Written evidence submitted by the Equality and Human Rights Commission (EHRC) (IB06)

House of Commons Public Bill Committee on Immigration and Social Security Coordination (EU Withdrawal) Bill 2019-21

Introduction

1. The Equality and Human Rights Commission has been given powers by the UK Parliament to advise the UK Government on the equality and human rights implications of laws and proposed laws, and to publish information or provide advice, including to Parliament, on any matter related to equality, diversity and human rights.

Summary

2. The Bill would repeal free movement and make EU, EEA and Swiss citizens subject to evolving UK immigration law. It provides an important opportunity for Parliament to address longstanding concerns about treatment in the immigration system. This submission focuses on parliamentary scrutiny, immigration detention and data-sharing for the purposes of immigration enforcement.

3. We recommend changes to the Bill in three priority areas:

   I. We recommend that Parliament's role in scrutinising the UK's equality and human rights legal framework is protected:

   - **narrow the scope of delegated powers** by removing the phrases "appropriate" and ", or in connection with," from Clause 4 **(amendments 2 and 3)**

- **ensure use of delegated powers is subject to scrutiny** by ensuring use of the “draft affirmative” procedure for all statutory instruments made under Clause 4 **(amendments 5, 6, 8 and 9)**
- **ensure transparency in the use of delegated powers** by ensuring any regulations made under delegated powers in the Bill are accompanied by a Ministerial statement confirming compliance with human rights law and the public sector equality duty, including an assessment of the equality impacts.

II. We recommend protections to ensure immigration detention is used only as a time-limited measure of last resort:

- **end indefinite detention by introducing a 28 day limit** with no further detention beyond this point unless there is a material change in the person’s circumstances **(new clause 1 [NC1])**
- **ensure detention is used only as a measure of last resort** by establishing clear statutory criteria for its use that reflect the requirements of human rights law **(new clause 2 [NC2])**
- **provide independent oversight for detention** by requiring a judicial decision for detention beyond 96 hours and ensuring bail is only exceptionally refused **(new clause 3 [NC3])**

III. We recommend that compatibility with human rights and equality law is strengthened:

- **Ensure access to essential public services** (health, education, reporting of crime) by preventing data sharing for immigration enforcement purposes.

I. Narrow the scope of delegated powers

Our recommendation:

4. We recommend support to amendments 2 and 3:

(2) **Clause 4, page 2, line 34**, leave out “appropriate” and insert “necessary”;

(3) **Clause 4, page 2, line 34**, leave out ", or in connection with,"[1]

Why are these amendments needed?

5. As drafted, Clause 4 of the Bill provides a broad power that would allow Ministers to make regulations they consider appropriate as a consequence of or in connection with the ending of free movement, including the power to amend primary legislation.

6. These amendments narrow the scope of delegated powers provided for in the Bill by ensuring that regulations can only be made under Clause 4 where the Secretary of State considers them necessary in consequence of the ending of free movement.

7. Immigration is a context in which fundamental rights are routinely engaged and often at risk – including the prohibition on inhuman and degrading treatment, the rights to liberty and respect for family and private life, data protection rights, property rights and the right to non-discrimination.[2] As a matter of constitutional principle, changes that affect fundamental rights should be made by Parliament in primary legislation and not by Ministers through secondary legislation.

8. By narrowing the scope of delegated powers provided for in the Bill, these amendments reduce the likelihood that fundamental rights will be amended by Ministers through secondary legislation and help protect Parliament's role in scrutinising the UK's equality and human rights legal framework.

II. Ensure use of delegated powers is subject to scrutiny

Our recommendation:

9. We recommend support to amendments 5, 6, 8 and 9:

(5) **Clause 4, page 3, line 9**, leave out subsection (6);

(6) **Clause 4, page 3, line 14**, leave out "other";

[1] See House of Lords Delegated Powers and Regulatory Reform Committee (2019), 46th Report – Immigration and Social Security Co-ordination, paras. 15 and 30.
[2] Equality and Human Rights Commission (2020), Civil and Political Rights in Britain, p. 52; Equality and Human Rights Commission (2018), Is Britain Fairer? The state of equality and human rights 2018, pages 63, 94, 101, 105, 128-129, 146

(8) **Clause 4, page 3, line 18**, leave out subsection (8);

(9) **Clause 4, page 3, line 14**, leave out from "(1)" to "is"[3]

Why are these amendments needed?

