





Illegal Migration Act 2023: Part 1 – A New Era of Detention Challenges

27 September 2023



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Hardial Singh and the Illegal Migration Act 2023

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27 September 2023



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Introduction

- The aim of this talk is to give an overview of the effect of s12 of the Illegal Migration Act 2023 by reference to:
 - The codification of *Hardial Singh* (ii) and (iii)
 - The codification of ‘grace periods’



Hardial Singh



Hardial Singh [1984] 1 WLR 704

- The *Hardial Singh* principles, clarified in *R (I) v SSHD* [2003] INLR 196 and approved in *Lumba* [2012] 1 AC 245 provide:

(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose

(ii) The deportee may only be detained for a period that is reasonable in all the circumstances

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention

(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.



Hardial Singh – key features

- In determining whether there is a breach of *Hardial Singh* principles the Court will make findings of fact and decide for itself whether a reasonable period has been exceeded *R (A) v SSHD* [2007] EWCA Civ 804 (at §62)
- That assessment is on the basis of the information as it presented itself to the SSHD (*R (MH) v SSHD* [2009] EWHC 2506 (Admin) at §105)
- The *Hardial Singh* principles only do “...that which article 5(1)(f) does: they require that the power to detain be exercised reasonably and for the prescribed purpose of facilitating deportation” (*Lumba* at §30)



Grace periods

- In *FM v SSHD* [2011] EWCA Civ 807 (§60) the Court of Appeal identified the concept of grace periods, holding that ‘reasonableness’, in *Hardial Singh*:

“...applies equally to the moment of practical termination of detention as it does to the decision whether to detain at all” (§64).

- A “grace period” was then defined by the Court of Appeal in *AC(Algeria) v Secretary of State for the Home Department* [2020] 1 WLR 2893 as (§1):

“...that period of time allowed to the Secretary of State, once detention has ceased to comply with the Hardial Singh principles, to make suitable arrangements for release.”

- The use of ‘grace periods’ has expanded significantly over the years



Grace periods – AC(Algeria)

- Per Irwin LJ (at §§38-42):

“...Once any of the second, third or fourth principles are breached, then the question arises whether any further detention is lawful. Such further detention can be lawful, in my judgment, only for a reasonable period to put in place appropriate conditions for release.

The duration of such a "period of grace" must be judged on the facts of the case. The relevant facts include the history, as well as the risks to the public... the risk to the public is a highly important factor, but it cannot justify indefinite further immigration detention. No risk can justify preventive detention...

It should be stressed that it is the Respondent's legal obligation to release a detainee when detention is no longer lawful... There can be no question that it is proper for officials to avoid such a decision until compelled to release by the courts...

...when the question of a "period of grace" arises or might arise, the Respondent should be expected to advance some evidence and to make considered submissions as to what period would be appropriate and why.”



Section 12



Illegal Migration Act 2023, s12 - changes

- A person detained under paragraph 16 of Schedule 2 of the 1971 Act, Schedule 3 of the 1971 Act, s62 of the 2002 Act, the EEA Regulations 2016 or s36 of the 2007 may be detained:
 - “*...for such period as, in the opinion of the Secretary of State, is reasonably necessary*”
 - “*...regardless of whether there is anything that for the time being prevents*” removal/deportation
 - Where removal/deportation can no longer be achieved within a reasonable period “*for such further period as, in the opinion of the Secretary of State, is reasonably necessary*”
- The purpose of the changes is, according to the explanatory notes:

”As well as codifying, in part, the Hardial Singh principles, this clause also overturns the common law principle established in R(A) v SSHD [2007] EWCA Civ 804 (and later authorities) that it is for the court to decide, for itself, whether there is a reasonable or sufficient prospect of removal within a reasonable period of time.”



Illegal Migration Act 2023, s12 – have they succeeded? (1)

- *Lam and Others v. Superintendent of Tai A Chau Detention Centre and Others* (Hong Kong) [1996] UKPC 5 (27 March 1996) (at §27):

“Their Lordships do not exclude the possibility that, by clear words, the legislature can confer power on the executive to determine its own jurisdiction. Say, for example, the power to detain was expressly made exercisable during such period as in the opinion of the Director removal from Hong Kong was pending. In such a case the court's only power would be to review the Director's decision on Wednesbury principles.”



