The Immigration Bill 2015 and immigration detention:

Briefing – Second Reading

October 2015

Summary

The Immigration Bill would risk seriously restricting judicial oversight of the Home Office's powers of immigration detention. The Bill would abolish the system of 'bail addresses' that enables destitute migrants to challenge their detention through bail applications to the First-Tier Tribunal. As a result, in a significant proportion of cases the Home Office could face no judicial scrutiny of detention until the point at which an expensive and time-consuming unlawful detention challenge can be brought in the High Court.

The Government is proposing what could amount to a dramatic reduction of judicial oversight of detention, despite the strong recommendations of the Parliamentary Inquiry and the Backbench Business Committee Debate that powers of detention be limited and judicial scrutiny increased.

The current system of bail addresses under Section 4

The UK already has the least constrained powers of detention in the EU. As well as being unique in having no time limit, it is unusual in lacking automatic judicial oversight of detention, despite the interference with the fundamental right to liberty. A decision to detain is only reviewed by the courts on the application of the person detained. By contrast, in France cases of detention are automatically brought before a court after five days.

In the UK, every detainee has the right to apply for bail to the First-Tier Tribunal, which must consider whether their detention is reasonable. However, bail applicants must provide an address at which they would live if released, in order to show the court that they would be able to remain in contact with the Home Office. Some migrants can provide an address of a friend or relative who can house and support them, but many are destitute and unable to provide such an address.

In this context, the Home Office currently provides addresses for most detainees on application, in order to enable their access to the First-Tier Tribunal. Migrants in detention have been able to apply for bail addresses under Section 4 of the Immigration Act 1999, which are almost invariably granted (with the exception of EEA nationals). This bail address can only be used in a bail application before the First-Tier Tribunal; if bail is granted, the person is released to live at that address and receive Section 4 support.

Changes in the Bill

Part 5 and Schedule 6 of the Bill abolish Section 4 of the Immigration Act 1999, and replace it with a new Section 95A. The intended operation of Section 95A is unclear and would be

set out in secondary legislation, but it appears that the Government is not proposing to recreate a system whereby detainees can request addresses for bail applications to the Tribunal. It appears that accommodation would only be provided in exceptional cases where the Home Office chooses to release and recognises the need for an address.

The Bill will provide a power, not a duty, to support refused asylum-seekers who have a 'genuine obstacle to removal' and those with pending further submissions or judicial review challenges. It restricts support to asylum-seekers or, in limited circumstances, refused asylum-seekers. Migrants in detention would not be able to apply to the Tribunal for bail unless the Home Office accepts their entitlement under Schedule 6, so this would allow the Home Office to prevent migrants from challenging their detention before the Tribunal.

This reliance on Home Office decision-making is unjustifiable: 61% of asylum support appeals made between September 2014 and February 2015 were successful, being either allowed or remitted by the Asylum Support Tribunal, or the refusal of support withdrawn by the Home Office.

An amendment could be introduced to create a right of appeal against refusal to grant support under Section 95A.

In addition, Clause 29 and Schedule 5 make new provision for the Secretary of State to provide support to a person bailed to an address of her choosing. It is provided, however, that the power would only be used in exceptional circumstances. It also only applies '*where a person is on immigration bail subject to a condition imposed by the Secretary of State requiring the person to reside at an address specified in the condition*'.

Schedule 5 and Explanatory Note 318 are poorly drafted and altogether unclear. However, it appears that the intention is not to use the power to provide bail addresses to enable detainees to make bail applications to the Tribunal. Without such an address they are unlikely to be granted bail and their rights to liberty under Article 5 of the European Convention on Human Rights risk being infringed. **The Minister could be asked how it is intended that the First-Tier Tribunal would be able to exercise judicial oversight of detention of migrants who cannot provide private addresses.**

Impact of the Bill on migrants and after detention

Without access to asylum support, many migrants in detention would be unable to apply for bail. This would lead to an **increase in long-term detention**, causing great harm to individuals' mental health. It would also be wasteful of taxpayers' money, as detention costs over £36,000 per person per year. The inaccessibility of bail would force challenges to detention into the High Court, as unlawful detention challenges would be the only available option for many in detention to seek their release. The High Court is already under significant pressure from the numbers of asylum and detention-related judicial reviews, which are far more expensive than bail applications. The Home Office has already paid out almost £10 million in 2011-13 in compensation following claims for unlawful detention.

Increasing long-term detention is likely to result in **protests and disturbances** in an already tense environment. Frustration and stress is likely to increase amongst migrants in

detention, as people will have no lawful steps available to seek their release. The HM Inspectorate of Prisons has repeatedly noted that long-term detention causes frustration and a tense environment. The safe management of the detention estate would be seriously undermined by depriving a substantial proportion of migrants of any opportunity to legally challenge their detention.

The Bill would generate **unnecessary asylum claims**. A significant proportion of migrants in detention have never claimed asylum. The proposals may create a situation where migrants in detention cannot apply for an address that would allow them to apply for bail unless they make an asylum claim first. As a result, migrants may feel obliged to make a groundless asylum claim, as otherwise they will remain in detention indefinitely or be street homeless. This would undermine efforts to reduce misuse of the asylum system, generating substantial unnecessary costs for the Home Office.

To the extent that migrants are released to homelessness, the Bill will be likely to lead to an **increase in absconding**, which will reduce the ability of the Home Office to resolve cases and increase the backlog of outstanding cases. Migrants released from detention are likely to become street homeless, as many will feel compelled to provide an address at which they cannot live in the long-term, in order to avoid indefinite detention. Without support, it will be difficult for many to comply with reporting restrictions, and they will have little incentive to remain in contact with the Home Office.

The Bill would be likely to lead to **increased offending** by ex-detainees. Significant numbers of ex-offenders who have never claimed asylum are released from immigration detention because they face barriers to removal. Some have lived in the UK since they were small children, and are refused travel documentation by their countries of origin. As non-asylum-seekers, there would be no power to support them. Making ex-offenders street-homeless with no right to work would make significantly increase the likelihood of re-offending, as they seek to support themselves.

Without access to bail addresses, migrants in detention face the prospect of being deprived of their liberty for years without any opportunity to challenge their detention.

Case studies

T was detained for almost five years under immigration powers. He was eventually bailed after 13 failed applications. The First Tier tribunal judge accepted that T was not returnable. T required probation approval for the address, and this was not granted for the only private address he was able to use to apply for bail. Without access to Section 4, T would have remained in detention indefinitely.

C is extremely unwell and has a heart condition. He has been deemed unfit to fly and is eventually released from immigration detention to Section 4 accommodation. He has never been an asylum seeker and is not complying with documentation. However, he has not been fit to fly for years. As a non-asylum-seeker, there would be no power to support him, so he would remain indefinitely in detention or street-homelessness.

The need for a time limit

The Bill is a missed opportunity to bring the UK into line with the rest of Europe by providing for a time limit on detention, following the recommendation of the Parliamentary Inquiry of a time limit of 28 days. In August 2015 the HM Chief Inspector of Prisons echoed the Parliamentary Inquiry's call for a time limit.

An amendment could be introduced ensuring that immigration bail be granted after not more than 28 days from the date of detention.

About the Detention Forum

The Detention Forum (www.detentionforum.org.uk) is a network of over 30 organisations who are working together to challenge the UK's use of immigration detention.