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Safeguarding Principles on Immigration Detention and the Rule of Law

Applications in the UK Legal and Policy Context



**British Institute of
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Acknowledgements

This Commentary has been prepared as part of a project that involved updating the Safeguarding Principles on Immigration Detention and the Rule of Law ([available here](#)). The acknowledgements included there apply also to the present Commentary. The views expressed are those of the authors and do not necessarily reflect the views of individuals and organisations that were involved in the research process.

This project was made possible with the support of the Nuffield Foundation.



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Introduction and Overview

This Commentary provides an analysis of ongoing rule of law challenges in the use of immigration detention in the United Kingdom (UK), drawing on the standards expounded in [Immigration Detention and the Rule of Law: Safeguarding Principles \(2nd Edition\)](#). The 23 Safeguarding Principles set out in that document promote a rule of law-compliant and human rights-based approach to the use of immigration detention with the intention of informing policy design, legislative drafting, litigation, advocacy and wider engagement with parliamentary and policy processes. The present Commentary applies those Safeguarding Principles to highlight areas where current approaches regarding immigration detention in the UK fall short of these standards, either in law or in practice. It is by no means intended to provide an exhaustive account of all the rule of law challenges presented by this complex and frequently changing area of policy. Nonetheless, it is hoped that this exercise will draw attention to some key areas of concern, while also providing a blueprint for how the Safeguarding Principles may be applied for scrutinising future developments in this area. The intended audience for this Commentary are judges, lawyers, policy makers and advocates seeking to engage with current developments in the field of immigration detention from the perspective of the rule of law.

The Commentary is divided into six parts. The first five address the safeguarding themes around which the Safeguarding Principles are organised, namely: Overarching Principles, Legality, Non-arbitrariness, Treatment in Detention and Judicial Oversight and Remedies. The final part focuses on vulnerable persons in detention. Each part begins with a brief overview of the issues under scrutiny and the Safeguarding Principles which they engage. This is followed by a more detailed analysis of the different ways in which the provision, policy or practice under examination departs from the standards developed in the relevant Safeguarding Principles.

Part 1 addresses recent developments in the expansion of immigration detention powers, focusing on the changes introduced by section 12 of the Illegal Migration Act 2023 (IMA 2023) and by section 44 of the Border Security, Asylum and Immigration Act 2025 (BSAIA 2025). The analysis underlines how section 12 of the Illegal Migration Act permits the Secretary of State to exercise immigration detention powers regardless of factors which prevent the achievement of the relevant statutory purpose ‘for the time being’—an approach that threatens to undermine the requirement that immigration detention must pursue a legitimate aim which is achievable within a reasonable timeframe (SP10: Achievability). Section 12 also permits detention to be maintained for such further period as the Secretary of State deems necessary to organise arrangements for release, which challenges the understanding that immigration detention must be strictly for the purpose of preventing unauthorised entry or effecting removal or deportation (SP7: Legitimate Aim).

Section 44 of the BSAIA, meanwhile, permits the Secretary of State to impose detention at an earlier stage of the deportation process (while merely *considering* whether to make a deportation order), which similarly risks undermining the requirement for detention to pursue a legitimate immigration control aim (SP7: Legitimate Aim). The Act further stipulates that this power is to have retrospective application. This raises serious concerns around the predictability of the laws governing detention (SP3: Prescription), while it also threatens to divest individuals of the possibility of pursuing claims for compensation for detention which lacked lawful authority at the relevant time (SP23: Compensation).

Part 2 highlights recent measures that undermine judicial scrutiny of immigration detention by stripping domestic courts of the ability to substitute their own assessment of the reasonableness of the length of detention, including any additional periods imposed while the Secretary of State organises arrangements for release. These changes—introduced by section 12 of the IMA 2023—pose serious challenges to the right to judicial review, which demands that the scope of judicial scrutiny must be sufficiently broad to ensure that individuals are not deprived of their liberty arbitrarily (SP21: Judicial Review). These developments must also be considered alongside the lack of any system of automatic

judicial scrutiny of immigration detention within the UK—either initially when detention is first imposed, or periodically over time to ensure the continued justification of the detention. The absence of such a system diverges from the Safeguarding Principles, which underline the importance of automatic court control as a critical rule of law safeguard in the context of administrative immigration detention (SP22: Automatic Court Control).

Part 3 draws attention to concerns around the regulation of alternatives to detention (ATDs) under Schedule 10 of the Immigration Act 2016, and particularly the possibility of imposing immigration bail restrictions in circumstances where individuals could not otherwise be detained lawfully. This contradicts the Safeguarding Principles, which emphasise that ATDs must not be used as alternatives to unconditional release in situations where immigration detention would not otherwise be permitted (SP9: Alternatives).

Part 3 also addresses concerns raised by section 46 of the BSAIA 2025, which goes even further in permitting the extension of immigration bail conditions to individuals who have been granted limited leave to enter or remain in the UK (and who are therefore not liable to immigration detention). While the UK Government has clarified that these powers are to be used for individuals posing serious risks to public safety, section 46 does not reflect these limitations, while the absence of a link between the permissible restrictions and an immigration aim raises issues of non-discrimination (SP2: Equality).

Finally, brief consideration is given to the suitability of accommodation provided for asylum seekers in so-called 'quasi-detention facilities' (such as former military barracks). While the persons housed in these facilities are formally at liberty (and not subject to an ATD under immigration bail), the nature of the environment and the conditions attached to residence are such that they raise significant concerns in terms of the right to liberty and rule of law adherence (SP1: Liberty).

Part 4 addresses the concern that the UK does not set a statutory maximum length of immigration detention, despite repeated calls from international and domestic bodies to introduce such a measure. As highlighted in the Safeguarding Principles, a statutory time limit is required to prevent disproportionate periods of immigration detention and to provide legal certainty to persons detained under immigration powers (SP12: Maximum).

Additionally, the lack of a statutory maximum has also been identified as a factor contributing to immigration casework inefficiencies, resulting in the unnecessary prolongation of detention while individuals' immigration status is resolved (SP11: Diligence). Accordingly, there have been widespread calls to introduce a 28-day statutory limit on the maximum period of immigration detention, extendable in exceptional cases following judicial approval. Recommendations have included ensuring a system of periodic court control to ensure that the maximum is not routinely applied (SP22: Automatic Court Control).

Part 5 underlines how the widespread use of prisons to detain foreign nationals under immigration powers in the UK contradicts the basic principle that immigration detention must take place in a non-carceral environment (SP13: Environment)—an approach consistent with the administrative and non-punitive nature of immigration detention (SP7: Legitimate Aim). The practice of using prisons for immigration detention in the UK has also given rise to equality concerns (SP2: Equality), particularly when it comes to ensuring access to legal services (SP20: Legal Representation) and preventing the detention of those at risk of harm (SP6: Individualisation).

This part also draws attention to the fact that facilities reserved for immigration detention often reproduce elements of incarceration in terms of the physical environment and regime applied. This contravenes the requirement under the Safeguarding Principles not only to avoid the use of prisons for immigration detention, but also to ensure that facilities used for this purpose do not otherwise reproduce aspects of a carceral environment (SP13: Environment).