Illegal Migration Act 2023, s12 – have they succeeded? (2)

- Any detention powers will be narrowly construed per Laws LJ (*In re Wasif Mahmood* [1995] Imm AR 311)
- The changes do not affect the Court’s power to make findings of fact – and the SSHD is afforded no further deference there. As held in *Fardous v SSHD* [2015] EWCA Civ 931 (at §43):
“*It is this objective approach of the court which reviews the evidence available at the time that removes any question that the period of detention can be viewed as arbitrary in terms of Article 5 of the European Convention on Human Rights.*”
- Unlike the solution suggested in *Lam*, the question is not subject to whether the SSHD considers detention is *pending*, but whether the SSHD considers detention is *reasonable*
- It is difficult to see how the SSHD could decide that a period of detention that was not *objectively* reasonable was reasonable in *her* view, without acting in breach of the *Lumba* principle. As held in *Lumba* at §30:
“*...the Hardial Singh principles reflect the basic public law duties to act consistently with the statutory purpose (Padfield) and reasonably in the Wednesbury sense...*”



Illegal Migration Act 2023, s12 – have they succeeded? (3)

- The grace period changes reflect the current law (subject to addition of “*in the opinion of the Secretary of State*”)
- There is a real question as to whether the ‘grace period’ complies with Article 5 ECHR anyway (see BID intervention in *ASK v United Kingdom* (43556/20):
 - Detention during a “grace period” is arguably not detention with a view to deportation for the purposes of Article 5(1)(f).
 - The concept of a “grace period” runs directly contrary to the principle that Article 5 ECHR does not permit a balance to be struck between the state’s interests and the individual’s right to liberty (*A & Ors v United Kingdom* (Application no. 3455/05) at (§171)).
 - It is a core principle of Article 5(1)(f) that detention must not endure for a period that exceeds what is “*reasonably required for the purpose pursued*” (*Saadi v United Kingdom* §74 (Application no. 13229/03)).



The future



Going forward

- These provisions come into force this week
- We should try to hold the line on the current *Hardial Singh* caselaw – this is a case worth making
- It will be essential to try to establish objective facts in evidence as much as possible to limit scope for SSHD views
- We need to deploy *Hardial Singh* (i) (is detention in a grace period for the purposes of deportation? What about where there is a clear barrier to deportation?) and (iv) (is deportation being pursued with reasonable diligence?)
- Article 5 ECHR may now provide more protection than *Hardial Singh*
- Policies and *Lumba* cases are unaffected



Thank you

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Powers of Detention in the Illegal Migration Act 2023

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Introduction

Section 11 is headed ‘Powers of Detention’ and amends existing legislation:

(1) Schedule 2 to the Immigration Act 1971:

(2) Section 147 of the Immigration and Asylum Act 1999 and

(3) Section 62 of the Nationality, Immigration and Asylum Act 2002



Duty to Remove

Section 2 of IMA 2023 places duties on the SSHD to make arrangements for removal of a person if they:

First Condition (S2(2)(a) – (e))

Entered UK without leave to enter/entry clearance/electronic travel authorisation or obtained leave by deception OR

Entered in breach of a deportation order OR

Are an excluded person:

Second Condition (S2(3))

Entered After 20th July 2023

Third Condition (S2(4))

Did not come directly to the UK from a country in which the person's life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.

Fourth Condition (S2(6))

The Person requires leave to enter or remain in the UK but does not have it (does not include leave given to a unaccompanied child under S4(1))



Exceptions (S2(11) IMA 2023)

S4(1) – No duty to make arrangements for removal of unaccompanied child
BUT

S4(2) – Provides that the SSHD **MAY** make arrangements for the removal of an unaccompanied child **WHERE** (S4(3)):

The child is being removed to be reunited with their parent:

Or to a country listed in section 80AA(1) of 2002 Act

Or if no protection/HR claim – to a country where they embarked from

Or in such other circumstances as may be specified in Regulations



Exceptions Cont.

