Bail for Immigration Detainees | Detention Action | ILPA | Medical Justice — working for health rights for detainees

Clauses 10-12:
Detention: Immigration Bail, Judicial Review and Habeas Corpus

A briefing produced jointly to summarise existing mechanisms for judicial scrutiny of immigration detention and the impact the Illegal Migration Bill's provisions will have on such scrutiny. This briefing also explores the limits of *habeas corpus*, which has been championed by the Government as providing the necessary legal remedy and oversight.

Table of Contents

Table of Contents 1
Reviewing Clauses 10-12 2
Current Legal Avenues to Challenge Detention 3
1. Immigration Bail 3
2. Judicial Review 4
3. Habeas Corpus 4
How the Illegal Migration Bill Restricts Legal Challenges to Detention 4
1. Changes to Immigration Bail 5
2. Changes to Judicial Review 5
Habeas Corpus and Challenging Detention Under the Illegal Migration Bill 7
Northern Ireland 8
Scotland 9
England and Wales 9

Reviewing Clauses 10-12

A person suspected of terrorism can be detained without charge for a maximum of 14 days. As pointed out by Lord Anderson (Crossbench) during the Committee stage of this Bill: ***"The law is full of anomalies but is it not remarkable that those who are not suspected of terrorism but may be fleeing from terrorism can be held for far longer periods than this, with the reasonableness of that period being judged by the Executive and with the possibility of applying to a court being specifically excluded under Clause 12 until 28 days have passed?"***[1]

When a Secretary of State deprives someone of their liberty, there must be a clear avenue for the person deprived to seek independent review of the legality and necessity of that detention. That avenue must be accessible and capable of providing a swift remedy where mistakes have been made. This briefing explains how the Illegal Migration Bill, with a particular focus on Clauses 10-12, closes routes for effectively challenging unlawful and unnecessary detention in the first 28 days. It clarifies why the writ of *habeas corpus* is an insufficient alternative to First-tier Tribunal bail and judicial review despite the Government's suggestions to the contrary. The briefing also explains how Clause 11 will limit the scope of judicial review of detention for all those detained under immigration powers.

Clause 10 gives the Home Secretary an *unnecessary* new power to detain people, abrogating existing protections in place for those at greater risk of harm in detention, including children, pregnant women and families.[2]

Clause 11 seeks to constrain the current ability of the courts to consider whether the length of detention is "reasonable" through reference to the common law *Hardial Singh* principles. Instead, it seeks to give the Home Secretary the power to decide if a period of detention is reasonably necessary in her "opinion", and goes further by excluding consideration of anything that prevents the purpose of detention - i.e. examination or removal - being carried out. This clause additionally creates statutory powers to detain where the Home Secretary considers that removal is no longer possible within a reasonable period of time 'for such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person's release as the Secretary of State considers appropriate'.[3] This significantly widens the powers of the Home Secretary and applies to all those detained in immigration detention, not just those detained pursuant to the provisions of the Illegal Migration Bill.

---

[1] HL Deb, 7 June 2023, Vol 830, Col 1508.
[2] The power to detain those who may be subject to removal already exists and clause 10 is therefore unnecessary and serves only to remove existing protections from unaccompanied minors, pregnant women and families.
[3] This appears to confer more discretion than the limited short 'grace period' for making such arrangements, controversially held to be lawful by the courts. See *AC (Algeria) v Secretary of State for the Home Department* [2020] EWCA Civ 36.

Clause 12 is an ouster clause which prevents the First-tier Tribunal from granting immigration bail and ousts judicial review on ordinary public law grounds during the first 28 days of a person's detention. It expressly seeks to shield immigration officers and the Home Secretary from judicial review of any errors made in their decision to detain and prevents their decision from being questioned or set aside in any court or tribunal. The right to apply for a writ of *habeas corpus* is retained.

Together, these clauses hand extensive powers to the Home Secretary while removing the safeguards against their misuse. For a more detailed explanation of Clauses 10-12 of the Illegal Migration Bill and their impact, please refer to the following briefings:

1. Illegal Migration Bill - Joint Civil Society Briefing for the House of Lords
2. In-Depth Briefing - The Illegal Migration Bill & the Expansion of Detention

Current Legal Avenues to Challenge Detention

Currently, a person held by the Home Secretary in immigration detention has three avenues available through which they can receive independent oversight of the necessity or lawfulness of their detention. Each avenue serves a different purpose.

