Immigration Bill 2015-16

House of Commons Report Stage

Briefing on Selected Amendments

26th November 2015

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Summary

The Immigration Bill 2015-16 will have its report stage and third reading in the House of Commons on 1st December, 2015. JUSTICE is concerned about a number of provisions in the Bill. However, in this briefing, we concentrate on those provisions most closely within our area of expertise and do not deal with those already voted on at the Public Bill Committee Stage. The following is a list of our recommended amendments in relation to those provisions.[1]

- **JUSTICE recommends that paragraph 1(6) of Schedule 5 is amended to require the Secretary of State to have just cause before detaining an individual granted bail by the Tribunal.**

- **JUSTICE recommends that paragraphs 2(3), 2(4), 2(5), 6(5), 6(8), 6(9) and 6(10) of Schedule 5 are removed from the Bill as they allow for decisions of the First-tier Tribunal (FTT) in respect of bail to be overruled by the Secretary of State.**

- **JUSTICE recommends that paragraph 3(2)(e) of Schedule 5, which requires those deciding whether to grant bail to consider whether detention is necessary in a person's interests, is amended because of the lack of safeguards in mental health cases.**

- **JUSTICE recommends that the following are added as mandatory considerations in paragraph 3 of Schedule 5 so as to limit the scope for a bail decision breaching an individual's human rights: the impact of detention on an individual's mental health; and the effect of the individual's detention on any children or other family members who may depend on the individual.**

[1] For a more comprehensive list of JUSTICE'S concerns, please refer to our briefing for the House of Commons Public Bill Committee Stage, available at http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/10/JUSTICE-Briefing-Immigration-Bill-2015-16-HCCS-October-2015.pdf

Introduction

1. Established in 1957, JUSTICE is an independent, all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.

2. We have produced this briefing to inform the House of Commons Report Stage debate. Where we do not comment on an issue in the Bill, this should not be read as approval.

Clause 29 & Schedule 5: Immigration bail

PROPOSED AMENDMENT

Page 79, line 22, insert 'where there has been a material change in circumstances' after '(1)'

Purpose

3. To restrict the power for the Secretary of State to detain an individual granted bail by the Tribunal to cases where there has been a material change in circumstances.

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4. Clause 29 and Schedule 5 make significant changes to the powers of the Secretary of State and the First-tier Tribunal (Immigration and Asylum Chamber) ('FTT') in relation to immigration bail.

5. JUSTICE is concerned that the proposals in Schedule 5 will have a significant effect on the ability of the FTT to provide an effective safeguard against prolonged administrative detention.

6. The Home Office and Immigration Officers have wide powers of administrative detention for immigration purposes, including detention powers pending decisions on whether to grant a person leave to enter or remain, and pending removal or deportation. There is no statutory limit on the period of time for which an individual can be detained, nor any provision for automatic judicial oversight of the use of detention.

7. There is evidence that these powers have previously been misused by the Home Office. Between 2011 and 2014 it paid out £15 million in damages for unlawful

detention.[2] A recent Parliamentary Inquiry[3] was critical of the Home Office's use of these powers and made significant recommendations for reform of the system, including the introduction of a 28-day time limit on detention and a robust system for reviewing detention.

8. While the ability of detainees to apply to the FTT for bail is no substitute for a proper system of automatic judicial oversight of detention, it remains an important safeguard. JUSTICE is concerned that the proposals in Schedule 5 weaken the FTT's ability to provide such a safeguard.

9. Paragraph 1(6) of Schedule 5 provides that a grant of bail does not prevent a person's subsequent re-detention. This is a significant departure from the current provisions where, if bail is granted by the FTT, re-detention is only permissible where the individual has breached the conditions of their bail. This also seems to conflict with the provision in paragraph 8(12) of the Schedule, which requires that an individual who has been arrested for a breach of bail is re-released on the same conditions if the relevant authority decides that bail has not been breached. In *R (on the application of S) v Secretary of State for the Home Department* [2006] EWHC 228 (Admin) the High Court decided that it was not lawful for an Immigration Officer to exercise his power to detain an individual granted bail by the Tribunal unless there had been a material change of circumstances. As it stands, paragraph 1(6) would allow the Secretary of State to effectively ignore and overrule the decision of an independent tribunal to grant bail. If that is not the intention, then JUSTICE recommends that this be made explicit in the Bill.

10. JUSTICE acknowledges that there are material changes of circumstances that may justify re-detaining an individual granted bail by the FTT. Such was the case in the case of *S v Secretary of State for the Home Department,* where detention was necessary in order to facilitate the claimant's earlier removal, the date of the flight removing him from the UK having been brought forward after he was granted bail by the FTT. This amendment seeks to preserve the power of the Secretary of State to re-detain individuals in such circumstances whilst limiting her power to ignore and overrule decisions of the FTT.