10. These amendments narrow the scope of the powers provided to the Secretary of State by ensuring that all statutory instruments made under Clause 4 of the Bill are subject to the draft affirmative procedure, which will improve the opportunity for parliamentary scrutiny over any changes to fundamental rights.

11. As drafted, Clause 4 of the Bill stipulates that regulations made under delegated powers will only be subject to the draft affirmative procedure wherever they amend or repeal primary legislation, rather than subjecting all statutory instruments made under Clause 4 to this level of scrutiny.

12. This amendment will protect equality and human rights laws in UK secondary legislation that are derived from EU law, such as those on maternity and parental rights, from amendment or repeal without parliamentary scrutiny.

III. Ensure transparency in the use of delegated powers

Our recommendation:

13. We recommend that any regulations made under delegated powers in the Bill should be **accompanied by a Ministerial statement confirming compliance with human rights law and the public sector equality duty, including an assessment of the equality impacts**.

Why is this change to the Bill needed?

14. Even with the above amendments relating to the draft affirmative procedure in place, the limitations of this scrutiny procedure are widely acknowledged. Between 1950 and 2017, there were only ten occasions when delegated legislation under the affirmative procedure was not approved by Parliament.[4]

[3] See House of Lords Delegated Powers and Regulatory Reform Committee (2019), 46th Report – Immigration and Social Security Co-ordination, paras. 17 and 18.
[4] House of Lords Delegated Powers and Regulatory Reform Committee (2017), Third report of session 2017-19, European Union (Withdrawal) Bill.

This change would help to enhance scrutiny by increasing the transparency of any changes to legislation affecting fundamental rights.

15. The Home Office memorandum on the compatibility of the Bill with the European Convention on Human Rights confirms that it "does not address Convention issues arising in relation to the future immigration system", but commits that "the Department will ensure that the Convention rights of [people affected by the Bill] are respected."[5] Similarly, the Government's equality impact assessment for the Bill does not assess the impact of the future immigration system, though it states that "We have considered equalities impacts of the points-based immigration system in line with our public sector equality duties", and "Impacts will continue to be considered as policies are developed."[6] We strongly recommend that transparency and accountability mechanisms should be provided for in the Bill to allow Parliament to give due consideration from the outset to ensuring that regulations made under the Bill uphold equality and human rights.

IV. Ending indefinite detention

Our recommendation:

16. We recommend support to new clause 1 limiting immigration detention to 28 days.

Why is this amendment needed?

17. The UK is the only country in Europe without a limit on how long someone can be held in immigration detention.[7] Despite common law principles restricting the use of detention to a reasonable period[8] and Home Office commitments to use

[5] Home Office (2020), Immigration and Social Security Co-ordination (EU Withdrawal) Bill, European Convention on human rights, memorandum by the Home Office, para 4.

[6] Home Office (2020), Policy equality impact assessment.

[7] See eg Home Affairs Committee (2019), Immigration detention, fourteenth report of session 2017-2019, para 202.

[8] The use of immigration detention is governed by the Hardial Singh principles, see R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB).

detention “sparingly, and for the shortest period necessary”,[9] in practice some people are detained for months or even years. More than a quarter of those who left detention last year had been held for more than 28 days, including 128 people who had been held for a year or more.[10] HM Inspectorate of Prisons identified an individual in 2017 who had been held for more than four and a half years.[11] The use of long-term detention may lead to violations of the right to liberty, contrary to article 5 of the Human Rights Act and article 9 of the International Covenant on Civil and Political Rights.[12] The UN Human Rights Committee and the Committee Against Torture have repeatedly expressed concern about prolonged periods of immigration detention and the continued absence of a statutory limit.[13]

18. Immigration detention has a negative impact on detainees’ mental health which increases the longer detention continues.[14] The indefinite nature of detention in the UK creates uncertainty and “traumatises those who are being held”.[15] Some individuals sharing protected characteristics are at particular risk of harm, including women who have survived sexual or gender-based violence and people with mental health conditions. For these individuals the absence of a time limit may contribute to violations of article 3 of the Human Rights Act, which prohibits torture, inhuman and degrading treatment.[16] The courts have found several violations of article 3 in the immigration estate, including cases

[9] Immigration enforcement guidance, Offender management: detention and temporary release.