1. Immigration Bail

Eight days after arrival in the UK, an application for bail can be made to the First-tier Tribunal.[4] Bail applications do not challenge the lawfulness of detention but rather the detention's necessity. If granted bail, at least one condition will be imposed.[5] Conditions are enforced to reduce the risk of absconding, which in any case is statistically low.

In 2022, the Home Secretary detained 20,446 people but 19,447 people were released (95%).[6] More than 15,000 people (78%) were released on immigration bail because it was not necessary to detain them. Of those, around 11,000 (73%) were released after fewer than 28 days.

Immigration bail is the least costly and most efficient way for a person to challenge their detention and be granted release. Bail applications are relatively straightforward and can be made by a person in detention with or without a solicitor or other legal support.

---

[4] Immigration Act 2016, Schedule 10, paragraph 3(3).
[5] Conditions include: a requirement to live at a specified address, to report to the Home Office at regular intervals either in person or electronically, or to be electronically monitored with a GPS tag.
[6] Home Office, National Statistics: How many people are detained or returned?, 23 February 2023 (https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022/how-many-people-are-detained-or-returned, accessed 16 May 2023)

2. Judicial Review

At any time, a person in detention can apply to the High Court for judicial review of the lawfulness of their detention. This enables a person in detention to show that, for example, the initial decision to detain them followed from a mistake of law or fact. In determining whether a period of detention is reasonable, courts refer to the *Hardial Singh* principles,[7] which state:

I. The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
II. The deportee may only be detained for a period that is reasonable in all the circumstances;
III. If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, she should not seek to exercise the power of detention;
IV. The Secretary of State should act with reasonable diligence and expedition to effect removal.

As the Court of Appeal has stated:

> *'It must be for the court to determine the legal boundaries of administrative detention. … [T]the court will no doubt take such account of the Home Secretary's views as may seem proper. Ultimately, however, it must be for the court to decide what is the scope of the power of detention and whether it was lawfully exercised, those two questions being often inextricably interlinked. In my judgement, that is the responsibility of the court at common law'.*[8]

3. Habeas Corpus

At any time, a detained person can make an application for *habeas corpus*. This allows a detained person to challenge the lawfulness of their detention on the basis that the decision-maker had no lawful authority to detain them. However, the writ of *habeas corpus*, as outlined below, is extremely limited in its application and the process of applying poses practical difficulties for those in immigration detention.

How the Illegal Migration Bill Restricts Legal Challenges to Detention

The changes made by Clauses 11 and 12 of the Illegal Migration Bill will decimate individuals' ability to challenge their detention. In doing so, the Illegal Migration Bill's

[7] R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888, [2003] INLR 196 [46]; quoted authoritatively in Lumba (WL) v Secretary of State for the Home Department [2011] UKSC 12 [22].
[8] R(A) v SSHD [2007] EWCA Civ 804, per Toulson LJ at [62].

provisions put people at unnecessary risk of harm caused by detention, including those who are most vulnerable.

1. Changes to Immigration Bail

Clause 12 would prevent the First-tier Tribunal from granting immigration bail within the first 28 days of a person's detention. After that period, the Tribunal may grant bail. As a result, people whose detention will later be found by the First-tier Tribunal to be unnecessary may have been detained without justification for 28 days. This includes individuals who present no risk of absconding or harm to the public because such issues are considered only during a bail hearing, but not on an application for habeas corpus. This is potentially harmful to the person detained and will result in significantly more people being held in detention and for longer periods, at a greater public cost, creating additional strain on the detention estate.

2. Changes to Judicial Review

Under Clause 12, the lawfulness of the first 28 days of detention (following a decision to detain being made by an immigration officer or the Home Secretary) cannot be challenged by judicial review on the ordinary public law grounds.[9] The Bill expressly states that is the case even where there has been an error made by either of those parties.

As explained below, *habeas corpus* deals only with whether there is a power to detain, and not with the underlying decision which leads to the power to detain arising. Judicial review on the other hand is directly concerned with the lawfulness of the underlying decision. For this reason, judicial review of the lawfulness of the first 28 days of detention is essential to ensure that people detained in error are released as soon as possible and do not remain detained, as the Bill requires, for at least four weeks.

Similarly, judicial review allows for individuals to challenge their detention on the basis that it is in contravention of government policy. For example, it would allow an individual who has a history of torture and is being re-traumatised in detention to challenge a decision to continue their detention when it is contrary to the Adults at Risk policy.[10] It is not enough to rely on the internal safeguards of the Home Office, which have been found to fail repeatedly.[11] Judicial review brings independent oversight to the effectiveness of those safeguards.