Section 4(4) provides that the Regulations made may confer a discretion on the SSHD

The rest of section 4 gives the SSHD various powers to make Regulations – including adding exceptions for unnamed groups.

Very limited exception for victims of trafficking – if **necessary** for them to remain in the UK to assist authorities



Note that...

The SSHD has power to amend the threshold date (20th July 2023) by Regulations: .

Condition 3 is intended to catch **all** asylum seekers who have spent any time in other ‘safe’ EU countries before entering the UK.

That is not completely obvious from the wording of condition 3 itself, which adopts the language of Article 31 Refugee Convention by stating that it applies to those who have not “*come directly*” to the UK. But while it has long been understood in international law that a person who briefly transited other countries can still have “*come directly*”, the 2023 Act says that anybody who “passed through or stopped” in another safe country did not: see s2(5).



New Section 2(C) of Paragraph 16 of Schedule 2 of the Immigration Act 1971

Section 11(2) of the IMA 2023 inserts a new paragraph 2C into Paragraph 16 of Schedule 2 of the 1971 Act and creates new powers of detention where:

2C(a) – an immigration officer suspects that the person meets the four conditions in section 2 of the IMA 2023 – he may detain ‘**pending** a decision as to whether the conditions are met’:

(b) - if an immigration officer suspects the SSHD has a duty to make arrangements for removal under section 2 – he may detain ‘**pending** a decision as to whether the duty applies’:

(c) – if there is such a duty, pending removal from the UK in accordance with that duty:

(d) – if the four conditions are met but there is no duty to remove by virtue of section 4(1)...then



New Section 2(C) to the Paragraph 16(2B) of the 1971 Act cont...

Section 2C(d) (i) – (iv) introduces new powers to detain, where there is no duty to remove:

- (i) Pending a decision to give limited leave to enter or remain for the purposes of section 4(1):
- (ii) Pending a decision to give leave under section 8AA of the 1971 Act – discretionary leave:
- (iii) Pending a decision to give leave under section 65(2) of the Nationality and Borders Act 2022 (leave to remain for victims of trafficking):
- (iv) Pending a decision to remove an unaccompanied child under 4(2) of IMA 2023 and pending their removal under that section.



Pregnant Women

The threat to end the limitation on the detention of pregnant women has not made it into the Act.

Sections 2D – 2G retain those limitations in terms of the length of detention:

2D – no longer than 72 hours unless authorised by a Minister, in which case no longer than 7 days:



Unaccompanied Children

Section 2H permits the detention of unaccompanied children under the powers granted by the Act:

‘ but only in the circumstances specified in regulations made by the Secretary of State...’

Sections 2I – 2K – empower the SSHD to make regulations specifying time limits for the detention of unaccompanied minors, conferring ‘a discretion’ on an Immigration Officer re detention, and 2K gives wide powers to make ‘different provisions for different purposes’

The Regulations must be made by Statutory Instrument and are subject to the negative resolution procedure.



Section 11 - Miscellaneous

Section 11 also amends section 62 of the Nationality, Immigration and Asylum Act 2002 in similar ways.

And removes the time limit for detention in pre-departure accommodation in section 147 of the Immigration and Asylum Act 1999.



Section 13

Section 13 amends Schedule 10 to the Immigration Act 2016:

To prevent the FTT from granting bail until 28 days after detention begins (13(3)(b))

Also provides that detention cannot be challenged in court proceedings during that period.

Unless the SSHD or Immigration Officer can be seen to have acted in bad faith or in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

Habeas corpus is retained.

Decisions include ‘purported decisions’



Potential Challenges

- Ouster clauses
- Interpretation of ‘procedurally defective’
- Article 3 and 5.
- Habeas Corpus



Thank you

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Illegal Migration Act 2023: Detention of children

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27 September 2023



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Detention of Children

- 1) How is this justified?
- 2) What are the relevant provisions?
- 3) Where next?



