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Director:
Professor Sir Jeffrey Jowell, KCMG, QC

Bingham Centre

Response to the Parliamentary inquiry into the use of immigration detention in the UK

INTRODUCTION

1. The Bingham Centre for the Rule of Law welcomes Parliament's inquiry into the use of immigration detention in the UK, and submits the following response. The response is authored by Justine Stefanelli (Maurice Wohl Associate Senior Research Fellow in European Law) with contributions from other members of the Bingham Centre.

About the Bingham Centre

2. The Bingham Centre for the Rule of Law was launched in December 2010 and is devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework within which it can operate; and fashioning the practical tools to support it. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. It is part of the British Institute for International and Comparative Law, a registered charity based in London.
3. The Bingham Centre has a particular interest and expertise in immigration detention, having published a report on Immigration Detention and the Rule of Law in 2013, which was written by Michael Fordham QC, Justine Stefanelli and Sophie Eser.¹ The report produced 25 Safeguarding Principles to promote the accountability of immigration detention under the rule of law, and is based on legal instruments, promulgated standards, working illustrations, judicial observations and includes 'soft law' sources.

Summary of this submission

4. In this response, we comment on the following two questions raised by the inquiry:
 - a. In your view what are the impacts (if any) of the lack of a time limit on immigration detention?
 - b. Are the current arrangements for authorizing detention appropriate?



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¹ Bingham Centre for the Rule of Law (M Fordham, J Stefanelli, S Eser), 'Immigration Detention and the Rule of Law: Safeguarding Principles' (2013), available at: http://www.biicl.org/files/6559_immigration_detention_and_the_rol_-_web_version.pdf.

5. Although the current UK immigration detention framework largely complies with the rule of law and fundamental rights, especially in relation to other European states, there remains room for improvement.
6. The UK framework could be enhanced by:
 - instituting a maximum duration of detention;
 - ensuring that rights-protecting provisions are set forth in legislation rather than policy; and
 - involving the judiciary in the process to a greater extent, especially in relation to confirming the imposition of detention.
7. We make specific recommendations with regard to each of these issues.

A. IMMIGRATION DETENTION AND THE RULE OF LAW

8. The comments in this submission are made with a particular focus on compliance with the rule of law. In particular, the following elements of the rule of law are emphasised: legal certainty and non-arbitrariness. Moreover, we emphasize that legal certainty and non-arbitrariness are vital in ensuring meaningful access to justice and the protection of rights.
9. The rule of law is part of the fabric of the UK's constitution and society. It underpins the nation's adherence to its legal and political obligations domestically and internationally. Compliance with the rule of law ensures equality, dignity, respect and justice for all individuals. It is of paramount importance that those vulnerable to immigration detention are not denied the protections of the rule of law.
10. Legal certainty is a fundamental aspect of the rule of law. It requires that the law must be definite and clear, made public and not be capable of retrospective application. It also ensures that individuals subject to the law are able to regulate their conduct in light of the law. Legal certainty also forms one of the general principles of interpretation of European Union (EU) law, and is an important aspect of the Venice Commission's definition of the rule of law.²
11. Legal certainty is related to the prohibition against arbitrary application of the law. Having clear rules in place will reduce the risk that a government task, such as detaining an individual, is exercised in an arbitrary manner.

B. DURATION OF DETENTION: THE LACK OF A TIME LIMIT

12. There are four main impacts resulting from the lack of a time limit on immigration detention in the UK:
 - (1) legal certainty is impaired;
 - (2) individuals cannot clearly ascertain the period during which they may be detained;
 - (3) the risk of arbitrary detention is increased; and
 - (4) the period of detention effectively becomes a discretionary matter.

² European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law', CDL-AD(2011) 003rev, 10-11.

These problems have been well-documented in regional and international law.