---

[9] In Clause 12(4), the High Court's jurisdiction in judicial review proceedings is isolated to situations where the Home Office acts in bad faith or 'in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice'.
[10] The Adults at Risk in immigration detention policy has statutory force under section 59 of the Immigration Act 2016.
[11] Independent Chief Inspector of Borders and Immigration, 'Third annual inspection of 'Adults at risk in immigration detention' June – September 2022' (12 January 2023) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1128198/Third_annual_inspection_of_Adults_at_Risk_Immigration_Detention_June_to_September_2022.pdf>.

A separate but even more concerning problem arises from the wording of Clause 11. Currently, the reasonableness of a period of detention under the *Hardial Singh* principles is a matter for the court to decide for itself.[12] Clause 11 seeks to replace the court as the primary decision-maker in relation to the reasonableness of the length of detention. Under Clause 11, for detention following the initial 28-day period, the court is limited to only reviewing the Home Secretary's decision on judicial review on the grounds of illegality, irrationality or procedural impropriety. Thus, under Clause 11 the court's independent opinion is discarded and usurped by the Home Secretary.

These changes are particularly significant given that Clause 11 applies to all those in immigration detention and not only those who meet the four conditions in Clause 2 of the Bill. They effectively insulate the Home Secretary from challenge when removal is not being pursued diligently or where removal is not in fact possible, for example, in the case of those who cannot be removed or deported from the UK due to significant and insurmountable barriers to their removal, such as being stateless. Given the lack of returns agreements in place with third countries, this is likely to occur frequently and result in an escalating number of people detained indefinitely and for longer periods. These new detention provisions also prevent challenges to detention in cases where no decision to remove has been made by the Home Secretary, including for a prolonged period of time.

[12] *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

Habeas Corpus and Challenging Detention Under the Illegal Migration Bill

It is completely inadequate for those detained under the Illegal Migration Bill to have their only opportunity to challenge their detention within 28 days be a remedy that is at best uncertain, and at worst, extremely limited.

During the first 28 days of detention, only the right to apply for a writ of *habeas corpus* is preserved in England, Wales, and Northern Ireland. In Scotland, the right to apply to the Court of Session for suspension and liberation is preserved. In response to criticism of Clauses 10-12 of the Illegal Migration Bill, the Government has stated that, during the first 28 days of a person's detention, when they can neither apply for immigration bail nor seek judicial review on the ordinary public law grounds, judicial oversight remains available through an application for a writ of *habeas corpus*. However, the extent of that judicial oversight and consequently whether *habeas corpus* would be an effective remedy is unclear. The scope of such claims is extremely narrow, and applications are costly and complex.

It is well established that *habeas corpus* deals with the question of whether there is lawful authority to detain a person (i.e. a power to detain). What is far less clear is what a court may consider when determining that question and how far behind the warrant they may look when considering an application for *habeas corpus*. Under existing case law, the examination undertaken by the court is limited. Where the power to detain is contingent on the existence of a particular fact (a 'precedent fact'), the court has considered itself able to examine whether that fact did or did not exist.[13] However, the court has not considered itself able to look any further behind the warrant than that. For example, if a person is detained in prison pursuant to a court order, even if the court errs in declining to discharge the order, *habeas corpus* does not apply and the correct avenue for challenge is judicial review.[14]

Similarly, if a power to detain arises as a result of a prior decision about a person's immigration status (such as a decision to refuse leave to enter or remain or to remove or deport them), the court has considered whether the decision maker was authorised by law to make that decision, and whether they in fact did make a decision. The court has *not* considered whether that decision was reasonable or the result of a failure to take into account relevant considerations. Again, the latter would fall only to be considered in a judicial review.[15]

It is true that the case of *Hardial Singh*, which established the common law principles regarding the reasonableness of a period of detention, was an application for a writ of *habeas corpus*. However, that does not necessarily mean that a court now considering a *habeas corpus* application brought by someone detained under the new powers that exist in the

---

[13] *R v Secretary of State for the Home Department, ex p. Cheblak* [1991] 1 WLR 890 at p. 894; *R v Secretary of State for the Home Department, ex p. Muboyayi* [1992] QB 244 at p. 254 and 255.
[14] *Jane v Westminster Magistrates Court* [2019] EWHC 394 (Admin) at [57] on.
[15] Circumstances arising in *Muboyayi.*

Illegal Migration Bill would consider itself able to examine whether the length of time someone is detained is "reasonably necessary". *Hardial Singh* principles concern the exercise of powers to detain, not their existence - the latter being the focus of *habeas corpus* applications.[16]

Clause 11 of the Illegal Migration Bill appears to preclude potential judicial oversight of the length of detention by requiring that such a period is "reasonably necessary" only in "the opinion of the Secretary of State". Consistent with the approach in existing case law, a court may limit its examination to considering whether the Secretary of State had such an opinion, not whether that opinion was reasonable or the Secretary of State had erred in forming that opinion.