Part 6 addresses the situation of vulnerable populations in immigration detention. While acknowledging the existence of formal safeguards to prevent the immigration detention of vulnerable persons in the UK (under the Detention Centre Rules 2001 (DCR) and Adults at Risk (AAR) Guidance), the analysis cites an extensive body of literature on the systematic failure of these safeguards to achieve their purported aim. This is exacerbated by a broader legal and policy framework which falls short of key standards exposed in the Safeguarding Principles. This is reflected in the lack of a clinical procedure for identifying vulnerabilities prior to the initial decision to detain, and the operation of a policy which permits persons accepted to be at risk of harm to be detained where this risk is outweighed by immigration or public security considerations (SP6: Individualisation).

1. Expanded Powers of Immigration Detention

A series of legislative amendments introduced by the IMA 2023 and the BSAIA 2025 seek to expand the scope of the executive's immigration detention powers. These changes raise serious concerns under the Safeguarding Principles, both in terms of authorising extensive interference with the right to liberty and in terms of departing from basic rule of law standards.

Two provisions cause particular concern. While the BSAIA 2025 revoked large parts of the IMA 2023, it retained section 12 of that Act. This permits the Secretary of State to impose detention regardless of an imminent prospect of removal—an approach at odds with the requirement for immigration detention to pursue a legitimate aim which is achievable within a reasonable timeframe (SP10: Achievability). Section 12 of the IMA also permits immigration detention to be extended for as long as the Secretary of State considers it 'reasonably necessary' to make arrangements for release. This challenges the understanding that immigration detention must be strictly for the purpose of preventing unauthorised entry or effecting removal or deportation (SP7: Legitimate Aim).

Section 44 of the BSAIA 2025, meanwhile, permits the Secretary of State to impose detention while considering whether to make a deportation order, rather than limiting this power to situations where there is already a decision to deport. Authorising detention at such an early stage of the process arguably fails to meet the requirement for detention to pursue a legitimate immigration control aim (SP7: Legitimate Aim). The Act further stipulates that this power is to have retrospective application. This raises serious concerns around the predictability of the laws authorising detention (SP3: Prescription), while it also threatens to deprive individuals of the possibility of pursuing claims for compensation for detention which lacked lawful authority at the relevant time (SP23: Compensation).

Relevant Safeguarding Principles

SP3. PRESCRIPTION. To be justified as a lawful derogation from the principle of liberty, detention must be based on clear and accessible legal rules setting out the relevant grounds and procedure.

SP7. LEGITIMATE AIM. Detention can only be imposed for the purpose of facilitating examination on entry or with a view to enforcing removal.

SP10. ACHIEVABILITY. The legitimate aim must be realistic and achievable within a reasonable timeframe.

SP11. DILIGENCE. Detention must be for the shortest time that is reasonably practicable. This requires the legitimate aim to be pursued diligently and expeditiously.

SP23. COMPENSATION. Everyone unlawfully detained is entitled to adequate compensation reflecting the violation of their rights.

Analysis

Within the UK, statutory powers of immigration detention serve two broad purposes: (i) to facilitate the administrative removal or deportation of foreign nationals ('exit control'); and (ii) to allow for the examination of individuals arriving in the UK while considering whether to grant permission to enter ('entry control').¹ Powers for immigration officers to detain individuals liable to examination or removal are contained in Schedule 2, paragraphs 16(1) and (2) of the Immigration Act 1971, while these were extended to the Secretary of State under section 62 of the Nationality, Immigration and Asylum Act 2002. The detention of individuals subject to a deportation process (i.e. on the basis that their presence is not conducive to the public good) is authorised by Schedule 3, paragraph 2 of the Immigration Act 1971 and section 36 of the UK Borders Act 2007.

In recent years, there have been concerted efforts to expand the scope of executive powers of immigration detention contained in these provisions. Some of these changes have recently been repealed by the BSAIA 2025, most notably with respect to the power to detain individuals subject to the removal duty contained in the IMA 2023.² Nonetheless, section 41 of the BSAIA retains **section 12 of the IMA**.³ This provision—in force since September 2023—permits the use of detention regardless of factors that prevent the achievement of the relevant statutory purpose 'for the time being', while also permitting detention to be maintained while the Secretary of State makes arrangements for release. **Section 44 of the BSAIA**, meanwhile, amends Schedule 3 of the Immigration Act 1971 to allow for detention to be imposed at an earlier stage of the deportation process—namely, while the Secretary of State merely *considers* whether to make a deportation order. Both provisions raise various issues under the Safeguarding Principles, as detailed below.

a. Section 12 IMA 2023

Section 12 of the IMA 2023 stipulates that powers of immigration detention apply 'regardless of whether there is anything for the time being' that prevents the achievement of the relevant statutory purpose (be this examination on arrival, administrative removal or deportation).⁴ As set out in the Safeguarding Principles, immigration detention must pursue a legitimate immigration control aim (SP7: Legitimate Aim) that is both *realistic* and *achievable within a reasonable timeframe*—a principle which is supported by extensive domestic and international legal authority (SP10: Achievability). Expressly authorising detention when the purpose for which it has been imposed cannot be achieved for an indeterminate period ('for the time being') threatens to circumvent these requirements, potentially leading to prolonged periods of detention. Such concerns have been raised, among others, by the Joint Committee on Human Rights, which noted that section 12 of the IMA 2023 'gives rise to a risk of detention continuing despite the purpose of that detention [...] being uncertain and far from imminent',

¹ In this document, 'removal' refers to the administrative process applied to those in breach of immigration laws (based on the power contained in section 10(1) of the Immigration and Asylum Act 1999). 'Deportation', by contrast, refers to the process applied where a foreign national's presence is deemed to no longer be conducive to the public good (under section 3(5) and (6) of the Immigration Act 1971), including where a foreign national falls within the scope of section 32 of the UK Borders Act 2007.

² Illegal Migration Act 2023 (IMA 2023) section 11.

³ The Border Security, Asylum and Immigration Act received Royal Assent on 2 December 2025. According to the commencement information contained in section 65 of the Act, section 41 (Repeal of certain provisions of the Illegal Migration Act 2023) and section 44 (Detention and exercise of functions pending deportation) came into effect on the day the Act was passed. The commencement of section 46 (Conditions on limited leave to enter or remain and immigration bail), analysed in Part 3(b) below, is subject to the making of regulations.

⁴ This provision applies to the relevant statutory powers of immigration detention under the Immigration Act 1971, the Nationality, Immigration and Asylum Act 2002, and the UK Borders Act 2007.

