

Written Evidence by Dr Sabina Garahan and Dr Matthew Gillett (IMB0015)

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I. Introduction

1. As experts on the international system of protection against arbitrary detention, we are concerned that the Illegal Migration Bill (the “**Bill**”) conflicts with core human rights obligations relating to detention and bail under applicable regional and international instruments. In pursuing this legislative initiative, the UK Government risks straying into bad faith, particularly insofar as it seeks to introduce widespread powers to detain asylum seekers without any effective possibility of judicial oversight.
2. This submission responds to questions 8-10 on detention and bail of the call for evidence by the Joint Committee on Human Rights. We focus on key challenges posed by the Bill to Articles 5, 17 and 18 of the European Convention on Human Rights (the “**ECHR**”) and Article 9 of the International Covenant on Civil and Political Rights (the “**ICCPR**”).
3. We start by identifying possible violations of Article 18 ECHR, which prohibits bad faith restrictions of ECHR rights, and of Article 17, which bans the abuse of rights. No Council of Europe Contracting State has ever been found in violation of Article 17. However, as the Bill in its current form threatens key aspects of the right to liberty as it applies to migrants, the UK risks becoming the first State held to be in breach of the provision. Findings of Article 18 violations are less rare, but are usually established in judgments against regimes which use detention as a tool of political oppression (for example, *Merabishvili v. Georgia* (“*Merabishvili*”), 2017, and *Gusinskiy v. Russia*, 2004).

II. Breaches of Articles 17 and/or 18 ECHR in conjunction with Article 5

4. By seeking to exclude asylum seekers from the protection granted by Article 5, the UK risks becoming the first Council of Europe State in the ECHR’s history to be found in violation of Article 17, which prohibits the destruction and excessive limitation of ECHR rights (*Mozer v. the Republic of Moldova and Russia*, § 222). The formulation of the Bill’s provisions indicates an intent to remove Article 5 rights or restrict them to a far greater extent than is permitted under the ECHR. This raises the possibility of a violation of Article 17 taken in conjunction with Article 5.
5. Moreover, Article 18 prohibits any limitations of ECHR rights in bad faith. Therefore, immigration detention that is imposed for reasons other than those permitted by Article 5 § 1 (f) will be found to have an “ulterior purpose”. A violation of Article 18 in conjunction with Article 5 will be established where that ulterior purpose was the predominant purpose for which detention was imposed.
6. The introduction of broad discretionary powers allowing for the detention of asylum seekers without the possibility of judicial oversight indicates a political motivation, rather than a permissible aim under Article 5 § 1 (f). Such a motivation would place the UK in contravention of Article 18 ECHR.

7. In identifying the existence of bad faith, the European Court of Human Rights (the “**ECtHR**”) considers contextual facts or sequences of events which can ground inferences about the primary facts. Reports and findings of international observers and non-governmental organisations are often used to interpret the facts (*Merabishvili*, § 317). The sequence of events surrounding the formulation and proposal of the Bill indicates a predominantly ulterior purpose for detaining migrants under the legislation.
8. There have been numerous reports referring to the Government engaging in anti-migrant rhetoric and pursuing a “hostile environment”. In particular, current Home Secretary Suella Braverman has referred to the arrival of asylum seekers in England as an “invasion”, sparking condemnation from the UN Human Rights Commissioner.
9. The predominantly political purpose behind the Government’s migration policies has been identified by relevant expert bodies, including the Council of Europe Commissioner for Human Rights, with UNHCR noting the Government’s distortion of facts about asylum seekers.
10. The fact that the Bill is being rushed through Parliament, thereby limiting the possibility of scrutiny, adds further concern in this respect.

III. Breaches of Article 5 ECHR

III.A Question 8

Do the powers to detain individuals contained in clause 11 comply with the UK’s human rights obligations, including the Refugee Convention and the prohibition on arbitrary detention under Article 5 ECHR? Is this affected by the powers to detain applying even though the detained person’s examination or removal is not possible “for the time being” (see clause 12(1)(b))?

11. Detention under Clause 12(1)(b), where examination or removal is not possible “for the time being”, will breach Article 5 ECHR. Article 5 sets out a list of exhaustive justifications for deprivation of liberty. The powers to detain foreseen by the Bill fall within Article 5 § 1 (f), which allows immigration detention only in the context of “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country” (the “**first limb**”) or of a person against whom action is being taken with a view to deportation or extradition” (the “**second limb**”).
12. Article 5 requires the existence of some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (*Saadi v. the United Kingdom* (“**Saadi**”), 2008). Detention pending examination under the first limb of Article 5 § 1 (f) is thus permitted where its aim is to allow authorities to determine asylum claims quickly and efficiently (*Saadi*). This will clearly not be the case where examination is not possible “for the time being”. Detention pending deportation under the second limb of Article 5 § 1 (f) is equally justified only while deportation proceedings are in progress (*Chahal v. the United Kingdom* (“**Chahal**”), 1996).