Why? “pull factor”



“The policy objective here is **not to detain children**, but it's important that we don't inadvertently create a policy that **incentivises people to bring children** who wouldn't otherwise come here. And that's why it's important that it applies equally to families, because **otherwise you increase the likelihood that people bring children here, they make very dangerous crossings**. I don't think anyone would want to see that, that's not good for children. So, the policy should and must apply to families, but it's right that we then look at families differently, as we do, and they should be in accommodation that's appropriate for them and that those family groups should not be separated. I think that is **the right thing to do**, because otherwise, as I said, **you create an incentive for a criminal gang to tell people to bring a child with them** when they otherwise wouldn't be. And I don't think that is a good thing. I don't think we want to create **a pull factor** to make it more likely that children are making this very perilous journey in conditions that are appalling. I don't think that's the right thing to do. We should not create a system that makes that more likely.”

March 2023, PMRS before the Parliamentary Liaison Committee defending detention of children in new IMB www.youtube.com/watch?v=Ux8qlmpGwY4



Any evidence of that “*incentive*”?

Illegal Migration Bill: Child Rights Impact Assessment, Home Office, July 2023

Refers to UK commitment to consider United Nations Convention on the Rights of the Child (UNCRC)

“Detention

In order to **avoid creating a perverse incentive** for people smugglers to prioritise children and families with children for dangerous crossing across the channel, families and children who come to the UK illegally are not exempt from detention and removal under this Bill....

The Home Office already has the power to detain children at the border for the purpose of removal, but detention for the purpose of removal is limited to **a maximum of 24 hours and unaccompanied children can only be detained in a Short-term Holding Facility**”

<https://bills.parliament.uk/publications/52110/documents/3774>



Child Rights Impact Assessment cont'd

“Unaccompanied children will only be detained in circumstances **to be prescribed in regulations**, subject to the affirmative parliamentary procedure... The detention powers in relation to removal will only be exercised **in very limited circumstances** ahead of them reaching adulthood, such as where they are being **removed for the purposes of reunion** with a parent or where **removal is to a safe country of origin**.

Where a decision is made to remove an unaccompanied child under 18, detention will be for **the shortest possible time in appropriate detention facilities with relevant support provisions** in place and all international obligations, including the UN Convention on the Rights of the Child, respected. The Home Office is not currently in the position of corporate parent to any unaccompanied child and there is nothing in the Bill which changes this position. It will continue to be for the local authority where an unaccompanied child is located to consider its duties **under the Children Act 1989**.”

Illegal Migration Bill: Child Rights Impact Assessment, Home Office, July 2023



S55 and the UNCRC

Illegal Migration Bill: Child Rights Impact Assessment, Home Office, July 2023

“UNCRC directly relevant to detention:

Article 3 (best interests of the child); Article 9 (separation from parents) Article 15 (freedom of association); Article 20 (right to special protection and help) Article 23 (children with a disability); Article 24 (health and health services) Article 25 (review of treatment in care) Article 27 (adequate standard of living) Article 28 (education); Article 31 (leisure, play and culture) Article 37 (inhumane treatment and detention)

Home Secretary has a duty **under Section 55 of the Borders, Citizenship and Immigration Act 2009** to make arrangements for ensuring that immigration, asylum and nationality functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. **With respect to the detention of families with children and the implementation of Articles 3, 9 and 23, it is assessed that the impact will remain neutral.”**



Child Rights Impact Assessment, Home Office, July 2023

To mitigate any negative impacts, where possible, that the legislative changes and policy will have on Articles **15** (freedom of association), **20** (right to special protection and help), **24** (health and health services), **25**(review of treatment in care), **27** (adequate standard of living), **28** (education); **31** (leisure, play and culture) **and 37** (inhumane treatment and detention) we will:

- Ensure these detention powers in relation to removal will only be exercised **in very limited circumstances** ahead of them reaching adulthood, such as for the purposes of family reunion or where removal is to a safe country of origin. Detention will be **for the shortest possible time in appropriate detention facilities with relevant support** provisions in place. In line with the current detention guidance, which we will review and update with the legislative changes, any welfare, medical and other safeguarding issues will be considered in all detention decisions.
- When developing the accompanying policy to accommodate the legislative changes on detention of children and families with children, we will work closely with the Department of Education, and continue open dialogue with the Family Returns Panel and Children's Commissioner to ensure that, where practicably possible, **children's needs can be met within detention**.
- Build upon our current detention facilities for families to ensure they are appropriate and provide safe and secure accommodation. We will ensure there are proper provisions in detention for children and families with children.