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concluding that this provision therefore ‘runs dangerously close to contradicting the requirements of Hardial Singh and Article 5 ECHR’.⁵ Elsewhere, it has been suggested that permitting detention for a purpose that cannot be achieved ‘for the time being’ risks legitimising the prolongation of detention due inefficient case management or resource constraints, thereby violating the principle that detention should be for the shortest period that is reasonably practicable (SP11: Diligence).⁶

The ‘Home Office Detention: general instructions’ (Detention Guidance) states that section 12 of the IMA 2023 ‘does not enable the Secretary of State to maintain detention where there has ceased to be any prospect of removal within a reasonable period of time, or where the statutory purpose of detention can no longer be achieved within a reasonable period of time’.⁷ Accordingly, the Detention Guidance understands section 12 of the IMA 2023 to permit detention only where ‘the obstacle in question can be overcome within a reasonable period of time [...] based on a case-by-case assessment’.⁸ Despite this welcome clarification, there is nothing within the broad language employed within section 12 of the IMA 2023 that would limit more expansive uses of these powers in the future—for instance, to authorise lengthy periods of detention while the Government negotiates return agreements with third countries (SP3: Prescription).⁹ Additional safeguarding concerns arise when considered along other aspects of section 12, particularly with respect to undermining judicial oversight of the lawfulness of the length of detention (discussed in greater detail below).¹⁰

A second concern prompted by the retention of section 12 of the IMA 2023 relates to the **introduction of statutory powers to maintain detention where this no longer serves an immigration control aim**. In addition to permitting detention where the statutory purpose cannot be achieved ‘for the time being’, section 12 of the IMA permits detention to continue *even after the Secretary of State has concluded that this objective cannot be achieved within a reasonable timeframe*. Specifically, this provision confers a power to maintain detention ‘for such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person’s release as the Secretary of State considers to be appropriate’. The introduction of this power would appear to be consistent with domestic case law, which acknowledges that the Secretary of State may benefit from a ‘short period of grace’ to maintain immigration detention while making arrangements for release—for instance, by putting in place any monitoring conditions (where removal may still be pursued at a later date), by securing appropriate accommodation to guarantee the individual’s welfare and to manage risks to the public.¹¹ This concession flows from the understanding that the lawfulness of detention at common law is subject to the broader test of ‘reasonableness’, which may in turn accommodate such practical considerations.¹²

Nonetheless, concerns persist once again around the ability of courts to review the lawfulness of the length of the grace period, given the emphasis in the provision on the Secretary of State’s opinion in determining what length is appropriate.¹³ More fundamentally, there continue to be doubts as to

⁵ Joint Committee on Human Rights (JCHR), [‘Legislative Scrutiny: Illegal Migration Bill—Twelfth Report of Session 2022–23’](#) (HC 1241/HL Paper 208), 11 June 2023, para. 199.

⁶ United Nations High Commissioner for Refugees (UNHCR), [‘Observations on the Border Security, Asylum and Immigration Bill’](#), 5 March 2025, para. 120.

⁷ Home Office, [‘Detention: General Instructions’](#) Version 5.0, 18 August 2025 (Detention Guidance) p. 10.

⁸ *Ibid.* For instance, the Detention Guidance refers to circumstances where the individual requires short-term medical assistance, has an upcoming appeal or where there are temporary issues with flight availability.

⁹ JCHR (n 5) para. 199.

¹⁰ See the analysis in Part 2 of this Commentary (Judicial Oversight of Immigration Detention).

¹¹ *FM v Secretary of State for the Home Department* [2011] EWCA Civ 807, para. 60 (Pitchford LJ).

¹² *Ibid.* para. 64 (Pitchford LJ).

¹³ See the discussion in Part 2 below. As highlighted there, domestic courts have underlined the need for a strict approach when determining what is a ‘reasonable’ period to maintain detention to put in place arrangements for release.

whether such a policy is compatible with the UK's international obligations, particularly under Article 5 of the European Convention on Human Rights (ECHR).¹⁴ As indicated in the Safeguarding Principles, Article 5(1)(f) of the ECHR only permits immigration detention for the purpose of preventing unauthorised entry or with a view to carry out removal (SP7: Legitimate Aim). The European Court of Human Rights has interpreted this requirement strictly, underlining that 'no deprivation of liberty will be lawful unless it falls within one of the grounds announced in Article 5 § 1'.¹⁵ It has also explicitly rejected the argument that additional forms of detention falling outside of these grounds may be accepted on the basis of striking a balance more generally between the individual's right to liberty and the interests of the State.¹⁶

The 'grace period' contained within section 12 of the IMA appears to contradict these requirements, given that maintaining detention to organise arrangements for release would no longer be in the pursuit of a legitimate immigration control aim and would also not fall within one of the other permissible exceptions to the right to liberty listed under Article 5(1). While the European Court of Human Rights has accepted that some administrative delay may be inevitable in implementing release after detention ceases to be lawful under Article 5(1)(f), it has suggested that such delays cannot be justified for more than a matter of hours.¹⁷ Moreover, in a judgment concerning the UK, the Court held that '[i]t is for the Contracting States to organise their systems in such a way that their authorities can meet the obligation to avoid unjustified deprivation of liberty', noting that every effort must be taken by the authorities to keep any administrative delays in organising release 'to a minimum'.¹⁸

b. Section 44 of the BSAIA 2025

Beyond retaining section 12 of the IMA 2023, the BSAIA 2025 introduces amendments that broaden the scope of detention powers under paragraph 2 of Schedule 3 to the Immigration Act 1971 (which authorises the detention of those liable to deportation on the ground that their presence in the country is not conducive to the public good). Specifically, **section 44 of the BSAIA extends the power to detain to cover the period during which the Secretary of State considers whether to make a deportation order**, as opposed to only pending the making of that order once that decision has been made.¹⁹ While the human rights memorandum to the Bill maintained that this merely provides a clarification of a power which already existed,²⁰ this claim has been challenged by numerous sources.²¹ According to these sources, this provision was inserted to authorise the existing practice of imposing detention following notification of an initial 'Stage 1' decision to make a deportation order, as opposed to following a final 'Stage 2' decision (which is appealable and applicable only after the affected

¹⁴ UNHCR (n 6) para. 121. See also ['Written Evidence submitted by Detention Action, Medical Justice and Bail for Immigration Detainees on the Border Security, Asylum and Immigration Bill \(BSAIB28\)'](#), 11 March 2025, para. 25.

¹⁵ *Mahamed Jama v Malta* [App No 10290/13](#) (ECtHR, 26 November 2015) paras. 154–155.

¹⁶ *A v UK* [GC] [App No 3455/05](#) (ECtHR, 19 February 2009) para. 171.

¹⁷ *G.B. v Turkey* [App No 4633/15](#) (ECtHR, 17 October 2019) para. 154.

¹⁸ *V.M. v UK (No 2)* [App No 62824/16](#) (ECtHR, 15 April 2019) para. 38.

¹⁹ BSAIA 2025, section 44(1)–(2).

²⁰ Home Office, ['Border Security, Immigration and Asylum Bill: European Convention on Human Rights Memorandum'](#), 30 January 2025, para. 127.

²¹ JCHR, ['Legislative Scrutiny: Border Security, Asylum and Immigration Bill—Fourth Report of Session 2024–2025'](#) (HL Paper 143 / HC 789), para. 130; House of Lords Constitution Committee, ['Border Security, Asylum and Immigration Bill—10th Report of Session 2024–2025'](#) (HL Paper 139), 12 June 2025, para. 14. See also Coalition for Asylum Rights and Justice (CARJ), ['Joint Briefing: Border Security, Asylum and Immigration Bill'](#), April 2025, noting that 'Clause 41 [corresponding to section 44 of the enacted Bill] creates new powers of executive detention which empower the Home Office to detain people earlier in the deportation process'.