13. Although the first limb of Article 5 § 1 (f) permits the detention of an asylum seeker or other migrant before the State's grant of authorisation to enter, such detention must be compatible with the overall purpose of Article 5, which is to protect against arbitrary deprivation of liberty (*Saadi*, § 66).
14. To comply with Article 5, the place and conditions of immigration detention should be appropriate, bearing in mind that such detention is imposed on people "who, often fearing for their lives, have fled from their own country", not those who have committed criminal offences (*Saadi*, § 74). For example, an asylum reception centre "specifically adapted to hold asylum-seekers" was found to be free from arbitrariness (*Saadi*, § 78). By contrast, legislation that fails to specify where asylum seekers may be held falls short of Article 5 guarantees (*Rashed v. the Czech Republic*, 2008).
15. The broad formulation of Clause 11(2) of the Bill creates risks of Article 5 breaches, as it allows persons of any age to be detained "in any place that the Secretary of State considers appropriate". Article 5 permits the immigration detention of children only "where national authorities can show that this measure of last resort was taken after actual verification that no other measure involving a lesser restriction of their freedom could be put in place" (*A.B. and Others v. France*, 2016, § 123). The ECtHR has equally recognised the particular vulnerability of pregnant women in immigration detention (*Mahmundi and Others v. Greece*, 2012, § 104). Clauses 11(11) and 11(4) of the Bill breach ECHR protections by removing existing limitations on the detention of pregnant women and families with children. By disapplying the duty to consult with the Independent Family Returns Panel, Clause 14 further undermines relevant protections intended to ensure that detention is applied only as a measure of last resort.

III.B Question 9

Clause 12 of the Bill would overturn the common law principle that, for the purposes of establishing whether immigration detention is lawful, it is for the court to decide whether there is a reasonable prospect of removal within a reasonable period. Instead, the Secretary of State would determine whether the period of detention is or is not reasonably necessary. Does this change adequately protect against arbitrary detention in breach of Article 5 ECHR?

16. By allowing detention for such period as "in the opinion of the Secretary of State" is reasonably necessary, Clause 12(1)(b) conflicts with fundamental standards of legal certainty, since the "opinion of the Secretary of State" is neither foreseeable nor open to legal challenge. In requiring that any deprivation of liberty is applied "in accordance with a procedure prescribed by law", Article 5 § 1 does not refer only to domestic law but also to the "quality of law". "Quality of law" implies that national law authorising detention must be sufficiently accessible, precise and foreseeable in its application (*J.N. v. the United Kingdom*, 2016, § 77).

17. In addition, Clause 12 fails to reflect the ECHR principle that, where deportation proceedings are not pursued with due diligence, detention under Article 5 § 1 (f) ceases to be permissible (*Chahal*).

III.C Question 10

Clause 13 of the Bill would, for the first 28 days of detention, prevent the First-tier Tribunal granting immigration bail to a person subject to removal in accordance with clause 2. It also seeks to oust judicial review in connection with their detention for the same period, although habeas corpus applications could still be made. Are these changes compliant with the UK's human rights obligations, particularly Article 5 ECHR?

18. The automatic barring by Clause 13 of access to a court for a 28-day period breaches Article 5. Article 5 § 4 enshrines the right to review by a court of the procedural and substantive conditions which are essential for the “lawfulness” of detention (*Khlaifia and Others v Italy*, 2016, § 131). There is no specific time-limit within which such review must take place, but in the context of immigration detention, the ECtHR has held a period of more than three weeks to be in breach of Article 5 § 4 (*Kadem v. Malta*, 2003, § 53).
19. As per Clause 13(4)(4) of the Bill, the only possibility of challenge arises in the case of bad faith or procedural defects. These limitations fail to ensure that the lawfulness of detention can be reviewed by reference to the aims of Article 5 § 1 (f). The ECtHR has previously found that habeas corpus proceedings fall short of Article 5 § 4 standards where they are not wide enough to determine the lawfulness of the detention of a person on the basis of “unsound mind” (*H.L. v the United Kingdom*, 2004). This resulted from an inability to determine, on the merits, whether a mental health disorder persisted. In the context of the Bill, Article 5 § 4 therefore requires that review by a court must be capable of assessing whether detention responds to the aims enshrined in Article 5 § 1 (f).

IV. Breaches of Article 9 ICCPR

20. Beyond the ECHR, international human rights instruments are also potentially relevant to the assessment of the Bill. In particular, Article 9 ICCPR, which provides *inter alia* that “[n]o one shall be subjected to arbitrary arrest or detention”, has been applied to immigration-related administrative detention.
21. The UN Human Rights Council’s Working Group on Arbitrary Detention (the “**Working Group**”) has explained that “[a]ny form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt” (Revised Deliberation No. 5; Human Rights Committee, General Comment No. 35 (2014) on liberty and security, paragraph 18). In introducing discretionary powers to detain anyone suspected of entering the UK unlawfully, without any time-limit, the Bill risks conflicting with this baseline guidance.

22. Moreover, the Working Group has held that the mandatory detention of non-citizens until they are removed, deported or granted a visa, without the possibility of effective judicial review violates Article 9(4) ICCPR and may also constitute discrimination in violation of Articles 2 and 26 thereunder (for example, Case Nos. 42/2017; 28/2017; 7/2019; 35/2020; and 42/2020). The Bill's provisions potentially entail violations of the ICCPR on analogous bases.

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