Statistics

2022 - 5,242 asylum applications from Unaccompanied Asylum-Seeking Children
=> 39% increase on the number prior to COVID19 pandemic

2019 - 3,775 - of these, 3,681 (70%) were aged 16 or 17

2016 – 3/2023: - there were 8,611 age disputed – 47%, 4088 found to be adults

1/7/21 – 31/12/22 - National Transfer Scheme facilitated the transfer of 4,187 children to LAs with children's services

To y/e 31/3/22 - 5,540 UASC cared for by LAs in England, increase of 34% from the previous reporting year

Illegal Migration Bill: Child Rights Impact Assessment, Home Office, July 2023



Regulations on time limits

Illegal Migration Bill: **Equality Impact Assessment**, Home Office, 26 April 2023

“The Bill also creates a power to detain those within scope of the scheme pending decisions on whether the conditions are met/the duty applies and pending their removal. The First-Tier Tribunal will not be able to grant immigration bail within the first 28 days and challenges to detention by way of judicial review will also be restricted in that period. However, applications to the High Court **for a writ of habeas corpus will be permitted at any time**. An individual will also still be able to apply to Secretary of State for bail at any point. The Bill provides **that unaccompanied children may only be detained for purposes prescribed in regulations made** by the Secretary of State, such as for the purposes of removal to effect a family reunion (as is the case under current law) or for the purposes of age assessment. **It also allows the Secretary of State to make regulations specifying time limits to be placed on the detention of unaccompanied children for the purpose of removal, if required.**”

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1155534/2023-05-03_Illegal_Migration_Bill_-_Overarching_EIA_FINAL.pdf



What about that deterrent effect?

Illegal Migration Bill: Equality Impact Assessment, Home Office, 26 April 2023
Assessment under PSED **s149 Equalities Act 2010**

“The Department’s view is that the Bill **should have a deterrent effect which** can result in **fewer unaccompanied children** arriving in the UK by dangerous and unlawful means. This serves to mitigate in the long term how many children will arrive in the UK, which impacts on the risk of children absconding. The Home Office is also taking new accommodation and transfer powers, which are just some of the steps the Department is taking to ensure unaccompanied children are placed into local authority care as soon as possible. The Home Office does not have, and therefore cannot discharge, duties under Part 3 of the Children Act 1989 and there is nothing in the Bill which changes this position. Taking into account the above, any differential impact is justified and proportionate in order to achieve the legitimate aims of controlling migration and reducing crime.....

This approach is **designed to safeguard the most vulnerable** and ensure they are properly supported and cared for. The remaining provisions apply equally to all regardless of age and equal treatment could be considered to foster good relations”



But what about the evidence?

Illegal Migration Bill: **Impact Assessment**, Home Office, 26 June 2023

“It has not been possible to undertake a full value for money assessment of the Bill. This is because:

1. The Bill is **a novel and untested scheme**, and it is therefore **uncertain what level of deterrence impact it will have**. Therefore, a range is presented to set out varying levels of deterrence that may be achieved.
2. The delivery plan is still being developed, adjusting for changes during legislative passage, so the scale of the Bill’s processes is not yet known. This includes **elements such as detention**, case working, judicial and third country capacity constraints.
3. No displacement effects of migrants shifting to other clandestine routes of entry are included in the core analysis, meaning wider socioeconomic costs of illegal migration through undetected routes are not included.
4. The baseline does not include impacts of to-be delivered projects within the NABA 2022”

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal Migration Bill IA - LM Signed-final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf)



There is no evidence.