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individual has been afforded the opportunity to make representations).²² Arguably, section 44 grants even broader discretion.²³ According to the Explanatory Notes published alongside the Bill, this provision triggers powers of detention when ‘the person has been notified in writing that the Secretary of State is considering whether to make a deportation order against them, or that the Secretary of State has decided to make a deportation order against them’.²⁴ This implies that powers of detention apply even before the notification of a ‘Stage 1’ decision—that is, when the individual has been notified that the Secretary of State is merely *considering* whether to issue such a decision.²⁵

As emphasised in the Safeguarding Principles, immigration detention must be closely connected to its stated purpose. Accordingly, detention for the purpose of deportation is permissible only where those proceedings are *actively in progress* (SP7: Legitimate Aim). The expansion of immigration powers under section 44 of the BSAIA raises serious concerns in this respect. It is arguable whether detention pursues a legitimate immigration control aim if imposed while the Secretary of State merely *considers* whether to issue a decision to make a deportation order. This is especially so if detention is ordered before even a ‘Stage 1’ decision is reached—that is, before there is even any clear intention to pursue the individual’s deportation on the basis that their presence in the country is not conducive to the public good. However, even if the amendments introduced by section 44 of the Act are interpreted more narrowly as only applying after a ‘Stage 1’ decision, there are still grounds to argue that deportation proceedings will not be ‘actively in progress’ until a final decision to issue a deportation order is made (following consideration of any representations). It should be noted that similar reservations may be raised under other statutory provisions authorising immigration detention. For instance, **section 36(1)(a) of the UK Borders Act 2007** similarly permits the Secretary of State to impose detention while *considering* whether the automatic deportation duty contained in section 23(5) of that instrument applies and, therefore, prior to deciding to make a deportation order on those grounds.

The breadth of section 44, meanwhile, raises serious rule of law issues. As underlined in the Safeguarding Principles, the law must clearly define the conditions under which individuals may be detained to avoid conferring excessive discretion that may result in arbitrary decision-making. Moreover, any deprivation of liberty must be authorised by domestic laws that are accessible and foreseeable in their application to allow potentially affected individuals to know the consequences of their actions, as well as to understand why they have been detained and to make representations to challenge this decision (SP3: Prescription). The formulation of section 44 falls well short of these standards. As the Bingham Centre for the Rule of Law has noted elsewhere, the trigger for authorising detention under section 44—i.e. when the Secretary of State ‘considers’ whether to issue a deportation decision—is very broad, failing to delimit the level of evidence or stage of investigation required to meet this threshold.²⁶ More fundamentally, section 44 appears to contradict the basic requirement that immigration detention can only be authorised if this is based on an underlying immigration decision that is itself lawful (SP3:

²² See, for instance, Public Law Project, arguing that the purpose of this provision ‘is to bring the law into line with the Home Office’s current practice of detaining people very early in the deportation process’: [‘Written Evidence Submitted by Public Law Project to the Joint Committee on Human Rights \(BSAI0013\)’](#), 22 May 2025, p. 4. As noted by the Immigration Law Practitioners Association (ILPA), para. 2(2) of Schedule 3 of the Immigration Act 1971 formerly permitted detention where an individual had been given notice of an *appealable* deportation decision ‘in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002’. This excluded ‘Stage 1’ deportation decisions. [‘Written Evidence Submitted by the Immigration Law Practitioners’ Association \(ILPA\) to the Joint Committee on Human Rights \(BSAI0036\)’](#), 12 June 2025, para. 72.

²³ Bingham Centre for the Rule of Law, [‘Border Security, Asylum and Immigration Bill—Clause 41: Rule of Law Analysis Report for the House of Lords Committee Stage’](#), 3 September 2025, pp. 7–8.

²⁴ Home Office, [‘Border Security, Asylum and Immigration Bill—Explanatory Notes’](#), 20 January 2025, para. 257 (emphasis added).

²⁵ *Ibid.* para. 256.

²⁶ Bingham Centre for the Rule of Law (n 23) p. 11.

Prescription). This was the conclusion reached by the UK Supreme Court, which held that the lawfulness of detention imposed under Schedule 3, paragraph 2 of the Immigration Act 1971 is wholly dependent on the lawfulness of the underlying decision to issue a deportation order.²⁷ Authorising detention in the absence of *any* decision to issue a deportation order—let alone a lawful one—is an affront to this basic rule of law safeguard and implies excessive interference with the right to liberty.

The expansion of detention powers under section 44 of the BSAIA 2025 is particularly problematic in light of subparagraph 17, which stipulates that this provision is to be treated as always having had effect. This is consistent with the Government’s position that the amendment enacted by section 44 is merely clarificatory of powers which already existed. However, given the foregoing analysis, the likely effect of subparagraph 17 would be to retrospectively render previous detention decisions lawful when these were not based on lawful authority at the material time—an outcome that is at odds with basic rule of law safeguards.²⁸ The House of Lords Constitution Committee, for instance, has repeatedly raised concerns around the use of retrospective legislation, arguing that such provisions are permissible only ‘in very exceptional circumstances’ and with ‘the strongest possible justification’. The Committee has reiterated these concerns in the context of subparagraph 17 of section 44, underlining the ‘limited justification’ for the inclusion of a retroactive clause which, contrary to the Government’s claims, clearly expands the scope of existing detention powers in the context of deportation.²⁹ While *any* retrospective legislation must be justified to a high standard to ensure compliance with basic rule of law safeguards, the Law Society is right to point out that, ‘[w]here retrospective law negatively impacts fundamental rights, as expanding detention powers does, the presumption against retrospectivity should be taken even more seriously’.³⁰

In addition to this broader rule of law challenge, retrospectively authorising detention which lacked a legal basis at the material time also risks depriving affected individuals of the right to compensation. As highlighted by the Safeguarding Principles, international law guarantees an enforceable right to compensation for any periods of unlawful detention suffered by an individual (SP23: Compensation).³¹ Section 44 of the BSAIA accordingly risks breaching the UK’s international obligations by removing the right to bring claims against the State for periods of detention which were at the time imposed without a lawful basis.³²

²⁷ *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7.

²⁸ [‘Written Evidence submitted by JUSTICE on the Border Security, Immigration and Asylum Bill \(BSAIB16\)’](#), 4 March 2025, para. 17.

²⁹ House of Lords Constitution Committee (n 21) para. 16.

³⁰ [‘Written Evidence submitted by the Law Society of England and Wales to Border Security, Asylum and Immigration Bill Committee \(BSAIB08\)’](#), 27 February 2025, paras. 21–22.

³¹ Among other sources, such a right is guaranteed under the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 9(5), and the European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR), Article 5(5).

³² JCHR (n 21) para. 135. See also Law Society of England and Wales (n 30) para. 24.
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2. Judicial Oversight of Immigration Detention

The expansion of immigration detention powers (Part 1) has been accompanied by efforts to legislate for reduced judicial oversight in this area. The Safeguarding Principles recognise that effective judicial oversight is a critical rule of law safeguard with a particularly important role in protecting against arbitrary deprivation of liberty in the immigration context. Accordingly, efforts to minimise the ability of courts to scrutinise decisions to impose or maintain immigration detention pose serious concerns.

The focus of the present analysis is section 12 of the IMA 2023 (which, as indicated above, has been retained under the BSAIA 2025). This provision aims to remove domestic courts' ability to substitute their own assessment of the reasonableness of the length of detention with that of the Secretary of State. This applies to the reasonableness of the length of detention in achieving the specific immigration objective, as well the reasonableness of any further periods of detention imposed while arrangements are made for release. As indicated in the following analysis, these provisions present serious challenges to the possibility of judicial review (SP21: Judicial Review), including specific international obligations binding on the UK.

