Nationality and Borders bill

Bail for immigration Detainees' amendment: to delete clause 45

This clause as currently constructed will reduce immigration detainees' access to being released on bail and will therefore lead to more prolonged periods of detention. It undoes years of progress in reducing the number of people in detention, and appears designed to use administrative detention to punish any instance of *historical* non-compliance. While clause 45 would be harmful and costly, there is no evidence that it would enable the government to carry out its objectives. Nor is there any evidence that current provisions are inadequate or result in the inappropriate or wrongful release of people on bail.

What the amendment does

Clause 45 stipulates an additional matter to be taken into account by the Secretary of State or the tribunal when deciding whether to grant immigration bail. It requires decision-makers to take into account "whether the person has failed without reasonable excuse to cooperate" with processes relating to the person's leave to remain in the UK or removal from the UK. This seeks to shift the scales in favour of maintaining detention and makes it more difficult for immigration detainees to secure release on bail.

Background to clause 45

This clause appears to have been included as a result of the Home Office's frustration at the high number of grants of immigration bail in recent months. In response to consistently losing tribunal bail hearings during the early stages of the pandemic[1], the Home Office wrote a letter to the President of the First-tier Tribunal[2] on 29 April expressing its 'surprise' at the level of grants of bail. In response to this widely criticised written enquiry, the President felt it necessary to remind the Home Office that, as an independent judiciary, the courts decide bail applications in accordance with the law (which he subsequently summarised for the Home Office). It seems the Government is now seeking to change the law to shift the balance in favour of refusing bail.

Why this amendment is harmful and unnecessary

This change to the law is unnecessary. Previous compliance or 'cooperation' is already taken into account by the Secretary of State, and tribunal judges, when deciding whether to grant bail. Moreover Schedule 10 of the Immigration Act 2016 already provides for "such other matters as the Secretary of State thinks relevant" to be considered in the decision of whether to grant immigration bail to a person. As the parliamentary Home Affairs Committee reported in 2019 in relation to immigration bail hearings, "the Home Office is attributing excessive weight to absconding and non-compliance[3]". This change will make the system even more heavily weighted in favour of refusing bail.

It should be noted that bail hearings are already unequal, placing marginalised people – deprived of their liberty and basic rights, and frequently unrepresented – against the effectively unlimited resources of the Home Office.

At the same time as punishing non-cooperation (even if historical) by reducing access to bail, the government is introducing more procedural requirements that applicants must meet at various points within the bill. There are numerous clauses which punish late evidence (clause 16, 17, 20, 23, 46, 47) and behaviour deemed not to be in 'good faith' (17, 51, 53, 64), or introduce new and onerous procedural requirements that applicants are forced to comply with, such as accelerated detained appeals, priority removal notices,

[1] From 23rd March to 10th June 2020 BID provided representation in 88 hearings, and 83 clients were granted bail. This 94 per cent success rate compared with BID's success rate of 59 per cent during 2018/19, and a usual success rate for all bail applications made to the First-tier Tribunal of around 30 per cent.

[2] First-tier Tribunal (Immigration and Asylum Chamber)

[3] *Immigration Detention* Home Affairs Committee https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/913/91302.htm

expedited appeals. Clause 45 means that failure to meet any of these could be relied upon in an attempt to prolong that individual's detention.

This provision is most likely to prolong detention of people who will in any case be released at the end of their detention. The vast majority of people who are released at the end of their period of detention, and the likelihood of removal diminishes the longer detention lasts[4]. Prolonging detention in this way is therefore both harmful and costly (daily cost of roughly £100 per person[5]), and ultimately pointless.

Compliance with immigration bail is extremely high. Data obtained by BID shows that of the people granted bail from February 2020 to March 2021 (of which there were more than 7,000[6]), just 43 people absconded – less than 0.56%, while other data suggests that 1% of people released from detention in 2020 absconded[7].

This clause is particularly pernicious not only because it seeks to expand the use of detention, but appears designed to enable the use of immigration detention to punish non-compliance, without there being the normal procedures and protections arising from the rule of law in a criminal process. Detention is an administrative rather than criminal process, it should not be used as a punishment or a deterrent and it should only be used to effect removal from the UK. The Home Office's powers of detention are already very wide and detention is currently used too casually and without sufficient safeguards.

Existing problems with detention decision-making:

Home Office decision-making on detention is poor and leads to people being detained unlawfully and unnecessarily. Detention for immigration purposes is an administrative and not a criminal process. As the JCHR found in its inquiry into immigration detention published in 2019, "*While there are strict safeguards to ensure independent decision making and fair processes for detention in the criminal justice system, there are far fewer protections for people caught up in the immigration system*[8]". The Home Affairs Committee stated in its report on immigration detention that "*there are serious problems with almost every element of the process, which lead to people being wrongfully detained, held in detention when they are vulnerable and detained for too long*[9]".

First, the decision to detain an individual, and subsequent detention decisions, are taken by an immigration officer and not overseen by a court[10] i.e. there is no independent judicial oversight of the use of detention. Second, unlike people suspected of a criminal offence, there is no automatic legal advice or representation to challenge immigration detention, and access to legal advice in immigration detention is frequently poor[11]. Third, where a detainee seeks bail (other than from the executive) bail hearings are ordinarily heard in the Immigration and Asylum Chamber of the First-tier Tribunal, which does not have the same safeguards to

[4] Home Office statistics reveal that in the last 5 years, 42% of people detained less than 28 days were removed at the end of their period of detention. For those detained more than 28 days, the figure is just 34%.

[5] Home Office Immigration Enforcement statistics shows that the average daily cost to hold an individual in immigration detention, in the second quarter of 2021 (the last point for which data is available) was £98.78

[6] in the year up to March 2021, 7,701 people were released on bail (stats are here). The number would be even greater if you include from the beginning of Feb but that isn't possible with the way the data is presented.

[7] FOI data obtained by Brian Dickoff, Response provided Monday 18 January 2021 https://www.whatdotheyknow.com/request/712000/response/1706999/attach/3/61618%20Dikoff.pdf?cookie_passthrough=1

[8] Joint Committee on Human Rights *Immigration Detention* https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/148403.htm#_idTextAnchor000

[9] *Immigration Detention* Home Affairs Committee https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/913/91302.html

[10] In 2018 the government introduced automatic bail hearings for people in immigration detention after four months. However these exclude foreign national offenders and the process is beset by shortcomings. A response to a BID FOI request revealed that only 4% of referrals for an automatic bail hearing actually led to a grant of bail.

[11] Since 2010 BID has conducted surveys every six months regarding immigration detainees' access to legal representation from within detention, you can see the results here. For those detained in prison – recently this figure has been more than 500 people – the situation is worse still, as the JCHR recognised in its report on immigration detention . The lack of immigration advice available to time-served foreign national offenders detained in prisons is well-documented and was recently declared unlawful by the High Court - see *SM v Lord Chancellor* [2021] EWHC 418 (Admin) .

ensure a fair trial and prevent wrongful deprivation of liberty as those which exist in the criminal justice system[12]. Fourth, there is no time limit.

Detention decision-making is frequently incorrect or unlawful. The Home Office paid out total of £9.3m compensation for 330 cases of wrongful detention in 2020/21 - up from £6.9m in 272 cases in 2019/20. This means that in the last 3 years, the government has paid out a total of £24.4 million to 914 people it was found to have locked up unlawfully. 77% of people leaving detention in 2020 were released back into the community.

[12] The tribunal can admit any evidence it considers relevant even if that evidence wouldn't be admissible in a court of law. The tribunal does not have the power to compel witnesses to attend court.