See on deterrent, Matthew Rycroft CBE, Permanent Secretary 13/4/22 to Home Secretary - on Rwanda:

“I recognise that, despite the high cost of this policy, there are potentially significant savings to be realised **from deterring people entering** the UK illegally. Value for money of the policy is dependent on it **being effective as a deterrent. Evidence of a deterrent effect is highly uncertain and cannot be quantified with sufficient certainty** to provide me with the necessary level of assurance over value for money

I do not believe sufficient evidence can be obtained to demonstrate that the policy will have a deterrent effect significant enough to make the policy value for money. This does not mean that the MEDP cannot have the appropriate deterrent effect; just that it there is not sufficient evidence for me to conclude that it will.”



Children's Commissioner - Ongoing concerns following the passing of the Illegal Migration Bill, 19 July 2023

“I am deeply concerned about the impact it will have on children’s rights and experiences. **The relaxation of rules around detention.** The lack of safeguards around Home Office accommodation. The inability for children to seek asylum. The removal of children at eighteen and the potential undermining of the Children Act 1989. It will mean that children fleeing war and persecution, and children who have been trafficked here, will no longer be able to claim asylum... I do welcome the small changes around the detention of pregnant women and unaccompanied children. But the impact the Act will have on children is still not fully understood. There has not been sufficient time to consider the implementation.

Keeping children safe from harm, receiving care, should be a guiding principle for everything...

As the Bill becomes an Act of Parliament, I will continue to push for urgent answers to the questions I have raised about how the Act will be implemented in practice.

I remain unconvinced that it is possible for the Act to be implemented in a way that is compatible with the Children Act.



Joint Child Detention Briefing, House of Lords Report, June 2023

Refugee & Migrant Children's Consortium

“What is **the impact of detention on children**?

As recently as 31 March 2023, the Home Office itself published guidance stating: ‘**a period of detention can have a significant and negative impact on a child’s mental or physical health and development**’. Assessing Age v6, 31/3/23

Previous research conducted in the UK evidenced the **long-lasting damage detention** does to children’s lives, both lone children and those with their families. The effects on their physical and mental health included weight loss, sleeplessness, nightmares, skin complaints, self-harm and attempted suicide, depression and symptoms of post-traumatic stress disorder...”

<https://www.helenbamber.org/sites/default/files/2023-06/Joint%20child%20detention%20briefing%20-%20HoL%20Report%20270623.pdf>



Joint Child Detention Briefing, House of Lords Report, June 2023

Refugee & Migrant Children's Consortium

“Will not detaining children act as a pull factor?”

Continuing to have limits on child detention **will not increase the number of children coming to the UK on small boats**. Once **routine child detention was ended in 2011, there was no proportional increase in children claiming asylum**. The Joint Committee on Human Rights, in looking at the removal of location and time limits on child detention, considered the Government's desire not to incentivise people smuggling gangs to target particular groups. The Committee stated: **‘We have not seen evidence that this is likely to happen, nor that it would justify detaining children for periods previously considered to be excessive.’**

Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, June 2023:
<https://committees.parliament.uk/publications/40298/documents/196781/default>



Power to detain

S11(2) IMA 2023 inserts 2C after paragraph 16(2B) of Sched 2 IA 1971: -

- (a) where IO **suspects** that the person meets the four conditions in s2 IMA 2023, he may detain '**pending** a decision as to whether the conditions are met'
- (b) if an IO **suspects** the SSHD has a duty to make arrangements for removal under s2, he may detain '**pending** a decision as to whether the duty applies'
- (c) if there is such a duty, pending removal from the UK in accordance with that duty
- (d) if the four conditions are met but there is no duty to remove by virtue of s4(1)



Powers to detain where no duty to remove

S2C(d) continued: -

- (i) pending a decision to give limited leave to enter or remain for the purposes of s4(1):
- (ii) pending a decision to give leave under s8AA of the 1971 Act (discretionary leave)
- (iii) pending a decision to give leave under s65(2) of Nationality and Borders Act 2022 (leave to remain for victims of trafficking) or
- (iv) pending a decision to remove an unaccompanied child under 4(2) of IMA 2023 and pending their removal under that section.