These developments should be considered alongside the lack of automatic judicial scrutiny of decisions to impose immigration detention. Unlike other forms of detention, immigration detention in the UK is imposed by an administrative decision. From a rule of law perspective, it is thus vital to ensure effective judicial oversight of these decisions—both initially when detention is first ordered, and periodically over time to ensure that detention continues to be justified (SP22: Automatic Court Control).

Relevant Safeguarding Principles

SP12. MAXIMUM. The period of detention cannot exceed what is reasonably necessary to achieve the immigration control aim and should be subject to a statutory maximum time limit resulting in immediate release.

SP21. JUDICIAL REVIEW. Detained persons must be guaranteed the right to have the lawfulness of their detention reviewed without delay by a court empowered to order release.

SP22. AUTOMATIC COURT CONTROL. Detained persons must be brought promptly before a court to review the lawfulness of their detention. Such reviews must be conducted periodically by a judicial body until detention ceases.

a. Section 12 of the IMA 2023

Effective judicial oversight of detention is widely recognised as ‘a fundamental safeguard of personal liberty’.³³ Its critical importance is reflected in the individual right to challenge the lawfulness of one’s detention before an independent judicial body, which is a core component of the right to liberty under international human rights law.³⁴ As set out in the Safeguarding Principles, the right to judicial review encompasses various components (SP21: Judicial Review).³⁵ For present purposes, the most relevant aspect of this principle concerns requirements around the *scope* of the review. In this respect, the reviewing court must be capable of ‘consider[ing] all available evidence that has a bearing on the arbitrariness and lawfulness of detention [...] and not merely its reasonableness or other lower standards of review’.³⁶ Courts must also be empowered to review whether detention complies with the standards imposed by international law, including under the ECHR and the International Covenant on Civil and Political Rights (ICCPR).³⁷ Accordingly, domestic provisions which impose limits on the ability of courts to review compliance with international requirements for non-arbitrary detention constitute a violation of international law. For instance, Article 9(4) of the ICCPR was violated where ‘there was no discretion for a domestic court to review the justification of [the] detention in substantive terms’, and specifically whether the period of detention ‘had become [...] contrary to article 9, paragraph 1’ of the ICCPR.³⁸

Against this backdrop, serious concerns are presented by the amendments introduced by the IMA 2023. As already noted in this commentary, section 12 of the IMA 2023 introduces powers to maintain immigration detention regardless of factors that prevent the achievement of the statutory purpose ‘for the time being’, while also authorising immigration detention to be maintained to enable arrangements to be put in place for release.³⁹ In addition to this, **section 12 amends the relevant statutory powers to authorise immigration detention ‘for such period as, in the opinion of the Secretary of State, is reasonably necessary’ to achieve the relevant statutory purpose.**⁴⁰ As detailed in the Explanatory Notes, this provision codifies the common law principle that immigration detention may only be imposed for a period that is reasonable in the circumstances (under the so-called *Hardial Singh* principles).⁴¹ However, in confirming this principle, this provision seeks to displace the role of the courts as primary decision-makers in determining what constitutes a ‘reasonable’ length of detention.⁴² This objective is further elaborated on in the Home Office’s Detention Guidance, which stipulates that the

³³ UN Working Group on Arbitrary Detention (UNWGAD), *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court*, [A/HRC/30/37](#), 6 July 2015, para. 3.

³⁴ Most notably, this right is guaranteed in ICCPR (n 31) Article 9(4) and ECHR (n 31) Article 5(4).

³⁵ These requirements cover effective access to proceedings, the characteristics of the judicial body and the speediness of the review.

³⁶ UNWGAD (n 33) para. 23.

³⁷ *Suso Musa v Malta* [App No 42337/12](#) (ECtHR, 23 July 2013) para. 50; *F.K.A.G. v Australia* [CCPR/C/108/D/2094/2011](#) (26 July 2013) para. 9.6.

³⁸ *Bakhtiyari v Australia* [CCPR/C/79/D/1069/2002](#) (29 October 2003) para. 9.4.

³⁹ See Part 1 of this Commentary.

⁴⁰ Emphasis added. This applies regardless of the statutory purpose pursued by detention—be this carrying out the examination, removal or deportation, making the relevant decision or giving the relevant directions.

⁴¹ These principles were originally developed in the judgment in *R (Hardial Singh) v Governor of Durham Prison* [\[1983\] EWHC 1 \(QB\)](#). They were approved by Lord Dyson in *Lumba (WL) v Secretary of State for the Home Department* [\[2011\] UKSC 12](#), para. 22.

⁴² The approach that it is for the courts to decide on the reasonableness of the length of detention was established in *R (A) v Secretary of State for the Home Department* [\[2007\] EWCA Civ 804](#) and confirmed by subsequent authorities. 14 Applications in the UK Legal and Policy Context

changes introduced by section 12 of the IMA 2023 'clarify that it is for the Secretary of State, rather than the courts, to determine what is a reasonable period of detention in order to enable the specific statutory purpose to be carried out'.⁴³ As the Detention Guidance goes on to explain, 'in reviewing any unlawful detention claims, the Courts should approach their task by examining the reasonableness of the Secretary of State's assessment, rather than by substituting their own assessment of the reasonableness of a period of detention'.⁴⁴

In undermining the established common law approach to reviewing the lawfulness of the length of detention, section 12 of the IMA 2023 presents profound rule of law challenges. Broadly speaking, '[w]ith liberty being a fundamental right, judges are well-suited to protect it on grounds of expertise and their role in the constitutional order'.⁴⁵ Objective judicial scrutiny of the lawfulness of administrative detention is also essential to ensure compliance with international human rights obligations, particularly under Article 5 of the ECHR.⁴⁶ The Court of Appeal has held that '[i]t 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'.⁴⁷ Similar conclusions have been reached by the European Court of Human Rights. In *J.N. v UK*, the Court held that the legal framework governing immigration detention in the UK provided sufficient safeguards against arbitrariness, despite the absence of fixed time limits and a system of automatic judicial control.⁴⁸ However, this conclusion was based on the fact that individuals detained under immigration powers are permitted to challenge the lawfulness of their detention at any time, while '[i]n considering any such challenge, the domestic courts are required to consider the reasonableness of each individual period of detention based entirely on the particular circumstances of that case, applying a test similar to—indeed, modelled on—that required by Article 5 § 1(f) of the Convention in the context of "arbitrariness"'.⁴⁹ As the Joint Committee on Human Rights has argued, 'by specifying that it is for the Secretary of State, the official responsible for the detention, to decide whether the detention is or is not reasonable, this crucial objectivity that prevents arbitrary detention in breach of Article 5 ECHR would be removed'.⁵⁰

Similar issues are presented by the introduction of a statutory power to maintain detention to enable arrangements to be made for release. In authorising detention to continue after it ceases to comply with the *Hardial Singh* principles, section 12 of the IMA 2023 stipulates that **detention may be maintained for 'such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person's release as the Secretary of State considers to be appropriate'**.⁵¹ As indicated in Part 1 of this Commentary, this provision reflects the understanding at common law that what constitutes a 'reasonable' period of immigration detention

⁴³ Detention Guidance (n 7) p. 9.

