

### **Illegal Migration Bill Briefing**

Bail for Immigration Detainees (BiD) provides free legal advice, information and representation for people held in detention in the UK and facing deportation. BiD also conducts research, policy advocacy and strategic litigation.

#### **Summary**

- ❓ The Bill begins with the admission that the Home Secretary, Suella Braverman, is unable to say that the Illegal Migration Bill is compatible with the European Convention on Human Rights. This is because the UK will be in breach of international and domestic human rights obligations. In fact, the Bill excludes the requirement of the Bill to be compatible with the Human Rights Act (**Clause 1(5)**).
- ❓ This Bill aims to ensure the removal of people who arrive to the UK via unsafe and illegal routes, on or after the 7<sup>th</sup> of March 2023. **This does not account for the fact that there is no visa for asylum seekers, nor any robust system for safe routes.** The current limited safe route schemes have been widely deemed ineffective.
- ❓ This Bill stipulates that a person detained under this must not be granted immigration bail by the First-Tier Tribunal until after 28 days in detention. During this period, unlawful detentions will not be subject to any legal oversight whatsoever (judicial review) by a court.
- ❓ The Bill purports to codify the Hardial Singh principles which have served as a regulatory framework for assessing unnecessary and unlawful detention. However, the Bill upends those principles and allows the Secretary of State to detain people even where the Secretary of State may be acting irrationally and where a person's removal from the UK is impossible. As such the Bill effectively changes the purpose of detention from one intended to enable the enforcement of immigration control, to one of coercion and punishment (without any of the protections that would be found within criminal procedures).
- ❓ **This Bill allows the Secretary of State to act with impunity and without judicial oversight.**
- ❓ This Bill effectively removes protections, assistance and support for potential victims of modern slavery and human trafficking.
- ❓ **This Bill effectively abolishes the right to seek asylum.**
- ❓ This Bill **allows for the detention of families and renews the policy to detain children (previously effectively ended in 2009)**

- ❑ This Bill allows for **the detention and removal of vulnerable people** including **people who lack mental capacity, victims of torture, modern slavery and human trafficking, people suffering the consequences of mental trauma**, etc.
- ❑ Bail for Immigration Detainees opposes this Bill in its entirety and urges Members of Parliament to vote against the Bill.

### **Introduction**

This briefing outlines BID's concerns regarding this alarming Bill, which proposes to remove people who arrive in the UK via unsafe and irregular routes on or after the 7<sup>th</sup> of March 2023. This Bill is intended to abolish the ability of most asylum seekers to obtain refuge in the UK. It will have an intergenerational impact as the families – including UK-born children – of people who arrived through irregular routes after 7<sup>th</sup> March 2023 will be excluded from ever obtaining leave to remain, let alone citizenship. It will create a sub-class of people living within the wider community and as such will have a significant, if not dangerous impact on the British public and their perception of asylum seekers, migrants, and significantly, minorities. The Bill aims to prevent the vast majority of asylum seekers, their children and those born in the UK from being granted settlement in the UK and excludes them from becoming British citizens. In sum, the Bill will increase racism and division.

This Bill (Clauses 29-36) will mean that the children of thousands of people who either claim asylum or whose entitlement to enter and remain in the UK is in question will never obtain permission to remain or the ability to live full and meaningful lives in the UK. It also means that children who are alone, once they turn 18, will be subject to removals. This effectively means that while the UK state recognises the support and educational needs of children in care who are citizens of the UK as they are required by law to be supported until the age of 25, asylum-seeking children who are alone and living in care will instead be deported or removed from the UK without regard to their unfortunate circumstances or upbringing in the UK.

While purporting to save lives this Bill relies upon coercive and cruel measures that will only make migration even more dangerous, while removing support for vulnerable people who seek help and refuge in the UK.