Detaining Pregnant Women s11(2) inserting(2D-2G)

(2D) If the IO is satisfied that a woman being detained under (2C) is pregnant, then she may not be detained under (2C) for a period of—

(a) **more than 72 hours from the relevant time**, or

(b) **more than 7 days from the relevant time**, in a case where the longer period of detention is authorised personally by a Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975).

(2E) If released as a result of paragraph (2D) she may be detained again under (2C) in accordance with (2D).

“Relevant time” - (2F) If detained under (2C) and previously detained under s62(2A) of the Nationality, Immigration and Asylum Act 2002 and not released in between, the definition of “**the relevant time**” in (2G) is to be read as if paragraph (b) referred to the time when the woman **was first detained** under (2C) or s62(2A) (detention by SoS) of that Act.

See 2G re definition of relevant time = the later of the time IO first satisfied the woman is pregnant and when detention begins.



Unaccompanied Children – s4 IMA 2023

- (1) The duty in s2 does not require the SoS to make arrangements for the removal of an unaccompanied child.
- (2) SoS *may* make arrangements for the removal of an unaccompanied child.
- (3) The power in subsection (2) may be exercised only—
 - (a) for the **purposes of reunion** with the person’s parent
 - (b) where **removal to a** country listed in s80AA(1) NI&A Act 2002 (**safe States**)
 - (i) a country of which person is a national, or
 - (ii) a country in which person has passport or other ID document
 - (c) where the person has not made a protection claim or a HR claim and the person is to be removed to — country of which a national; where passport/ID document of identity, or country in which the person embarked for the United Kingdom;
 - (d) Or as may be specified in regulations by the SoS – may confer discretion on SoS.
- (5) = “unaccompanied child” if—
 - (a) C meets the four conditions in s2, (b) C is under the age of 18, and (c) at the relevant time (entry/arrival) no individual (whether or not a parent of C) who was aged 18 or over had care of C.



No longer a duty to consult Independent Family Returns Panel

S14 IMA disapples the duty on SoS to consult the IFRP on the detention of families with children under the powers of the Act and disapples it for the purposes of removal of unaccompanied children.

Disapplication of duty to consult Independent Family Returns Panel

111. Section 54A of the Borders, Citizenship and Immigration Act 2009 makes provision for the IFRP. The IFRP **provides advice on the safeguarding and welfare plans** for the removal of families with children who have no legal right to remain in the UK, and have failed to depart voluntarily.

The IFRP **makes recommendations to the Home Office, ensuring the welfare needs of children and families are met** when families are returned to their home country (or, in asylum cases, the third country where the asylum claim legally must be heard).

Section 54A(2) requires the SoS **to consult the IFRP** in every family returns case, **on how best to safeguard and promote the welfare** of the children of the family (subsection (2)(a)), and in each case where detention in pre-departure accommodation is proposed **on the suitability** of so doing, having particular regard to the need to safeguard and promote the welfare of the children of the family (subsection (2)(b)). This section inserts new subsections (3A) and (3B) into section 54A of the 2009 Act **which disapples the duty**. [Explanatory notes]



Unaccompanied Children

Immigration Act 2014 - Amended Sched 2 to Immigration Act 1971 para 18A, restricting detention of unaccompanied children to a **maximum 24 hours detention**

- An unaccompanied child may only be held in a **short-term holding facility** (STHF) and in no other place, except either:
 - during transfer to or from a short-term holding facility
 - while being taken in custody as set out in paragraph 18(3) of Schedule 2 to the 1971 Act
- An unaccompanied child may be detained para 16(2) Sched 2 IA 1971 Act in an STHF for a maximum of 24 hours and only while
 - directions requiring the child to be removed from the STHF within 24 hours of being detained in the STHF are in force
 - or a decision is likely to result in such directions being given
 - The IO who gave the authority to detain reasonably believes that the child will be removed from the STHF within 24 hours in accordance with those directions



Unaccompanied Children – IMA 2023 s11(2)

(2H) The powers in (2C) may be exercised **in respect of an unaccompanied child** only in the circumstances **specified in regulations** made by the SoS.

