The Detention Forum

Briefing Paper: Immigration Bill, Committee Stage in the House of Lords, January 2016

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.

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Amendment 218 – a time limit on detention

This amendment, tabled by Lord Ramsbotham, would introduce a maximum time limit of 28 days on the amount of time an individual can be detained for immigration purposes.

During 2015, the issue of immigration detention was of concern both to parliamentarians and the wider public. In March 2015, the APPG on Refugees and the APPG on Migration published a report on the use of immigration detention in the UK.[1] The cross-party panel of parliamentarians behind the report called for substantial reform to the way the UK uses detention, concluding that detention is used disproportionately and inappropriately.[2] The recommendations made by the inquiry have been endorsed by the House of Commons when, following a backbench business debate on 10 September, Members of Parliament unanimously passed a motion calling on the Government to respond positively to the panel's recommendations.[3]

The amendment would give effect to one of the key recommendations made by the parliamentary panel – that a time limit of 28 days should be introduced.

The need for reform – The Shaw Review into the welfare in detention of vulnerable persons

In February 2015, the Government asked Stephen Shaw to carry out a review into the welfare in detention of vulnerable persons (the Shaw Review). The terms of reference for the Shaw Review set out that its purpose was to "review the appropriateness of its policies and practices concerning the welfare of those who have been placed in detention, whether in an immigration removal centre or a short-term holding facility, and those being escorted in the UK."[4] The terms of reference were explicit that the focus of the review would not be the decision to detain.

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[1] The *Inquiry into the Use of Immigration Detention in the UK.* The report and its executive summary are available at http://detentioninquiry.com/report/

[2] The inquiry panel consisted of parliamentarians from the Conservatives, Labour and the Liberal Democrats, as well as two crossbench members of the House of Lords. After examining nearly 200 written submissions of evidence from individuals affected by detention, lawyers, clinicians, international experts and NGOs over eight months and a study visit to Sweden, the panel concluded that the UK currently detains far too many people and for far too long.

[3] HC Deb 10 Sep 2015, c559

[4] Terms of Reference for a review into the welfare in detention of vulnerable persons https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/402206/welfare_in_detention_review_tors.pdf

The report of the Shaw Review – along with the Government's response – was published on 14 January 2016.[5] The damning conclusions and wide-ranging recommendations demonstrate that fundamental reform is needed. His main findings mirror those of the parliamentary inquiry: the UK detains too many people; detention is not a very effective means of meeting the Home Office's stated aim of ensuring people with no leave to remain leave the UK; and that the operation of the detention estate is in urgent need of reform.

Stephen Shaw made 64 recommendations for how the detention system should be reformed. A number of these relate to the detention of vulnerable groups. Shaw calls for the ending of the detention of pregnant women, and that there should be a presumption against detaining transsexual people as well as anyone with Post Traumatic Stress Disorder or Learning Difficulties. He also calls for a complete overhaul of the Rule 35 process, a supposed safeguard against the detention of victims of torture that Shaw says is not working. A number of these recommendations are the subject of new Clause *Immigration Detention: treatment of detainees*.

Shaw does not explicitly endorse the parliamentary inquiry's recommendation that a 28 day time limit should be introduced, but he argues that detention should be reduced "whether by better screening, more effective reviews, or formal time limit". In recommendations 62 and 63 of his report he calls for the Home Office to consider ways of strengthening legal safeguards against excessive lengths of detention, and for the Home Office to explore alternatives to detention.

Shaw makes clear that a fundamental change of culture is required. Such a culture shift cannot be achieved by legislation, and neither do many of the smaller changes that would contribute to that shift. Given the long-standing and unresolved concerns, expressed by successive Ministers about the Home Office, such a shift will be challenging. Amendment 218 is an opportunity for Parliament to give strong impetus to this shift towards a much more focused and limited detention system.

Indefinite detention in the United Kingdom

Currently there is no statutory maximum time limit on how long an individual can be held in immigration detention. This makes the UK an outlier amongst EU member states, most of whom are signatories to the EU Returns Directive, which specifies a six month time limit. Many member states operate a shorter time limit. For example, in France the time limit is 45 days, Spain and Portugal 60 days and in Belgium it is two months. In Ireland, which along with the UK is the only EU member state not signed up to the Returns Directive, the maximum time limit is 21 days.