### **Clause 1 – Introducing the Bill and its Purpose**

The SSHD argues that the purpose of the Bill is to prevent and deter unlawful migration, in particular by the use of unsafe and illegal routes. Subsequently, this Bill places a duty on the SSHD to arrange for the removal of people who enter the UK in breach of immigration controls. The duty to remove and the categorisation of 'illegal migrant' is formulated so as to completely disregard the position of the United Nations High Commissioner that people are often forced to seek asylum in circumstances

where they are unable to travel to countries of refuge via legal means.<sup>1</sup> In fact if a person does travel to the UK by legal means and applies for asylum, it is normal for the UK to refuse them refuge for this very reason.

The aim of the Bill is one of deterrence rather than fairness or the protection of those in need of help. The Bill requires the SSHD to use increasing levels of public resources to detain and remove people via expensive arrangements with third countries, rather than using such enormous funds to invest in communities to welcome and support asylum seekers. This Bill operates on the assumption that punishment, via the use of detention and removal will induce fear and trauma, which in turn will lead to a reduction in people seeking refuge in this country. There is no evidence at all to support such an approach, while there is abundant (particularly medical) evidence<sup>2</sup> of the harm such procedures cause to those impacted by and dehumanised by such measures. Conversely, there is also historical evidence that such measures can lead to ever-increasing cruelty on the part of those tasked with implementing them.<sup>3</sup>

The SSHD says she is unable to make a statement that the Bill is compatible with the European Convention of Human Rights (ECHR) as there is a high chance that the UK will be in violation of the ECHR. In fact, the SSHD goes much further than this statement, by introducing Clause 1(5) which specifically states that Section 3 of the Human Rights Act (which aims for legislation to be read compatibly with the European Convention on Human Rights) 'does not apply in relation to provision made by or by virtue of this Act'. In this and in other ways identified in this Bill, the SSHD and the Bill subvert the Rule of Law.

We are familiar with cruel Home Office processes that effectively punish and separate families. Our research on deportations has evidenced the devastating impact of deportation on families and communities, particularly young children, with the children of parents facing deportation developing

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<sup>1</sup> See for example the [UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection \(Reissued February 2019\)](#) that states at paragraph 49: 'retaining a valid passport of a country of whose protection [a refugee] is allegedly unwilling to avail himself [...] may cast doubt on the validity of his claim to have "well-founded fear"'.

<sup>2</sup> As the Helen Bamber Foundation concludes in the [summary of its research into 'The Impact of Immigration Detention on Mental Health \(7/9/22\)](#) "Detainees have been found to have high levels of anxiety, depression and post-traumatic stress disorder. Suicidal ideation and deliberate self-harm were also common. Severity of distress is significantly greater in those who had been detained for relatively long periods."

<sup>3</sup> See for example ['Dehumanization in Organizational Settings: Some Scientific and Ethical Considerations' by Kalina Christoff \(National Library Of Medicine\) \(2014\)](#): 'There is overwhelming evidence for the wide-reaching negative consequences of relatively mild dehumanizing attitudes and behaviors. Dehumanizing others leads to increased anti-sociality towards them in the form of increased aggressive behaviors such as bullying (Obermann, 2011) and harassment (Rudman and Mescher, 2012), as well as hostile avoidance behaviors such as social rejection (Martinez et al., 2011). This increased hostility and aggression are accompanied by reduced moral worth attributed to those who are dehumanized (Opatow, 1990; Haslam and Loughnan, 2014) and they are therefore judged less worthy of protection from harm (Gray et al., 2007; Bastian and Haslam, 2011).



anxiety; crying constantly; being unable to let their parent(s) out of their sight; withdrawing from everything; loss of appetite; difficulty sleeping; suffering nightmares; and causing self-harm and attempted suicide.<sup>4</sup> This Bill represents an unprecedented expansion of these cruel policies to most people seeking asylum or in the UK without legal authority.

**Clause 2 – Duty on SSHD to make arrangements for removal**

This clause creates a duty to remove people who arrive irregularly after the 7<sup>th</sup> of March 2023.

**Clause 3 – Relating to unaccompanied children etc.**

This clause regards unaccompanied asylum-seeking children. Whilst there is no duty to deport, this clause provides the power for the SSHD to deport children as soon as they turn 18.