The result is that *habeas corpus* may be of extremely limited value in securing release from detention, including during the first 28 days, under the detention powers created by the Illegal Migration Bill. At best, its value would appear to be uncertain. It does not, even on a broad reading of when it may apply, replace the crucial role served by immigration bail or judicial review. These three distinct avenues for the independent review of detention examine different issues and serve different purposes and, in addition, have varying degrees of accessibility for those detained.

Applications for *habeas corpus* give rise to practical difficulties for both courts and people detained. When an application for *habeas corpus* is brought, "traditionally the highest priority is given to applications for such a writ"[17] and it will take precedence over other court business. If the Illegal Migration Bill was passed with the Clause 12 ouster in place, the number of applications to the High Court for *habeas corpus* is likely to increase, particularly given the uncertainties around its application. This could disrupt the existing work of the Court and place significant burdens on judges to hear cases on an urgent basis.

Northern Ireland

In Northern Ireland, the only detention centre is a short term holding facility, where people can only be held for a maximum of seven days before being moved elsewhere in the UK.[18] Applying for habeas corpus within those seven days will be difficult because applications for a writ of habeas corpus must ordinarily be supported by an affidavit.[19] Once moved, individuals will lose their legal representatives and legal aid provision in Northern Ireland. As a result, the practical use of habeas corpus for those detained in Northern Ireland is questionable.

---

[16] *R v Secretary of State for the Home Department ex p. Cheblak* [1991] 1 WLR 890 at 894C-E: 'A writ of habeas corpus will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. See also *R (Khadir) v Secretary of State for the Home Department* [2006] UKHL 39 [2006] 1 AC 207.
[17] *Muboyayi* at p. 253.
[18] The Short-term Holding Facility Rules 2018.
[19] Order 54 of the Court of Judicature Rules for Northern Ireland 1980, rule 1.

Scotland

In Scotland, applications for suspension and liberation to the Court of Session will require a full civil legal aid application, including additional forms, a merits test, and lengthier periods for funding to be granted. As the Court of Session requires the involvement of counsel, unlike bail hearings, and given the small pool of immigration and asylum counsel in Scotland, there may not be sufficient expertise to cover the number of anticipated hearings. It is also anticipated that the cost to the public purse for the Court of Session procedures will be astronomically higher than bail hearings.

England and Wales

In England and Wales, those in immigration detention already face significant barriers to obtaining legal advice and communicating with lawyers. The existing legal resources for those in immigration detention are characterised by persistent, fundamental defects. Those in detention primarily receive legal support through the Detained Duty Advice Scheme (DDAS), through which providers offer 30 minutes of free legal advice which in certain instances may be followed by further legal support. Evidence gathered by Detention Action has demonstrated that individuals receiving support through the DDAS are often:

1) Turned away due to reported lack of capacity or due to the alleged complexity of their case;
2) Not informed whether their legal case has even been taken on by representatives;
3) Not offered written advice about the legal issues arising from the facts of their case;
4) Not counselled on potential further action regarding their case; and
5) Counselled by representatives with insufficient or incorrect knowledge on key issues including detention, removal, deportation, bail, trafficking, judicial review, and the scope of legal aid funding.

For those seeking an application for *habeas corpus*, there will be difficulties in obtaining advice over and above those faced by all those held in immigration detention outlined above; *habeas corpus* claims are not made regularly, leading there to be a small number of lawyers experienced in such matters. There are also difficulties in communicating with legal advisers due to lack of phone signal and limited email access.[20]

[20] Report on an unannounced inspection of Brook House Immigration Removal Centre by HM Chief Inspector of Prisons, 30 May-16 June 2022; Report on an unannounced inspection of Colnbrook Immigration Removal Centre by HM Chief Inspector of Prisons 28 February – 18 March 2022 (https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2022/07/Colnbrook-web-2022.pdf, accessed on 21 June 2023).