[10] Home Office (2020), Returns and detention datasets - immigration detention, see table Det DO3. Figures are for the year ending December 2019. In that period, 24,512 people left detention, of whom 6,470 (26 per cent) had been held for 29 days or longer.

[11] HM Chief Inspector of Prisons (2018), Harmondsworth immigration removal centre – persistent failings in safety and respect.

[12] The International Covenant on Civil and Political Rights is binding under international law.

[13] UN Human Rights Committee (2015), Concluding observations, para 21; UN Committee Against Torture (2019), Concluding observations, paras 54-55. The UN Human Rights Committee has recently asked the UK to provide information on the maximum time limit on immigration detention during its latest examination of the UK’s compliance with the International Covenant on Civil and Political rights, see Human Rights Committee (May 2020), List of Issues, para 21.

[14] See Stephen Shaw (2016), Review into the welfare in detention of vulnerable persons.

[15] Home Affairs Committee (2019), Immigration detention, fourteenth report of session 2017-2019, para 221.

[16] Article 3, Part 1, Schedule 1 of the Human Rights Act 1998.

where detention has been maintained despite serious deterioration in the detainee's mental health.[17]

19. Inappropriate use of immigration detention has financial as well as human costs. In the period from 2012–17 the Home Office paid £21.2 million in damages in relation to 867 cases of unlawful detention.[18] In the quarter ending December 2019 the average cost of holding someone in detention was £94.56 per day.[19] The Joint Committee on Human Rights in 2019 found the absence of a time limit "reduces the incentive for the Home Office to progress cases promptly which would reduce both the impact on detainees and detention costs."[20]

20. **New clause 1 responds to these concerns** by limiting detention to 28 days, with further detention beyond this point only possible where the Secretary of State is satisfied there has been a material change in the person's circumstances.[21] The introduction of a time limit is supported by a range of professional bodies and other experts, including the British Medical Association, Bar Council, Amnesty International, UN Human Rights Committee and UN Committee Against Torture.[22] It was recommended in 2019 by both the Home Affairs Select Committee and the Joint Committee on Human Rights.[23]

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[17] See eg R (on the Application of MD) v SSHD [2014] EWHC 2249 (Admin); R (on the Application of HA (Nigeria)) v SSHD [2012] EWHC 979 (Admin); and ARF v SSHD [2017] EWHC 10 (QB).

[18] 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.

[19] Home Office (2020), Immigration enforcement data – quarter 4 2019, see table DT 02.

[20] Joint Committee on Human Rights (2019), Immigration detention: sixteenth report of session 2017–19, para 68.

[21] Subsection (6) of new clause 1 provides that the 28 day time limit would not apply to anyone who the Secretary of State has certified is detained in the interests of national security.

[22] 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 Human Rights Committee (2015), Concluding observations; UN Committee Against Torture (2019), Concluding observations.

[23] Home Affairs Select Committee (2019), Immigration detention, fourteenth report of session 2017-2019; Joint Committee on Human Rights (2019), Immigration detention: sixteenth report of session 2017–19.

V. Ensure detention is a last resort

Our recommendation:

21. We recommend support to new clause 2 introducing statutory criteria for the use of detention and preventing detention beyond 96 hours, save where bail has been refused or a bail hearing is scheduled.

Why is this amendment needed?

22. We are concerned that immigration detention is not currently limited to cases where there is a realistic prospect of removal within a reasonable period. This may be leading to violations of article 5 of the Human Rights Act, which requires that detention is closely connected to the purpose of facilitating deportation or preventing unlawful entry.

23. In 2019, 24,443 people were detained for immigration purposes.[24] The Government has committed to "keep the use of immigration detention to a minimum"[25] and use alternatives wherever possible.[26] 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".[27] Despite this, only 37 per cent of those leaving detention last year were returned to their country of origin or another foreign country.[28] An inspection of Tinsley House immigration removal centre in 2018 found that, in the 11 months since the centre opened, of 19 families detained only four had been removed.[29] These findings raise concerns that detention is not consistently linked to a realistic prospect of removal within a reasonable period. Immigration law experts

[24] Home Office (2020), Immigration statistics, how many people are detained or returned?

[25] Letter from the Minister of State for Immigration to the Chair of the Home Affairs Select Committee, 23 July 2019.

[26] Immigration enforcement guidance, Offender management: detention and temporary release, paras 55.3 and 55.1.3.

[27] Ibid, para 55.1.3.

