96 hours would not prevent a further application within 28 days. This is an important protection in circumstances where an individual will not choose the timing of an initial automatic bail hearing and may need time to gather relevant information or seek legal representation.

In response to Stephen Shaw's 2016 'Review into the Welfare in Detention of Vulnerable Persons', the Home Office introduced a number of mechanisms aimed at reducing the excessive use of immigration detention, including the creation of Home Office panels to review case progression. Internal reviews of detention consequently take place at periods of three months, six months, nine months and twelve months

⁴² Immigration Act 2016, Schedule 10, paragraph 3(4).

⁴³ Immigration Act 2016, Schedule 10, paragraph 12(2).

⁴⁴ New Clause 7, sub-clause (10).

detention.⁴⁵ In his 2018 report, however, Shaw concluded that more work needed to be done in this area and specified that while he welcomed ‘improved internal oversight mechanisms, there remains a need for robust independent oversight of the caseworking process’.⁴⁶ The case for judicial oversight was recently made by Chair of the Independent Monitoring Board and former Chief Inspector of Prisons, Dame Ann Owers, who argued in evidence to the JCHR, that judicial involvement would improve accountability and the quality of decision-making.⁴⁷ Further, in its 2019 report the JCHR recommended that a judicial decision should be required for detention beyond 72 hours.⁴⁸ In reaching this recommendation the Committee considered the protections available in the criminal justice system, including a requirement for a Magistrate’s warrant for detention exceeding 36 hours.⁴⁹

New Clauses 6 and 7 would provide a strong framework for judicial consideration of the appropriateness of detention, ensuring robust, independent oversight. The Commission considers that this would provide a strong practical protection against the use of arbitrary detention in violation of Article 5 ECHR. It would further mitigate the risk that individuals at particular risk of harm will be held for protracted periods in circumstances which amount to violation of Article 3 ECHR, Articles 2 and 16 CAT and Article 7 ICCPR. The addition of mandatory judicial scrutiny will help the UK to meet the requirement of Article 11 CAT to keep arrangements for the custody and treatment of persons subject to detention under systematic review to prevent torture or other forms of cruel, inhuman or degrading treatment or punishment.

Further information

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the

⁴⁵ Any detainees held for longer than twelve months are reviewed by a panel chaired at a senior level every subsequent three months, complemented by an internal monthly Director-chaired Criminal Casework Internal Review Panel’. Shaw (2018), paragraph 4.73.

⁴⁶ Shaw (2018), paragraph 2.22

⁴⁷ JCHR (2019), paragraph 35.

⁴⁸ JCHR (2019), paragraph 74.

⁴⁹ JCHR (2019), paragraph 8.

Commission's work on [the Commission's website at www.equalityhumanrights.com](http://www.equalityhumanrights.com).

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