13. The UK is one of only a few states in the Council of Europe which does not provide an upper limit on the duration of immigration detention. In that regard, it has been criticized for some time by a number of international organisations, including the United Nations.³ The lack of a maximum has not changed with the Immigration Act 2014, which obtained Royal Assent on 14 May 2014.
14. Setting a maximum duration of detention in law functions as a means of promoting legal certainty and protecting against arbitrary detention.
15. At the European and international levels, there is an increasing trend toward setting maximum periods in national law. Specifically, with the entry into force of the EU Returns Directive 2008/115/EC, an upward limit of 18 months applies across all the EU Member States except the UK, Denmark and Ireland (all of which chose not to take part in the Directive).
16. The United Nations and its agencies have endorsed the implementation of a maximum duration in many of their policy documents, stating that “Without maximum periods, detention can become prolonged, and in some cases indefinite.”⁴ Moreover, it has been emphasized that “Maximum time limits on ... administrative [immigration detention] in national legislation are an important step to avoiding prolonged or indefinite detention.”⁵
17. Legal certainty is a fundamental aspect of the rule of law. In the context of immigration detention, it requires that states not only publish their immigration policy, but also that a maximum duration of detention is set in law regarding both detention pending removal or pending examination of the case.
18. Relying, as the UK does, on a “shortest period necessary” standard fails to offer those liable to detention clarity regarding how long they might be detained.
19. Setting a maximum by law also protects against arbitrariness. Without a clear time limit, the period during which someone may be detained becomes a discretionary matter, which is subjectively determined according to whether detention is still necessary.
20. The arbitrary nature of the UK system is also problematic in terms of the “quality-of-law” requirement under Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, the Strasbourg Court has held that “in the absence of clear legal provisions ... setting up time limits for ... detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness.”⁶
21. The existence of an upward limit on detention should not imply that the limit must be reached in all cases. The maximum should not become a default period of detention routinely applied. Detention must only be imposed where necessary and properly justified, and for the shortest possible time. That time should not, in any circumstance, exceed the maximum provided by law.
22. **Recommendation:** To address these problems and associated criticism, it is our strong view that the UK should enact laws that provide for a maximum duration of detention. Further, we would suggest that an appropriate maximum would correspond with that established under the EU

³ See, e.g., UN Committee Against Torture, ‘Concluding observations on the fifth periodic report of UK (2013) s 30; UNHCR, ‘Concluding Observations: United Kingdom of Great Britain and Northern Ireland’, (December 2001), CCPR/CO/73/UK, para 16; ‘Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe - Following his visits to the United Kingdom (5-8 February and 31 March-2 April 2008)’, CommDH(2008)27.

⁴ UNHCR Detention Guidelines (2012), Guideline 6.

⁵ UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention for Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011) s 2.

⁶ *Ismoilov v Russia* [2008] ECHR 348, 140.

Returns Directive 2008/115/EC, which imposes a six-month maximum with a possible 12-month extension in exceptional circumstances.

C. AUTHORIZING DETENTION: ARE CURRENT ARRANGEMENTS APPROPRIATE?

Authorizing Authority

23. There are currently three statutory bases for the power to detain for immigration purposes:
- Schedule 2 (sections 16.1 and 16.2) of the Immigration Act 1971;
 - Schedule 3 (section 2) of the Immigration Act 1971; and
 - Section 62 of the Nationality, Immigration and Asylum Act 2002 (as amended by Schedule 9, Part 1 of the Immigration Act 2014).
24. These provisions empower both immigration officers and the Secretary of State to order detention either before a decision whether to give leave to enter is made (i.e., pending examination), pending a decision to remove, pending removal itself, or pending deportation.
25. In practice, the decision is typically made by a high-level immigration officer. In that regard, the UK Enforcement Instructions and Guidance (EIG) provide that authorization must be given by an officer of at least chief immigration officer rank, or a higher executive officer caseworker, and that detention must be reviewed at regular intervals by the administrative authority.⁷
26. This aspect of UK practice is positive and in line with the recommendation by the UN Working Group on Arbitrary Detention that “The decision [to detain] must be taken by a duly empowered authority with a sufficient level of responsibility”.⁸
27. The Bingham Centre agrees with this principle and reiterates that detention should only be imposed by decision, and carried out by action, of prescribed and duly-authorized authorities.⁹
28. The UK’s practical exercise of requiring a high-level immigration officer should therefore be made an explicit requirement in sections 16(1) and (2), Schedule 2 of the Immigration Act 1971, as the EIG is often subject to change and does not benefit from the same type of Parliamentary oversight as immigration legislation.
29. **Recommendation:** It is our view that sections 16(1) and (2) of Schedule 2 of the Immigration Act 1971 should be amended to reflect current practice and to require that immigration detention be ordered by a high-level immigration order.
30. Moreover, the Centre stresses that executive involvement in the immigration detention framework should continue beyond the initial order to detain to encompass periodic reviews of detention orders.¹⁰

⁷ UK Border Force, ‘Enforcement Instructions and Guidance’ (updated August 2014) s 55.5.

⁸ UN WGAD, Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 6. See also UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), Principle 2: “detention ... shall only be carried out ... by competent officials or persons authorized for that purpose”. Principle 6: “The decision [to detain] must be taken by a duly empowered authority with a sufficient level of responsibility”.

⁹ Bingham Centre for the Rule of Law (M Fordham, J Stefanelli, S Eser), ‘Immigration Detention and the Rule of Law: Safeguarding Principles’ (2013), SP5: Authorisation.

¹⁰ Ibid, SP22: Administrative Review.