The impact of the provision is to undermine children during their upbringing, to limit their aspirations and hopes and therefore their development. It will in all likelihood create a sub-class generation of children and people who will be kept in limbo with limited ability to participate in their communities and wider society. Children will grow up in a state of anxiety, living with the terror of knowing that they may be removed to a third country, away from their communities of support in the UK, or with the threat of removal to countries where their safety may be threatened.

**Clause 4 – Disregard of certain claims, applications etc**

When a person who meets the four conditions makes a protection claim or a human rights claim, the SSHD must declare this claim as inadmissible, and their human rights will not be considered under the Immigration Rules. there is no right of appeal. **This clause effectively abolishes the right to seek asylum. It also removes the right of people to make human rights claims or claims to remain when they have been trafficked or are victims of modern slavery.**

The clause further undermines the Rule of Law by removing any form of legal accountability or judicial oversight, preventing any challenge to the SSHD's decisions that may be made by way of an application for judicial review. Instead, the SSHD will be able to act with impunity, even in circumstances where it may be argued that the SSHD is acting irrationally.

**Clause 5 – Removal for the purposes of section 2 or 3**

Under Clause 5, the SSHD is required to arrange for the removal of a person from the UK

- a. 'as soon as reasonably practical'
- b. 'where the person has ceased to be an unaccompanied child.'<sup>5</sup>

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<sup>4</sup> Bail for Immigration Detainees – [“Excessively cruel”: Detention, deportation & separated families](#) – June 2021

<sup>5</sup> Illegal Migration Bill – March 2023 – Clause 5

It also outlines the countries to which a person may be sent. People may be removed to countries listed in a Schedule to the Bill, including the EEA, Switzerland or Albania), or to a country considered a 'safe third country' such as Rwanda. In the first half of 2022, more than half of asylum applications (55%<sup>6</sup>) from Albanian adults were successful at the initial Home Office decision, indicating that it is not a safe third country for the majority of people. Of the 45% of applications which were refused at the initial decision, the Migration Observatory notes that some are likely to be successful at the appeal level and thus granted asylum or another form of leave, contributing the majority of applications from Albania who will be recognised as refugees.<sup>7</sup>

While this clause allows for a person not to be removed to their country of nationality, it does allow them to be removed to a country through which they travelled to the UK or *any* country that may admit them. The only exception will be where they make a protection claim *and* the SSHD 'considers that there are exceptional circumstances which prevents [their] removal to that country'. The Bill however seeks to define 'exceptional circumstances' as referring to countries that may be derogating from the ECHR under Article 15 of the Convention (e.g., Ukraine's derogation due to its state of emergency at a time of war with Russia).

#### **Clause 7 - Further provisions about removal**

This Clause stipulates the requirement of the SSHD to give notice to explain that the person will be removed, where they will be removed to and the person's right to make a suspensive claim.

Clause 7 also gives powers to the SSHD to force private companies and individuals such as captains of ships or aircrafts, train drivers, train managers, and drivers of vehicles to prevent people from disembarking before removal has been fulfilled.

We are concerned this Clause may reinforce the dangerous use of force in deportations. In 2010, Jimmy Mubenga was unlawfully killed due to being forcibly restrained by G4S security guards. Similar cases have occurred in the past and without measures to enable scrutiny and accountability of such steps, and in circumstances where traumatised people will in all likelihood feel unjustly treated, there is a real danger of further cases occurring in the future.

#### **Clause 11 – Powers of detention**

This clause reinforces the SSHD's existing powers to detain people and confirms that this includes people who meet the conditions of Clause 2 and their families, including pregnant people, their

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<sup>6</sup> Albanian asylum seekers in the UK and EU: a look at recent data -

<https://migrationobservatory.ox.ac.uk/resources/commentaries/albanian-asylum-seekers-in-the-uk-and-eu-a-look-at-recent-data/#:~:text=In%20the%20year%20ending%2030,during%20this%20one%2Dyear%20period>

<sup>7</sup> Albanian asylum seekers in the UK and EU: a look at recent data -

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children and children who are alone. This Bill removes the existing time limit on the detention of families (who can currently be detained for 3 days, extendable to 7 days with ministerial approval).