[28] Home Office (2020), Immigration statistics, how many people are detained or returned? 61 per cent of those who left detention received bail. The remaining 2 per cent were granted leave to enter or remain in the UK, or left detention for 'other' reasons, which include being detained under the Mental Health Act, entering criminal detention and having been detained in error.

[29] HM Chief Inspector of Prisons (2018), Report on an unannounced inspection of Family detention, Tinsley House Immigration Removal Centre.

have also identified a need for further clarity in how a 'reasonable period' of detention is defined.[30]

24. **New clause 2 responds to these concerns** by introducing statutory criteria for detention that would limit its use to circumstances where the person can shortly be removed from the UK and detention is proportionate and strictly necessary to effect removal (subsection (1)). Subsection (2) would prevent detention beyond 96 hours, save where the tribunal has already refused bail or a bail hearing is scheduled.

VI. Independent review of detention

Our recommendation:

25. We recommend support to new clause 3 requiring a judicial decision for detention beyond 96 hours.

Why is this amendment needed?

26. The use of long-term detention without a comprehensive requirement for an individual to be brought before a judge may be leading to violations of the right to liberty, protected by article 5 of the Human Rights Act. While Home Office policy states a presumption in favour of bail,[31] the decision to detain is not automatically referred to the courts until the person has been detained for four months.[32] We are concerned that this permits protracted detention without judicial involvement. By comparison, in the criminal justice context, the police must apply to a magistrate if they wish to detain someone beyond 36 hours without charge.[33] There are a number of barriers preventing immigration detainees from proactively

[30] Joint Committee on Human Rights (2019), Immigration detention: sixteenth report of session 2017–19, para 62. Evidence was provided by Bhatt Murphy Solicitors, Duncan Lewis Solicitors and Garden Court Chambers.

[31] Immigration enforcement guidance, Offender management: detention and temporary release, para 55.1.3.

[32] This provision does not apply to former offenders although they are particularly likely to face long periods in detention.

[33] Joint Committee on Human Rights (2019), Immigration detention: sixteenth report of session 2017–19, p7.

applying for bail, particularly the complexity of immigration laws[34] and difficulties accessing legal advice.[35] This is likely to disproportionately affect people sharing certain protected characteristics, including those who have experienced trauma or who have mental health conditions, cognitive impairments or language difficulties.

27. Stephen Shaw's follow-up report on the welfare of vulnerable people in detention welcomed the Home Office's introduction of stronger internal oversight for case progression, but concluded that "there remains a need for robust *independent* oversight of the caseworking process".[36] The case for judicial oversight was also made by Dame Ann Owers, National Chair of the Independent Monitoring Boards and former Chief Inspector of Prisons, who has argued that judicial involvement would improve the quality of and accountability for decision-making.[37]

28. **New clause 3 responds to these concerns** by requiring that the Secretary of State refer detainees to the immigration tribunal for a bail hearing within 96 hours of initial detention. Subsection (6) secures the presumption in favour of bail: it provides that the tribunal must grant bail unless removal directions are in place and removal is set to take place within 14 days, a travel document is available and there are no outstanding legal barriers (except where there are very exceptional circumstances justifying continued detention according to subsection (7)). Subsection (10) would require the Secretary of State to provide the person seeking bail, or their legal representative, with all documents relevant to the decision to detain within 24 hours of their initial detention. Where documents are not provided in this way the tribunal would not consider them at the bail hearing, unless the individual consents or the tribunal considers there is a good reason for the delay (subsection (11)).

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[34] Ibid. The Committee reported that "immigration law, rules and policy have become so complex over time that even the most experienced practitioners find the system difficult to navigate", para 40.

[35] For example, in a survey of detainees at Colnbrook Immigration Removal Centre, 21 per cent of respondents said they had difficulties accessing legal advice when they first arrived. 23 per cent said they did not have a lawyer and 42 per cent said they found it difficult or very difficult to obtain bail information. HM Chief Inspector of Prisons (2018), Report on an unannounced inspection of Colnbrook Immigration Removal Centre.

[36] Stephen Shaw (2018), Review into the welfare in detention of vulnerable persons, para 2.22.

[37] Joint Committee on Human Rights (2019), Immigration detention: sixteenth report of session 2017–19, para 35.