31. Chapter 55 of the EIG suggests that monthly reviews “should” be conducted using a detention review template, and that additional reviews may be necessary in certain circumstances.¹¹
32. **Recommendation:** We strongly suggest that sections 16(1) and (2) of Schedule 2 of the Immigration Act 1971 should be amended to reflect the suggested practice on periodic reviews in the EIG.

Judicial Participation

33. There is currently no requirement in UK law or policy that requires participation by a judicial authority in the authorization process.
34. This practice has long been endorsed at the international and regional levels. For example, the UN Working Group on Arbitrary Detention stated in its 1999 Annual Report: “Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.”¹²
35. Indeed, in the context of deprivations of liberty under criminal law, such an automatic review is considered “an essential feature of [a] guarantee ... intended to minimise the risk of arbitrariness” that is “implied by the rule of law”.¹³ Although the legal basis may differ, the end result of detention is the same. We therefore consider that immigration detainees should not be treated differently, particularly where they have not been accused of any criminal behaviour.
36. Automatic judicial referral ensures that the lawfulness, necessity and appropriateness of the detention is assessed by an impartial authority from the outset of a person’s detention.
37. Moreover, it is important to underscore that the authorization process does not end once the initial decision to detain has been made. The authorities have an on-going responsibility to review the appropriateness of detention. The requirement for periodic review is included in the UK EIG under section 55.8. The responsible authority differs depending on the duration of detention, that is, the longer someone is detained, the higher ranking the reviewing authority must be.
38. However, as with the initial decision to detain, judicial participation is not foreseen in the periodic review process. We reiterate the value of judicial participation in the review process, in addition to the availability of judicial review at the request of the detained individual. Automatic court-control of this nature ensures that detainees will have their detention reviewed ex officio from the outset of their detention and periodically throughout.
39. Part III, section 44(4)-(5) of the Immigration and Asylum Act 1999 makes provision for an automatic bail hearing at two stages during a person’s detention. The Secretary of State is required to “secure that a first reference to the court is made ... no later than the eighth day following that on which the detained person was detained” and then a second reference “no later than the thirty-sixth day following that on which the detained person was detained.”
40. Inspiration for such a provision may be drawn from other jurisdictions which either require an expediency standard, or have set periods ranging from 72 hours to 30 days. For example:

¹¹ UK Border Force, ‘Enforcement Instructions and Guidance’ (updated August 2014) s 55.8.

¹² UN Working Group on Arbitrary Detention, Annual Report 1999 E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 3. See also: WGAD Annual Report 2003, E/CN.4/2004/3, 15 December 2003, s 86; EU Agency for Fundamental Rights, Detention of third-country nationals in return procedures (2011), 44; Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, ‘Report on the detention of asylum seekers and irregular migrants in Europe (the Mendonça Report)’, 11 January 2010, Doc. 12105, Appendix 1, s12.

¹³ *Brogan v UK* [1988] ECHR 24, 58.

- German law requires that a detained individual be brought before a judicial authority “forthwith” or “without delay”.¹⁴
 - Danish law requires that a noncitizen deprived of liberty be brought before a court of justice within three days (72 hours), and the court must rule on the lawfulness of detention and whether its continuance is appropriate.¹⁵
 - In Switzerland, the legality and appropriateness of detention must be reviewed at the latest within four days (96 hours) by a judicial authority on the basis of an oral hearing.¹⁶
 - In France, a court order is required to extend detention beyond an initial period of five days (120 hours).¹⁷
 - In the Netherlands, a court must be notified of the detention within 28 days, and then must hear the individual’s case within 14 days of that notice.¹⁸
41. In the interest of promoting legal certainty, it is our view that a clear minimum time period for review of a detention order by a judicial authority should be required by law. The Upper Tribunal Immigration and Asylum Chamber would be one example of such a judicial authority. Moreover, it is vital that the time limit be such so as not to unnecessarily prolong a potentially arbitrary detention.
42. **Recommendation:** In order to protect against arbitrary detention, we strongly suggest that:
- Part III, section 44(4)-(5) of the Immigration and Asylum Act 1999 should be implemented in order to provide for automatic bail hearings at two stages during a person’s detention; or
 - An amendment be made to Schedule 2, section 16 of the Immigration Act 1971 and section 62 of the Nationality, Immigration and Asylum Act 2002 to require judicial review of a detention order within 72 hours from its issue.

¹⁴ German Residence Act (2004), art 62(5); German Basic Law, Federal Law Gazette I, p 944, art 104(2).

¹⁵ Aliens (Consolidation Act) No 685 of 2003, 24 July 2003, s 37(1).

¹⁶ Swiss Federal Act on Foreign Nationals of 16 December 2005, art 80(2).

¹⁷ Code d l’entrée et du séjour des étrangers et du droit d’asile, art L.552-1, L.552-7.

¹⁸ Netherlands: Aliens Act 2000, arts 94.1.