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A DEFINITE END TO INDEFINITE DETENTION?

Currently:

- Discretionary power to detain at any point of someone's immigration process:
  - upon arrival in the UK;
  - upon presentation to an immigration office;
  - during a check-in with immigration officials;
  - once a decision to remove has been issued;
  - and after a prison sentence or following arrest by a police officer

Reasons for detaining

- The reasons to hold a person in immigration detention include one or more of the following:
  - to effect a person's removal from the UK;
  - to establish their identity or basis of an immigration or asylum claim;
  - where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release, such as a risk of absconding; or
  - where there is a risk of harm through trafficking or to the public.
- Sometimes the reasons for a person's detention change while he or she is already being held.

Legal limits

- Detention powers are largely governed by processes set out in policy and guidance, which include directions on the power to detain, the decision and authority to detain, and detention procedures.

- The combined effect of these and the caselaw is that the Government has a responsibility to use detention sparingly, and for the shortest period possible. The power to detain can sometimes be necessary but should be used only if there are no other options, as a last resort prior to removal.

House of Commons Home Affairs Committee

report published on 21 March 2019 (HC 913)

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"This policy and guidance is too often not being followed."

"Over the course of our inquiry, we have found serious problems with almost every element of the immigration detention system. People are being wrongfully detained, held in immigration detention when they are vulnerable and detained for too long."

"Immigration officials who are tasked with detaining and removing people from the UK face making difficult decisions on a daily basis. But too often the Home Office has shown a shockingly cavalier attitude to the deprivation of human liberty and the protection of people's basic rights."

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"Our inquiry identified a weak administrative process and a serious lack of judicial oversight of the decision to detain. Decisions to hold an individual in immigration detention are taken by Home Office officials and not by a Judge or court, and immigration detention is overseen by the Immigration Enforcement directorate in the Home Office… Moreover, there is no requirement in UK law for those decisions to be subject to judicial oversight within a certain period after a detention order is made"

Some numbers

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- Overall numbers of people detained has been falling since 2015, but numbers still significant: according to government figures:
  - 2017: 27,331 people were detained
  - 2018: 24,748 people were detained
- But for how long were they detained?
- Tables available on government website. E.g. Q4 of 2018:
  - 1784 detained of which 754 were detained for 28 days or less (42%).
  - But tables also show that since 2015, whilst percentage of persons detained for 28 days or less went up, the percentage of persons detained for more than 6 months also rose (from 10 to 12%).

PROPOSAL 1

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- The Immigration (Time Limit on Detention) Bill 2018
  - 5 December 2018 Labour MPs Tulip Siddiq and Paul Blomfield introduced a Ten Minute Rule Bill to limit immigration detention to 28 days.
  - The bill has secured backing from Conservative MPs, including Dominic Grieve, Andrew Mitchell, Caroline Spelman and David Davis.
  - Simple bill, introducing a 28 day time limit into the Immigration Act 1971
  - No date for second reading.

PROPOSAL 2

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- An amendment to the Immigration and Social Security (EU Withdrawal) Bill currently pending before Parliament
- 2 alternative versions – for scoping reasons
- STRUCTURE: 4 clause amendment:

Immigration and Social Security (EU Withdrawal) Bill

- Clause 1 prescribes an overall time limit of 28 days for immigration detention. A person who has been detained for 28 days must be released and cannot be re-detained unless there is a material change of circumstances: see cl1(2) and (3).

- It also defines to whom the time limit is to apply – basically everyone who could be subject to immigration detention.

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- Clause 2 sets out the general substantive criteria for initial detention – *initial detention criteria*

- Clause 3:
  - introduces judicial oversight by the requirement for an automatic bail hearing once P has been detained for 96 hours
  - Lays down criteria which, if not fulfilled, mean the Tribunal must grant bail unless “very exceptional circumstances” apply.
  - requires the SSHD to provide P or his legal representative, within 24 hours of P first being detained, copies of all document in the SSHD’s possession which are relevant to the decision to detain.

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- Clause 3 also amends Sch10 of the Immigration Act 2016.
- Clause 4 relates to bringing these proposals into effect.

Some thoughts…

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- Proposal clearly attempts to build a regulatory structure to provide meaningful safeguards against arbitrary detention and to cure many of the ills in the current system.
- However, the automatic bail hearing scheme within 5 days of detention may be controversial
  - resource intensive
  - What are the proposals? To send FTT judges into detention centres on a daily basis to consider bail applications?
  - If not, is the infrastructure adequate? Video link availability (both at court and at the detention centres), interpreters, bringing people to court etc.

Some thoughts (cont)

  - Might an automatic bail hearing in fact be a hindrance to many detainees: where bail is refused on the automatic bail hearing e.g. because they have not got their information ready and are not represented, are they at a disadvantage in their next application?
- What are the consequences of failing to meet the requirements laid down in Clause 3: what if the Tribunal cannot hear the automatically generated bail hearing within 24 hours (or the next working day)? Detention becomes automatically unlawful and person must be released?
- What about re-detaining – on the face of it, it is the SSHD who decides whether there has been a material change in circumstances. But is that something that can be argued over at the bail hearing?

Thank you for listening

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