(2I) SoS may, by regulations, **specify time limits that apply** as to the detention of an unaccompanied child under (2C)(d)(iV) (detention of unaccompanied child in relation to removal).

(2J) Regulations under (2H) may confer a discretion on the SoS or an IO.

(2K) Regulations under (2H) or (2I) –

(a) may make different provision for different purposes;

(b) may make consequential, supplementary, incidental, transitional or saving provision;

(c) must be made by statutory instrument (SI).

(2M) Person (of any age) detained under (2C) anywhere that SoS considers appropriate.

(2N) SI with Regs under (2H)/(2I) subject to annulment under resolution of either House of Plt.

(2P) (2H) and (2I), “unaccompanied child” has the same meaning as per IMAct 2023 (s4)



IMA s13 Power to grant bail

S13 - amending Sched 10 to IA 2016 - inserts 3A

(3A) A person who is being detained under para 16(2C)(d)(iv) of Sched 2 IA 1971 or s62(2A)(d)(iv) of NIAA 2002 (detention of unaccompanied child for purposes of removal) must not be granted immigration bail by the First-tier Tribunal until after the earlier of—

- (a) the end of the period of 28 days beginning with the date on which detention began, and
- (b) the end of the period of 8 days beginning with the date on which the person's detention (unaccompanied minor)



And no challenge in relevant period – IMA s13 (4)

S13: amends Schedule 10 to the Immigration Act 2016 - inserts 3A(1)

- (a) a decision to detain a person by IO under para 16(2C) of Sched 2 IA 1971
 - (b) decision to detain a person by SoS under s62(2A) NI&AA 2002, and
 - (c) detained under paragraph (a) or (b) a decision of SoS to refuse to grant immigration bail
- (2) Re detention during the relevant period, the decision is final and is not liable to be questioned or set aside in any court or tribunal.

Unless - (4), decision involves or gives rise to any question as to IO/SoS acting or has acted—

- (a) in bad faith, or
- (b) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

- (5) Can apply for a writ of habeas corpus, or (b) in Scotland, apply to the Court of Session for suspension and liberation.
- (6) “decision” includes any purported decision



Implications and next steps?

- S55 BCIA 2009 - all the functions, including decisions to detain have to be 'discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'
- Decision makers must have regard to guidance issued under these provisions
- Every Child Matters guidance (11/09) expressly states that the Home Office must act in accordance with Article 3 of the UNCRC – best interests of the child a primary consideration.
- *ZH(Tanzania) v Secretary of State for the Home Department [2011] UKSC 4*



Implications and next steps?

- Await the Regulations
- S55 BCIA 2009
- ECHR - Detention of children in inappropriate accommodation can potentially engage Article 3 *Popov v France* [2016] 63 EHRR 8 and
- Article 5 ECHR - *Kanagaratnam v Belgium* [2012] 55EHRR 26 (violation of 3 and 5 re mother and 3 children in closed transit centre)
- Consider with Article 14 - ‘other status’ of unaccompanied children seeking asylum being detained - without justification
- A failure to take account of the best interests of the child can render the decision to detain unlawful *R (on the application of Abdollahi) v SSHD* [2013] EWCA Civ 266
- *AN (a child) and FA (a child) v SSHD* [2012] EWCA Civ 1636 practice of detaining children for the purpose of conducting so called illegal entry interviews in breach of policy



UNHCR Guidance

UNHCR's clear view is that children should not in principle be detained at all (see UNHCR Detention Guidelines 9.2). It adopts the wording of Article 37 of the CRC (Convention on the Rights of the Child)

“States Parties shall ensure that:

...(b) **No child shall be deprived of his or her liberty unlawfully or arbitrarily.** The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only **as a measure of last resort** and for the **shortest appropriate period** of time;

(c) Every child deprived of liberty shall be **treated with humanity and respect for the inherent dignity** of the human person, and in a manner which takes into **account the needs of persons of his or her age**. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the **right to prompt access to legal and other appropriate assistance**, as well as **the right to challenge the legality** of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.



Thank you

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