It has been argued that a time limit is unnecessary as there is a considerable amount of case law that limits when the Government can detain someone.[6] This case law is based on the 'Hardial Singh principles', which state that detention can only be used where the Secretary of State intends to remove the person, that detention must only be for a

[5] Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf

[6] For example, Lord Bates in his letter to Lord Rosser dated 8 January 2015: http://data.parliament.uk/DepositedPapers/Files/DEP2016-0028/Letter_from_Lord_Bates_to_Lord_Rosser_RE_Immigration_Bill.pdf

reasonable time, that if removal is not possible within a reasonable period it should not continue, and the removal should occur as quickly as possible. The courts consider the lawfulness of detention based on the facts of the case, including whether the person is prolonging their detention through appealing against deportation.

However, the highly complex case law does not provide a clear guide to decision-makers as to the point at which detention will become unlawful in any given case. The courts have emphasised that every case is different and no rules of thumb can be laid down. This makes it impossible for the Home Office to detain up to but not beyond the point of unlawfulness, leading to the dozens of findings of unlawful detention and six breaches of Article 3. Further, the 'Hardial Singh' principles can only be relied on through expensive and time-consuming litigation by each individual in the High Court. *There is an urgent need for parliamentarians to give a clear lead on what they consider to be reasonable periods of detention.* Debates in parliament over the last year have indicated that, for many parliamentarians, administrative detention for years, with no automatic judicial oversight, is unlikely to be reasonable.

The government has already acted to reduce in-country appeal rights, and therefore the scope for appeals to delay deportation. Most cases of long-term detention involve barriers to removal related to difficulties in obtaining travel documentation from countries of origin. The majority of long-term detained migrants are released, so indefinite detention is an expensive and ineffective way of overcoming these barriers. By contrast, community-based alternatives have been shown internationally to increase compliance with immigration control.

The Parliamentary Inquiry panel concluded that the lack of a time limit has "several negative consequences, including, in far too many cases, protracted detention."[7] The panel highlighted the medical evidence that showed the detrimental impact on mental health of prolonged detention and the lack of a time limit, says that without a time limit "[d]etainees are left counting the days they have been in detention, not knowing if tomorrow their detention will continue, if they will be deported, or if they will be released."

There is also evidence that the lack of a time limit is an incentive for inefficient case-working on behalf of Home Office officials. Hindpal Singh Bhui, a member of the Chief Inspector of Prison's inspection team, told the inquiry that a quarter of cases of prolonged detention examined by the inspection team were a result of inefficient case-working.[8] Given the lack of automatic bail hearings for individuals who have been detained, and without the initial decision to detain being sanctioned by any kind of legal proceeding, the lack of effective case-working has serious and damaging consequences.

Home Office statistics show that a 28 day limit, which would reflect best practice internationally, is achievable by the Home Office. As the parliamentary panel highlighted, the majority of people spend less than 28 days in detention currently. Between June and September, two thirds of those peopled detained were released within 28 days, and eight in ten were held for less than two months.[9]

Since the report was published, there has been further support for a time limit on detention. The UN Human Rights Committee, a body of 18 international experts who monitor the implementation of the international covenant on civil and political rights, issued a

[7] APPGs on Refugees and Migration, Inquiry into the Use of Immigration Detention in the UK, p.33
[8] See page 19 of the report.
[9] Home Office, Immigration Statistics July to September 2015, table dt_06_q

recommendation to the UK to introduce a time limit on immigration detention, echoing the inquiry panel's key recommendation.[10] In August, the then Chief Inspector of Prisons added his voice to those calling for a time limit in a report on an inspection of Yarl's Wood Immigration Removal Centre. In the report, the Chief Inspector, Nick Hardwick, said "Some periods of detention were prolonged as a result of unreasonable delays in decision-making and women reported considerable stress as a result of open-ended detention", adding that "there should be a strict time limit on the length of detention".[11]

Introducing a time limit on immigration detention would be the first step in implementing the reform of the UK's use of detention recommended by the parliamentary panel and Stephen Shaw.

The immigration detention system is fundamentally flawed. The Detention Forum endorses the parliamentary inquiry's call for radical reform. Though it is a huge task, there is a precedent. The Coalition Government radically transformed the way families with children are detained; as a result of a change in the process fewer families with children now go through detention, and those that do spend a much shorter period of time in detention. In fact, there is now a de facto detention time limit of 72 hours for most such cases. A time limit would be a vital step towards an alternative approach based on engagement with migrants and community-based alternatives to detention, which can deliver better value for money for taxpayers and reduce the harm caused by detention.