[2] The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom - A Joint Inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, p. 21
https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf

[3] *Ibid.*

PROPOSED AMENDMENTS/STAND PART DEBATE

Schedule 5, page 80, line 5, omit paragraphs 2(3), 2(4) and 2(5)
Schedule 5, page 83, line 4, omit paragraph 6(5)
Schedule 5, page 83, line 12, omit paragraphs 6(8), 6(9) and 6(10)

Purpose

11. To remove from the Bill the power for the Secretary of State to overrule a decision of the Tribunal with regard to electronic monitoring or residence conditions placed on immigration bail.

Briefing

12. Paragraphs 2(3), 2(4), 2(5), 6(5), 6(8), 6(9) and 6(10) of Schedule 5 allow the Secretary of State to overrule decisions by the FTT about the appropriate conditions to be imposed on a grant of bail.[4] Where the FTT decides not to impose a condition of residence or electronic monitoring, the Secretary of State will be able to reverse that decision and impose such a condition. The imposition of these conditions – as the Government's 'ECHR Memorandum'[5] recognises – restricts individuals' liberty, has the potential to constitute a deprivation of liberty in certain circumstances, and interferes with their rights to respect for their private and family life under Articles 5 and 8 of the European Convention on Human Rights ('ECHR'). JUSTICE is very concerned that these provisions allow the Secretary of State to overrule the decisions of an independent tribunal and are contrary to the rule of law. As Lord Justice Neuberger put it in giving the lead judgment in *R (on the application of Evans) v Attorney-General* [2015] UKSC 21:

> "A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law."

[4] Paragraph 6(8) would create a similar power where the FTT decides to vary the conditions of bail.

[5] Home Office, Immigration Bill: European Convention on Human Rights Memorandum, published 17.09.15, paragraphs 87-89

PROPOSED AMENDMENT

Schedule 5, page 80, line 32, delete 'in that person's interests or'

Purpose

13. To remove from the Bill the requirement to consider whether detention is in that person's interests when granting bail.

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14. JUSTICE is concerned by the inclusion among these mandatory factors of a requirement to consider "whether the person's detention is necessary *in that person's interests* or for the protection of any other person" (paragraph 3(2)(e) of Schedule 5, emphasis added). In 2010 the High Court found such an approach to be unlawful:

> "The use of immigration detention to protect a person from themselves, however laudable, is an improper purpose. The purpose of the power of immigration detention, as established in *Hardial Singh* and subsequent authorities, is the purpose of removal. The power cannot be used to detain a person to prevent, as in this case, a person's suicide. In any event, it is unnecessary to use immigration detention for this purpose since there are alternative statutory schemes available under section 48 of the Mental Health Act 1948 or under the Mental Health Act 1983."[6]

This analysis was endorsed by the Court of Appeal in 2011 and again in 2014.[7]

15. There have also been five cases in the last few years in which the High Court has also held that the long-term detention of mentally ill individuals has resulted in inhuman and degrading treatment contrary to Article 3 ECHR.[8] JUSTICE considers that the use of immigration detention powers on the basis that it is in an individual's own interest to be detained, without any of the safeguards contained in the Mental Health Act 1983, without any time limit or judicial oversight, and without any requirement for expert assessment by mental health professionals, is likely to give rise to further breaches of Article 3 ECHR.

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[6] *R (on the application of AA) v Secretary of State for the Home Department* [2010] EWHC 2265 (Admin), see in particular paragraph 40.

[7] *R (on the application of OM acting by her litigation friend, the Official Solicitor) v Secretary of State for the Home Department* [2011] EWCA Civ 909 at paragraph 32 and *R (on the application of Das) v Secretary of State for the Home Department* [2014] EWCA Civ 45 at paragraph 68.

[8] *R (on the application of S) v Secretary of State for the Home Department* [2011] EWHC 2120*; R (on the application of BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin)*; R (on the application of HA) v Secretary of State for the Home Department* [2012] EWHC 979*; R (on the application of D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin); and *R (on the application of MD) v Secretary of State for the Home Department* [2014] EWHC 2249 (Admin).

PROPOSED AMENDMENT

Schedule 5, page 80, line 33, delete 'and' and insert new sub-paragraphs
( ) the length of detention to date;
( ) the prospects of removal;
( ) the impact of detention on an individual's mental health;
( ) the effect of the individual's detention on any children or other family members who may depend on the individual; and

Purpose

16. To introduce additional relevant factors that decision makers are required to consider when granting bail.

Briefing

17. JUSTICE is concerned by the overwhelming emphasis in paragraph 3(2) on factors likely to militate in favour of detention. These mandatory factors do not include consideration of the length of detention to date or the prospects of removal, both of which have been repeatedly emphasised by the courts as key considerations in the lawfulness of detention.[9] Nor is there any express reference to the impact of detention on an individual's mental health or to the need to take account of the effect of the individual's detention on any children or other family members who may depend on the individual, both of which are important human rights considerations.

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[9] *R (on the application of I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, approved in *R (on the application of Lumba and Mighty) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245