This clause expands the list of places where the SSHD can detain people to ‘any place that the Secretary of State considers appropriate.’ Currently, the SSHD has powers to detain people in prisons, Immigration Removal Centres (IRCs – detention centres) and short-term holding facilities, as outlined in the Immigration (Places of Detention) Direction 2021<sup>8</sup>. Under this Bill, this could lead to the SSHD having de-facto powers to detain people *anywhere*, without any judicial oversight or review as may apply, for example to IRCs under the Detention Centre Rules 2001, prisons under the Prison Rules 1999 or Short-Term Holding Facilities (STHF) under the STHF (Amendment) Rules 2022.

Given the history and practice of detention, this could give the SSHD powers to indefinitely detain children, pregnant people and vulnerable people in new centres without regulation or legal oversight. Conditions at Manston STHF were deemed inhumane, with overcrowding, children sleeping on the floor and disease outbreaks.<sup>9</sup> However, while the SSHD was found to have been in breach of the regulations covering Manston STHF, conditions could have been worse or endured longer had there been no regulations governing the centre.

Combined with the plans for the expansion of the detention estate at IRCs including Haslar and Campsfield, the concern is that the SSHD is giving herself licence to create places of detention without any adequate legal or judicial oversight.

#### **Clause 12 – Period for which persons may be detained**

The explanatory notes to the Bill state that this clause codifies the Hardial Singh principles that regulate when the use of administrative immigration detention is unlawful. These principles are particularly important in view of there being no time limit on immigration detention.

However, rather than codifying the Hardial Singh principles, the SSHD is bestowing upon herself the power to disregard the principles. The Hardial Singh principles essentially only allow for detention to be used where removal is to be carried out within a reasonable period, where a travel document and arrangements for removal are in prospect and where the SSHD is acting diligently. **However, the SSHD is essentially giving herself the power to do the opposite: she is empowered to detain where a person’s removal will not happen within a reasonable period.** Clause 12 states that detention can be maintained for as long as the Secretary of State deems it to be “reasonably necessary”, and it can continue “regardless of whether there is anything that for the time being prevents the deportation order from being made or the removal from being carried out”. The Secretary of State will be empowered to act unreasonably and irrationally under this proposed law. Further, even where the

<sup>8</sup> <https://www.gov.uk/government/publications/immigration-places-of-detention-direction-2021>

<sup>9</sup> <https://www.bbc.co.uk/news/uk-england-kent-63262176>





SSHD thinks a person should be released as they cannot be removed within a reasonable period, she will be able to detain them as long as she deems this to be necessary.

Under Clause 13(4) the SSHD specifically removes the jurisdiction of the courts from assessing whether or not detention is lawful during the first 28 days of detention even where a claim is based upon the SSHD or an Immigration Officer having made a mistake in deciding to detain.

Instead, the SSHD is giving herself the power to detain people, families and children ‘for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the examination or removal to be carried out, the decision to be made, or the directions to be given.’<sup>10</sup>

Since this Clause would be in conflict with the common law *Hardial Singh* principles for detention as an administrative procedure for regulating detention in circumstances where a person is facing removal, it would also result in a breach of a person’s Article 5 human right to liberty and security.

### **Clause 13 – Powers to grant immigration bail**

Clause 13 stipulates that a person who is detained must not be granted immigration bail by the First-tier Tribunal until after 28 days of detention have passed. It also impedes the ability of the High Court to review the lawfulness of the decision to detain.

As with clause 12, this clause raises serious concerns that the UK Government is undermining the Rule of Law. Having previously argued before the European Court of Human Rights in the cases of *JN*<sup>11</sup> and *Draga*<sup>12</sup> that the ability of people in immigration detention to apply for judicial review meant that it was not in breach of Article 5(1)(f) of the ECHR, the Government is reversing its position and placing itself on a collision course with the court. It is removing the ability of people to go before the domestic courts to challenge their unlawful detention during the first 28 days of their detention.