Jacques was detained for the purposes of removal to Denmark where he had previously claimed asylum. He had a traumatic history as a child soldier and was severely impacted by PTSD. Despite being visibly unwell, and despite anecdotal evidence of staff feeling unable to manage the situation, he was detained for over two months before being removed to Denmark.

During detention, Jacques suffered periodic blackouts and dizziness, which at least once led to injury. He was unable to communicate with staff or other detainees and exhibited erratic behaviour, at times running naked out of his room or speaking in what was understood by staff as gibberish. In response, Jacques was regularly placed in isolation, which appeared to exacerbate his confusion and paranoia.

The local visitors' group made efforts to raise concerns with the detention centre staff, but got no response from the healthcare centre. Attempts to support Jacques were made by a fellow detainee who spoke the same language as well as a solicitor who was willing to represent him for a temporary admission application and for unlawful detention. Jacques' paranoia made him unwilling to enter the room with the solicitor, and so it was impossible to represent him. Communication was so difficult that his fellow detainee was unable to do much to support him either.

(Taken from *Rethinking 'Vulnerability' in Detention; a Crisis of Harm*[12] by the Detention Forum)

[10] http://detentioninquiry.com/2015/07/30/un-committee-back-british-parliamentarians-call-for-a-time-limit-on-immigration-detention/

[11] Report on an unannounced inspection of Yarl's Wood Immigration Removal Centre (13 April – 1 May 2015), https://www.justiceinspectorates.gov.uk/hmiprisons/inspections/yarls-wood-immigration-removal-centre/

[12] http://detentionforum.org.uk/rethinking-vulnerability-in-detention-a-crisis-of-harm/

Amendment 216ZC – *Immigration detention: presumptions against detention*

This amendment would put into legislation a number of the recommendations made by Stephen Shaw relating to groups of individuals for whom there should be a presumption against detention. In order for the Home Secretary to be able to detain a person who is a member of one or more of those groups, which include victims of torture, victims of rape, and those with serious mental illness, she would need to demonstrate to a court that detention is necessary in the public interest. The amendment would also prevent the detention of pregnant women under any circumstances.

In Part 4 of his report, Shaw identifies a number of categories of vulnerable people who should be added to the list of people considered only suitable for detention in very exceptional circumstances.[13] Shaw recommends that there should be a presumption against the detention of victims of rape and other sexual or gender-based violence (including FGM), as well as those with post traumatic stress disorders or learning difficulties. He also argues there should be a specific upper age limit, rather than a vague reference to "the elderly", and a presumption against detaining transsexual people.

The amendment reflects the Shaw Review recommendation that there should also be a presumption against the detention of "persons otherwise identified as being sufficiently vulnerable that their continued detention would be injurious to their welfare."[14] The Detention Forum has previously criticised the tick-box approach taken to vulnerability by the Home Office, in which the reliance on the categories of vulnerability overlooks individual characteristics and changes over time, creating a system where detainees who do not fit within the pre-existing categories remain invisible and at risk. Vulnerability cannot be understood simply through the use of categories, but is instead a combination of factors that may change throughout the time an individual spends in detention.

Shaw also echoes a recommendation made by the parliamentary inquiry that guidance on the detention of people with mental illness should be tightened. The current guidance states that "those suffering from serious mental illness which cannot be satisfactorily managed within detention" should not normally be detained. Shaw recommends that "which cannot be satisfactorily managed in detention" be removed as the term has no clinical meaning. He said that "it is perfectly clear to me that people with serious mental illness continue to be held in detention and that their treatment and care does not and cannot equate to good psychiatric practice." He goes on to say that "such a situation is an affront to civilised values."[15]

Shaw's recommendations reflect his serious concerns at the treatment of vulnerable people in detention. He was 'acutely concerned' to discover that there had been six recent cases in which inhuman or degrading treatment of mentally ill people in detention was found to have breached the high threshold of Article 3 of the European Convention on Human Rights, although previously no domestic court had found a breach in the first 11 years of the Human Rights Act.

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[13] See para 55.10 of the Enforcement Instructions and Guidance https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470593/2015-10-23_Ch55_v19.pdf

[14] See recommendation 16 of the Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw

[15] Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw, page 88.