⁴⁴ Ibid pp. 9–10. This would effectively mean that 'the court is limited to only reviewing the Home Secretary's decision [...] on the grounds of illegality, irrationality or procedural impropriety'. Bail for Immigration Detainees et al, [Joint Briefing on Clauses 10–12 of the Illegal Migration Bill](#), June 2023, p. 6. Nonetheless, there are doubts as to whether section 12 of the IMA 2023 achieves its intended effects. See, in this respect, [Written Submission by Medical Justice and Bail for Immigration Detainees to the Joint Committee on Human Rights \(BSAI0033\)](#), 22 May 2025, paras. 14–17.

⁴⁵ [Written Evidence submitted by The Bar Council on the Border Security, Immigration and Asylum Bill \(BSAIB16\)](#), 11 March 2025.

⁴⁶ JUSTICE (n 28) para. 6.

⁴⁷ *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931, para. 43 (Lord Thomas).

⁴⁸ The absence of fixed time limits on immigration detention and automatic judicial control is dealt with in other parts of this Commentary. See, respectively, Part 4 and Part 2(b).

⁴⁹ *J.N. v UK* [App No 37289/12](#) (ECtHR, 19 May 2016) paras. 97–99, referring to the *Hardial Singh* principles.

⁵⁰ JCHR (n 21) para. 198.

⁵¹ Emphasis added.

may also take into account practical matters relating to arranging appropriate conditions for release. Despite this concession, domestic courts have underlined the need for close judicial scrutiny to prevent an ‘over-liberal approach’ to the question of grace periods,⁵² highlighting that in such instances ‘the Secretary of State continues to detain on borrowed time’.⁵³ Accordingly, by referencing the opinion of the Secretary of State, section 12 ‘appears to confer more discretion than the limited “grace period” for making such arrangements held to be lawful by the courts’.⁵⁴

Removing the ability of the courts to objectively assess whether detention has continued beyond a period that can be considered ‘reasonably necessary’ to organise arrangements for release also risks violations of the ECHR.⁵⁵ In *V.M. v UK (No 2)*, the European Court of Human Rights criticised the domestic courts for all too readily accepting that, had the applicant’s detention reviews been conducted correctly, she would likely have continued to be detained in any event pending the organisation of arrangements for her release. Accordingly, this judgment suggests that domestic courts must apply rigorous scrutiny in reviewing the compliance of grace periods with a State’s obligations under Article 5 of the ECHR, departing from the assumption that ‘[i]t is for the Contracting States to organise their systems in such a way that their authorities can meet the obligation to avoid unjustified deprivation of liberty’.⁵⁶

b. Absence of Automatic Court Control

As set out in the Safeguarding Principles, the right for individuals to challenge their detention before a court at any time during their detention (SP21: Judicial Review) should be complemented by a system of automatic court control (SP22: Automatic Court Control). To ensure a rule of law-compliant approach to immigration detention, these principles should operate in harmony, rather than as alternatives. Automatic court control of the lawfulness of detention should be applied in the period immediately following an administrative detention decision. It should also be conducted at regular intervals thereafter to ensure that detention continues to be necessary to achieve its stated purpose (SP8: Necessity), that this purpose remains achievable within a reasonable timeframe (SP10: Achievability) and that the overall period of detention does not exceed what is reasonable in light of the individual circumstances of the case (SP12: Maximum).

In the UK, the only automatic judicial oversight of immigration detention comes after an individual has already spent four months detained under immigration powers, whereupon a referral must be made to the First Tier Immigration and Asylum Tribunal for consideration for immigration bail.⁵⁷ However, this duty does not extend to individuals detained in connection with deportation proceedings⁵⁸—an exclusion that is highly problematic in light of the fact that this cohort remains the most likely to be detained for excessively long periods.⁵⁹ More fundamentally, the purpose of a bail hearing is to review the possibility of release under alternatives to detention (SP9: Alternatives), rather than to examine the lawfulness of detention *per se*.⁶⁰ Accordingly, there is no system in place whereby courts must

⁵² *R (AC (Algeria)) v Secretary of State for the Home Department* [2020] EWCA Civ 36, para. 2 (Lord Irwin).

⁵³ *Ibid* para. 29.

⁵⁴ [‘Joint Civil Society Briefing on the Illegal Migration Bill’](#), 3 May 2023, p. 29.

⁵⁵ JCHR (n 21) para. 200.

⁵⁶ *V.M. v UK (No. 2)* (n 18) paras. 38–39.

⁵⁷ Immigration Act 2016, Schedule 10, para. 11(1).

⁵⁸ *Ibid*. This applies to individuals detained under Schedule 3, para. 2 of the Immigration Act 1971 or section 36 of the UK Borders Act 2007.

⁵⁹ See the criticisms set out in Home Affairs Committee, [‘Immigration Detention—Fourteenth Report of Session 2017–19’](#) (HC 913), 21 March 2019, paras. 197–201.

⁶⁰ See Courts and Tribunals Judiciary, [‘Guidance on Immigration Bail for Judges of the First-tier Tribunal \(Immigration and Asylum Chamber—Presidential Guidance Note No 1 of 2024\)’](#) (Implemented on 31 January 2024), para. 7: ‘When considering whether to grant bail, judges are not deciding whether continued detention is lawful.’
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automatically review the lawfulness of detention imposed under immigration powers (either initially or on a periodic basis).

As highlighted in the Safeguarding Principles, many European countries recognise strict time limits for imposing immigration detention without oversight and confirmation from a judicial body (SP22: Automatic Court Control). The absence of comparable safeguards in the UK has been a consistent source of criticism. Inquiries conducted by the Home Affairs Committee and Joint Committee on Human Rights both put forward recommendations for immigration detention orders to be automatically reviewed by a court within the first 72 hours,⁶¹ while similar recommendations have been made by non-governmental organisations active in the sector.⁶² It should be noted that, following an independent review into the welfare of vulnerable persons in immigration detention in 2016, the Home Office introduced a Detention Gatekeeper (DGK) function that seeks to review all immigration detention orders within the first 24 hours.⁶³ Nonetheless, this cannot be considered a substitute for judicial review, not least because the DGK continues to operate as an internal Home Office function.⁶⁴

Alongside ensuring automatic judicial oversight over the initial decision to detain, the Safeguarding Principles underline the need to ensure that immigration detention is reviewed periodically by a court to ensure its continued lawfulness (SP22: Automatic Court Control). Such a function would serve a particularly important safeguarding function in the UK context given the absence of a statutory maximum period of immigration detention (SP12: Maximum).⁶⁵ Currently, however the only mechanisms in place for reviewing the continued legality of immigration detention on a periodic basis are situated within the Home Office.⁶⁶ As with the Detention Gatekeeper function, there continue to be serious concerns around the quality and independence of existing Home Office mechanisms of administrative review and their effectiveness in preventing periods of unlawful detention.⁶⁷ This is reflected in the high levels of compensation that continue to be paid out for proven cases of unlawful immigration detention.⁶⁸

⁶¹ Home Affairs Committee (n 59) para. 38; JCHR, [‘Immigration Detention—Sixteenth Report of Session 2017–19’](#) (HC 1484/HL Paper 278), 7 February 2019, para. 74.

⁶² See, for instance, Detention Action, Medical Justice and Bail for Immigration Detainees (n 14) para. 23.

⁶³ Detention Guidance (n 7) p. 30.

⁶⁴ JCHR (n 61) paras. 33–34.