As is made clear under clause 13(4): ‘the powers of the immigration officer or the Secretary of State [...] are not to be regarded as having been exceeded by any error made in reaching the decision’.

The Government states in paragraph 94 of its explanatory notes to the Bill that individuals will have the power to apply for a writ of habeas corpus. But such writ is not a challenge to the unlawful exercise of the power to detain, rather it is a challenge that there is no power at all to detain a person – of course, this Bill provides ample power to detain people, even if such a decision to detain is made in error. The only caveat is where it can be shown that the Home Office has acted ‘in bad faith or in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.’<sup>13</sup>

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<sup>10</sup> Illegal Migration Bill – March 2023 – Clause 12

<sup>11</sup> [ECtHR - J.N. v. United Kingdom, Application No. 37289/12, 19 May 2016](#)

<sup>12</sup> [ECtHR - Arben Draga v United Kingdom \(Application no. 33341/13\)](#)

<sup>13</sup> Illegal Migration Bill – March 2023 – Clause 13

**Clause 14 – Disapplication of duty to consult Independent Family Return Panel**

Clause 14 disapples the duty of the SSHD to consult the Independent Family Returns Panel (set up under section 54A of the Borders, Citizenship and Immigration Act 2009) on best safeguarding practices and the welfare of children & families in relation to removal and detention.

The explanatory notes to the Bill provide no reason for the disapplication of this duty, and taken together with other aspects of the Bill, is contrary to the Secretary of State's statutory duty to safeguard and promote the best interests of children<sup>14</sup>. The lack of any mention in the Bill or in the explanatory notes to the Bill of the best interests of the child or related concerns is glaring, to say the least.

This implies that the responsibility for child safeguarding will be the sole responsibility of the SSHD. BID has serious concerns regarding the Home Secretary's failure, to date, to pay proper heed to her duty to protect children's best interests, regularly failing to consult not only with the Family Return Panel, or the Children's Champion but also with social services with regards to children in its care. The SSHD also repeatedly fails to make any meaningful enquiry into the welfare of children (including British national children) who may be affected by an immigration decision to remove a member of a family.

**Clause 21 – Provisions relating to removal and leave**

This clause extends the application of Public Order Disqualifications for potential victims of modern slavery and human trafficking to people who meet the four conditions stipulated in Clause 2, unless they are cooperating with an investigation or criminal proceeding which necessitates that they must remain in the UK.

As with the exclusion of protections for people seeking asylum, this clause will lead to vulnerable victims of trafficking being kept in detention and facing removal to either their home countries or to any other country.

**Clause 22 – Provisions relating to support: England & Wales**

This Clause removes the legal duty of the SSHD to provide assistance and support for potential victims of modern slavery and human trafficking, as stipulated in Section 50A of the Modern Slavery Act 2015.

This clause removes any incentive for a victim or survivor of modern slavery or human trafficking to identify themselves as in doing so, they will be subject to detention and removal. This will have a devastating impact on the physical and mental well-being of victims and survivors and it puts the UK in opposition with the European Convention on Human Rights.

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<sup>14</sup> section 55 of the Borders, Citizenship and Immigration Act 2009



### **Conclusion**

The Illegal Migration Bill increases the powers of the Secretary of State to act against asylum seekers and people who have been trafficked to the UK. It labels these categories of people as 'illegal migrants' allowing for them to be detained and removed without important protections and checks and balances to ensure the government does not act with impunity. If enacted, vulnerable people, children, pregnant women and victims of modern slavery and human trafficking will be detained and removed, breaching the UK's obligations to human rights protections. The little judicial oversight that currently exists must be maintained.

Detention and deportation are inherently inhumane, traumatising and violent, and their effects on individuals and families are well evidenced.<sup>15</sup> It could be well argued that the aim of this Bill is not to prevent and deter unlawful migration but to make seeking asylum a punishment.

**Bail for Immigration Detainees opposes this Bill in its entirety and urges Members of Parliament to vote against the Bill.**

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<sup>15</sup> Bail for Immigration Detainees – [Research Reports](#)