VIII. Ensure people with insecure immigration status can access essential services

Our recommendation:

29. We recommend the Bill introduces a **prohibition on the use of data collected or held by essential public services for immigration enforcement purposes. We specifically recommend data collected or held in relation to an individual's access to essential healthcare, education or policing services should not be used for immigration enforcement purposes.**

Why is this change to the Bill needed?

30. There is evidence of data-sharing with the Home Office, as part of the Government's compliant environment controls, when people access healthcare, education or report a crime to the police.[38] This may deter people from accessing essential services and raises significant equality and human rights concerns, including in relation to the right to life,[39] the prohibition on torture,[40] and the rights to health,[41] education[42] and privacy.[43] By ending freedom of movement, this Bill potentially brings many more people (EU, EEA and Swiss nationals) within the scope of immigration enforcement and therefore substantially increases this risk.

31. A super-complaint by Liberty and Southall Black Sisters in 2018 detailed the effect of data-sharing on reporting crime, including perceived prioritisation of immigration enforcement over victim protection.[44] It highlighted the cases of people who had been subject to immigration controls after reporting very serious crimes, including a pregnant woman who was arrested on immigration charges after reporting to the police that she had been raped.[45]

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[38] Liberty (2018), Care don't share.

[39] Article 2 HRA.

[40] Article 3 HRA.

[41] Article 12, International Covenant on Economic, Social and Cultural Rights.

[42] Article 28, Convention on the Rights of the Child.

[43] Article 8 HRA.

[44] Liberty and Southall Black Sisters (2018), Police super-complaints: police data sharing for immigration purposes.

[45] Ibid.

32. Our own research has shown that fear of data-sharing between the Home Office and the NHS (including among migrants who are lawfully resident in the UK) prevents people from accessing healthcare, including pregnancy and maternity services and treatment for communicable diseases.[46] Public Health England has previously stated that perceived or actual data sharing by the NHS "could present a serious risk to public health".[47] In 2019 the Health and Social Care Select Committee reported that this advice been "comprehensively ignored".[48] The coronavirus pandemic makes clear the risks to individual migrants and wider public health if people cannot safely access healthcare or report on their health to service providers. A coalition of human rights organisations has called on the Government to immediately suspend data-sharing so that migrants can access healthcare without fear they will be subject to immigration controls.[49]

33. In 2018, the Department for Education removed the requirement for schools in England to ask for pupil nationality and country of birth in the school census. However, parents no longer have the power to retract information on their children's nationality and country of birth submitted to the schools census.[50] A concern with data sharing arrangements is that they break down the trust between schools and the communities which they serve. This may deter children and families from accessing education to which they are entitled, raising concerns under Article 2 of the First Protocol to the ECHR (asserting that no person shall be denied the right to education), Article 28 of the Convention on the Rights of the Child (which recognises the right of the child to education, and requires states to take steps to achieve this, including by taking measures to

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[46] Equality and Human Rights Commission (2018), The lived experiences of access to healthcare for people seeking and refused asylum.

[47] Public Health England (2017), Correspondence between the Chair of the Health Select Committee and the Minister for Public Health, the Chair of NHS Digital, the Chief Executive of Public Health England, the Chief Executive of the General Medical Council and the National Data Guardian, see p23.

[48] Health and Social Care Select Committee (2018), Memorandum of understanding on data-sharing between NHS Digital and the Home Office, fifth report of session 2017-9, p24.

[49] Liberty (2020), Letter to the Home Secretary on protecting migrants from COVID-19. Signatories include Medact, Doctors of the World, Runnymede Trust and Women for Refugee Women.

[50] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-01-04/205076/

encourage regular attendance at schools) and Article 8 ECHR (which protects a child's right to privacy).

34. In 2018, the Government committed to moderate some of its data sharing policies, including refining arrangements with the NHS[51] and although the Home Affairs Committee welcomed these changes they said they were "unconvinced that the Government's actions are sufficient to address the problems [they] identified."[52] The Committee was particularly concerned the Government had not addressed data-sharing with the police, and recommended the immediate removal of the obligation on police to share data on victims of crime.[53] The independent Windrush lessons learned review identified a number of people from the Windrush generation who had been wrongly subject to proactive compliant environment sanctions where the Home Office had shared data with other departments.[54]

Further information

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

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[51] HC Deb, 9 May 2018, col 756 [Margot James MP].

[52] Home Affairs Committee (2018), The Windrush generation, sixth report of session 2017-19.

[53] Ibid.

[54] Wendy Williams (2020), Windrush lessons learned review.