⁶⁵ All-Party Parliamentary Group (APPG) on Refugees and the APPG on Migration, [‘Report of the Inquiry into the Use of Immigration Detention in the United Kingdom’](#), 3 March 2015, p. 48. See Part 4 of this Commentary on the safeguarding issues prompted by the lack of a statutory time limit on immigration detention.

⁶⁶ This includes a monthly review carried out by an immigration officer, together with an additional review carried out (at least) every three months by a Case Progression Panel. For further details, see Detention Guidance (n 7) pp. 31–34.

⁶⁷ JCHR (n 61) paras. 33–38.

⁶⁸ In the financial year ending 31 March 2025, the Home Office paid out a total of £10.4m in relation to 334 cases of unlawful detention. Home Office, [‘Annual Report and Accounts 2024–2025’](#) (HC 1133), 17 July 2025, p. 190.

3. Alternatives to Detention

The Home Office recognises that immigration detention should only be authorised after having considered all reasonable alternatives—an approach that is consistent with the understanding that immigration detention can only be resorted to as a measure of last resort (SP8: Necessity). Nonetheless, concerns arise under the Safeguarding Principles when it comes to the regulation of alternatives to detention (ATDs). These concerns centre around the scope of powers to impose immigration bail conditions under Schedule 10 of the Immigration Act 2016, which are not limited to circumstances where that individual could otherwise be detained lawfully (SP9: Alternatives).

Concerns are also raised by section 46 of the BSAIA, which foresees the extension of immigration bail conditions to individuals who have been granted limited leave to enter or remain in the UK (and who are therefore not liable to immigration detention). The security-oriented nature of this measure introduces risks of discrimination on the basis of immigration status (SP2: Equality), while the broad formulation of this provision provides limited safeguards against the extensive use of restrictions on liberty permitted under these powers.

Finally, brief consideration is given to the suitability of accommodation provided for asylum seekers within so-called 'quasi-detention facilities'. While the persons housed in these facilities are formally at liberty (and not subject to an ATD under immigration bail), the nature of the environment and the conditions attached to residence are such that they may amount de facto to unlawful deprivation of liberty.

Relevant Safeguarding Principles

SP1. LIBERTY. Everyone, whatever their immigration status, has a basic right to liberty.

SP2. EQUALITY. The right to liberty must be enjoyed without discrimination of any kind, including on the basis of immigration status.

SP6. INDIVIDUALISATION. Detention must be based on due appraisal of the individual's circumstances.

SP8. NECESSITY. Detention must be a last resort and sufficiently closely connected to the legitimate aim as to be necessary to achieve it.

SP9. ALTERNATIVES. Alternatives to detention must be sought and applied on the basis of minimum intervention.

Analysis

a. Schedule 10 of the Immigration Act 2016

As detailed in the Safeguarding Principles, immigration detention can only be imposed a matter of last resort—that is, after it has been established that the relevant immigration aim cannot be achieved through less coercive means (SP8: Necessity). This principle is reflected in the Home Office's published policy on immigration detention. This establishes a 'presumption in favour of granting immigration bail', noting that 'there must be strong grounds for believing that a person will not comply with conditions

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of immigration bail for detention to be justified', while 'all reasonable alternatives to detention must be considered before detention is authorised'.⁶⁹ Significantly, this general policy applies to *all* forms of immigration detention, including cases involving the deportation of foreign national offenders.⁷⁰

While ATDs are intended to be less intrusive than depriving an individual of their liberty, they may nonetheless involve considerable restrictions on personal freedoms. Accordingly, the Safeguarding Principles recognise that ATDs must be guided in their use by strict safeguarding considerations (SP9: Alternatives). Key amongst these is the principle that ATDs are permissible only where detention would otherwise be justified. In other words, ATDs must never be imposed as an alternative to unconditional release where detention cannot (or can no longer) be imposed lawfully—for example, when deportation, expulsion or removal is no longer a viable objective' (SP7: Legitimate Aim).⁷¹ The UK Supreme Court has expressed a similar position, noting that '[a]s a matter of legal instinct, the proposition that the ability to exercise a lawful power to detain is a precondition to a power to grant bail seems entirely sound'.⁷²

The use of ATDs in the UK is governed by Schedule 10 of the Immigration Act 2016, which authorises the Secretary of State to grant immigration bail in two scenarios: where an individual is currently being detained under one of the relevant statutory powers, or where they are 'liable to detention' under those powers.⁷³ However, in contrast to the position developed within the Safeguarding Principles (and with the express intention of reversing the Supreme Court judgment in *B (Algeria) v Secretary of State for the Home Department*), **Schedule 10 of the Act clarifies that the imposition of bail restrictions is not dependent on whether that individual can be detained lawfully**.⁷⁴ This was confirmed by the Court of Appeal in *R (Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ 1875, which concluded that the phrase 'liable to detention' within Schedule 10 simply requires the *existence* of a power to detain, and not that this power is capable of being exercised lawfully in line with the *Hardial Singh* principles.⁷⁵

There remain, nonetheless, limits to whether such a power can be considered to continue to exist for the purpose of imposing immigration bail conditions. For instance, this power will cease to exist where there is no longer 'some prospect' of achieving the aim for which it has been conferred (such as deportation), regardless of whether this aim continues to be actively pursued by the Secretary of State (SP10: Achievability).⁷⁶ In a recent judgment of the High Court, it was duly held that the electronic monitoring condition had been imposed unlawfully as there was factually 'no prospect' of the claimant's removal to Turkey under deportation powers, and he was therefore not liable to detention within the meaning of Schedule 10 of the Immigration Act 2016.⁷⁷

⁶⁹ Detention Guidance (n 7) p. 14.

⁷⁰ *Ibid* pp. 6–7.

⁷¹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and their Connection with Other Human Rights, [CMW/C/GC/5](#), 21 July 2022, para. 47.

⁷² *B (Algeria) v Secretary of State for the Home Department* [2018] UKSC 5, para. 48 (Lord Lloyd-Jones).

⁷³ Immigration Act 2016, Schedule 10, paras. 1(1) and 1(2).

⁷⁴ *Ibid* para. 1(5). The Explanatory Notes clarify that one of the express aims behind the introduction of Schedule 10 was to reverse the Supreme Court judgment in *B (Algeria)* (n 72). Home Office, '[Explanatory Notes to the Immigration Act 2016](#)', para. 286.

⁷⁵ *R (Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ 1875. This relies on a distinction originally introduced by Lord Brown in *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39.

⁷⁶ *R (Khadir)* (n 75) para. 32.