While Shaw's recommendations are welcome, there remains a question about how the vulnerabilities he discusses should be identified. Home Office policy also lists a number of groups that should only be detained in exceptional circumstances. However, as the Association of Visitors to Immigration Detainees told the parliamentary inquiry, visitor groups regularly report meeting pregnant women, those suffering from mental illness, those who have survived torture, and those who have experienced trafficking.[16] The amendment may go some way to addressing this situation as for those people where there is a presumption against their detention, as it would require the Home Secretary to show to the courts that detention is required. This would provide a new safeguard relating to detention only in exceptional circumstances.

What it does not address, however, are the failures of the Home Office to identify vulnerabilities in the first place. The Detention Forum argues that a vulnerability tool should be developed based on international models.[17] Such a tool would enable a more thorough approach to screening before detention as well as enabling vulnerability to be monitored over time, so that those at risk of harm can be easily identified and released.

[16] See the Association of Visitors to Immigration Detainees written submission to the detention inquiry https://detentioninquiry.files.wordpress.com/2015/02/association-of-visitors-to-immigration-detainees.pdf
[17] http://detentionforum.org.uk/rethinking-vulnerability-in-detention-a-crisis-of-harm/

Amendment 216ZA – *Immigration detention: revision of policy*

This amendment provides an opportunity to discuss the Shaw Review's fundamental critique of detention policy.

The Shaw Review focuses on the welfare of vulnerable people in detention, yet also considers wider questions of the extent to which detention is necessary to meet policy objectives. The literature review that he commissioned 'demonstrates incontrovertibly that detention in and of itself undermines welfare and contributes to vulnerability.' Given that, he considers that detention policy can only be ethical if 'everything is done to mitigate the impact, and if countervailing benefits of the policy can be shown'.

His recommendations on extending the list of groups presumed unsuitable for detention address the need to mitigate the impact of detention. Yet he also finds that detention falls short in terms of the policy benefits it delivers. He positions himself alongside previous dispassionate observers, including the Parliamentary Inquiry, which have found that 'there is too much detention; detention is not a particularly effective means of ensuring that those with no right to remain do in fact leave the UK; and many practices and processes associated with detention are in urgent need of reform.'

He calls on the Home Office to display 'much greater energy in its consideration of alternatives to detention. He finds that 'voluntary returns options should be exhausted, and a community-based approach attempted, before detention is considered.' There is scope for 'models of intensive support and case management to help detainees and to meet the Government's concerns about reoffending and absconding'.

Shaw concludes that 'a smaller, more focused, strategically planned immigration detention estate, subject to the many reforms I have outlined in this report, would both be more protective of the welfare of vulnerable people and deliver better value for the taxpayer. Immigration detention has increased, is increasing, and – whether by better screening, more effective reviews, or formal time limit – it ought to be reduced.'

Both the UK's capacity to detain and its use of detention have expanded rapidly in the last twenty years. In 1993, there were just 250 places available, rising to 2,665 in 2009. By 2015, the capacity of the immigration detention estate had reached over 3,500 and the UK is home to some of the largest detention centres in Europe. The last twelve months have also seen the UK detain more people than ever before. In the year ending September 2015, 32,741 people were detained, an 11% increase on the preceding twelve months.[18]

The Parliamentary Inquiry highlighted the financial cost of such extensive use of detention. According to the House of Commons Library, the cost of running the immigration detention estate in 2013/14 was £164.4million, with a cost of detaining one person for one year of £36,026.[19] In addition, between 2011 and 2014 the UK Government paid out nearly £15million in compensation following claims for unlawful detention.[20]

The Home Office's own immigration statistics show that radical reform of immigration detention is drastically needed. Despite being called Immigration Removal Centres, in the

[18] Home Office, Immigration Statistics July to September 2015, table dt_01_q

[19] House of Commons Library, 'Immigration Detention in the UK: an overview', Briefing Paper Number 7294, 7 September 2015

[20] House of Commons Written Question 214974, 1 December 2014

last quarter for which statistics are available, only 40% of people who left detention did so because they were removed from the UK. For the majority of people, their detention ends with them being released back to their communities, having potentially spent months, if not years, needlessly being locked up indefinitely. For those detained for longer than four months, the percentage drops considerably. Between June and September this year, only a quarter of those people who left detention after being held for more than four months were removed from the country.[21]

[21] Home Office, Immigration Statistics July to September 2015, table dt_06_q