⁷⁷ *R (Tasrikan) v Secretary of State for the Home Department* [2025] EWHC 2574 (Admin), paras. 67–70 (Lavender J).

b. Section 46 of the BSAIA 2025

Alongside Schedule 10 of the Immigration Act 2016, additional concerns are raised under the Safeguarding Principles by **section 46 of the BSAIA 2025**.⁷⁸ This amends section 3(1)(c) of the Immigration Act 1971 to permit a number of additional conditions to be imposed on individuals with limited leave to enter or remain in the UK who are deemed to pose a threat to national security or public safety, including electronic monitoring, curfews, geographical restrictions and 'such other conditions as the Secretary of State sees fit'.⁷⁹ According to the Government, the aim of this provision is to extend the kinds of restrictions available under immigration bail to individuals who, despite posing a threat to national security or public safety, have been granted limited leave on the basis that their removal or deportation from the UK is prohibited under domestic or international law.⁸⁰

From the perspective of the Safeguarding Principles, it is highly concerning that the use of ATDs applicable in the context of immigration proceedings could be extended to individuals who have limited leave to enter or remain in the UK, and who are therefore not 'liable to detention' under any of the existing statutory powers (SP9: Alternatives). The Government's explanation for the insertion of the corresponding clause in the Bill makes clear that the provision serves a strictly preventive public safety function, rather than contributing to the administration of immigration controls. In this respect, it should be recalled that purely preventive detention based on immigration status is prohibited, and will likely amount to unlawful discrimination given the absence of a link to a legitimate immigration aim (SP2: Equality; SP7: Legitimate Aim).⁸¹ Similar considerations would inevitably apply to the kinds of serious restrictions on liberty permitted by section 46.⁸²

In sum, the effect of section 46 would be to permit serious restrictions on liberty to be imposed indefinitely on individuals who cannot be removed from the territory on human rights grounds.⁸³ This is clearly very different to the situations under which such restrictions can currently be imposed on a grant of immigration bail (where at least 'some prospect' of removal or deportation must exist),⁸⁴ and as such constitutes 'an extraordinary overreach of power'.⁸⁵

The breadth of section 46, meanwhile, raises additional rule of law concerns, particularly in terms of the range of conditions permitted by section 46. While these were exhaustively enumerated in the former version of section 3(1)(c) of the Immigration Act 1971, the amendments introduced by section 46 permit

⁷⁸ This provision was added to the Bill by the Government at the House of Commons committee stage (originally as Clause 43).

⁷⁹ BSAIA 2025, section 46(1) and (2). This vastly exceeds the powers currently contained in section 3(1)(c), which permits restrictions on work and study, together with certain reporting and residence requirements.

⁸⁰ Minister for Border Security and Asylum, cited in JCHR (n 21) p. 52. As acknowledged in the Home Office's Supplementary Memorandum, immigration bail must cease (and a form of leave must be granted) when it becomes clear that an individual can no longer be removed from the UK. Home Office, '[Border Security, Immigration and Asylum Bill: European Convention on Human Rights Supplementary Memorandum](#)', 13 March 2025, para. 3.

⁸¹ As argued by Amnesty International, 'there is no reason to conclude that the national security or policing concerns raised by ministers have any particular connection to the nationality or immigration status of people in the UK': Amnesty International, '[Written Evidence Submitted to the Joint Committee on Human Rights \(BSAI0002\)](#)', 22 May 2025, para. 12.4.

⁸² While the analysis in respect of the Safeguarding Principles pertains to deprivation of liberty specifically, the same principle would apply to the kinds of serious restrictions on liberty permitted by section 46 of the BSAIA 2025, which would in most cases amount to interference with the right to private life (and may, in certain instances, even amount to a deprivation of liberty in themselves). JCHR (n 21) para. 143.

⁸³ The potentially indefinite nature of these restrictions is reflected in the fact, despite the lack of a prospect of removal or deportation, section 46 does not set any time limits on the use of these powers.

⁸⁴ See the discussion in Part 3(a) (above).

⁸⁵ Amnesty International (n 81) para. 12.2.

the imposition of ‘such other conditions as the Secretary of State thinks fit’.⁸⁶ As noted by the House of Lords Constitution Committee, this power is ‘notably broad’, granting excessive discretion to the Secretary of State to impose further restrictions on liberty.⁸⁷ Similarly broad discretion applies to the personal scope of the provision, which pursuant to section 46(2)(b) permits conditions to be imposed not only on individuals who have (or are suspected of having) committed sufficiently serious criminal offences, but also anyone who the Secretary of State considers to pose a threat to national security or public safety. Critically, despite the broad discretion conferred on the Secretary of State, the exercise of these powers is not subject to any legal safeguards, such as judicial scrutiny.⁸⁸

c. Asylum Accommodation

Another issue of growing concern in recent years has been the reception of asylum seekers in facilities formerly used as Immigration Removal Centres (IRCs) or military bases.⁸⁹ While used to house individuals who are formally at liberty pending the examination of their asylum claims, an inquiry conducted by the All-Party Parliamentary Group on Immigration Detention in 2021 concluded that these sites ‘are most accurately described as “quasi-detention”’, noting that they ‘replicate many of the features found in detained settings—including visible security measures, surveillance, shared living quarters, reduced levels of privacy and access to healthcare, legal advice and means of communication, and isolation from the wider community’.⁹⁰ Similar findings have been made in judicial proceedings. For instance, in concluding that the claimants had been subjected to inadequate reception conditions at the Napier Barracks, the High Court underlined how they had been accommodated ‘in a detention-like setting—a site enclosed by a perimeter fence topped with barbed wire, access to which is through padlocked gates guarded by uniformed security personnel’.⁹¹ Detention-like conditions have also been observed at Wethersfield airfield, the other former military site currently being used to accommodate asylum seekers.⁹²

Such conditions are unsuitable for asylum seekers provided with accommodation under section 95 of the Immigration and Asylum Act 1999. Moreover, as the cited sources indicate, they may also amount *de facto* to a deprivation of liberty based on the objective conditions of confinement (SP1: Liberty), even in the absence of an official detention order (SP4: Authority).⁹³ In this respect, it is concerning that the Government not only continues to make use of these sites for hosting asylum seekers who would otherwise be destitute, but has also communicated plans to expand on the use of these facilities for

⁸⁶ BSAIA 2025, section 46(2)(a).

⁸⁷ House of Lords Constitution Committee (n 21) para. 24.

⁸⁸ JCHR (n 21) para. 149: ‘Given the potential severity of interferences with the rights of individuals with any form of limited leave to remain, the exercise of these powers should be subject to judicial scrutiny.’

⁸⁹ See Medical Justice, [‘Medical Justice Annual Review: The State of Healthcare and Harm in UK Immigration Detention in 2024’](#), July 2025, p. 56, recommending the Government to ‘[a]bandon the use of former military barracks to accommodate those seeking asylum’.

⁹⁰ All-Party Parliamentary Group on Immigration Detention, [‘Report of the Inquiry into Quasi-Detention’](#), December 2021, p. 5. This inquiry investigated the conditions in Napier Barracks in Kent (which remains in use as asylum accommodation at the time of publication), Penally Camp in Wales and Tinsley House IRC in West Sussex (which was briefly used as asylum accommodation for some individuals in 2021).

⁹¹ *R (NB & Ors) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin), para. 163 (Linden J).

⁹² Helen Bamber Foundation, [‘Ghettoised and Traumatized: The Experiences of Men Held in Quasi-detention in Wethersfield’](#), December 2023.

⁹³ As the Safeguarding Principles make clear, such *de facto* conditions of detention will necessarily be unlawful due to the absence of a domestic legal basis (SP1: Liberty; SP3: Prescription).

asylum accommodation, earmarking former military sites in Inverness and East Sussex as part of an effort to end the use of asylum hotels.⁹⁴

⁹⁴ Nick Eardley and Maia Davies, 'Two Military Sites Earmarked as Asylum Seeker Accommodation' (*BBC News*, 28 October 2025) <<https://www.bbc.com/news/articles/cjr0lx7n0y3o>> accessed 11 December 2025.
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4. Absence of Statutory Time Limits

The UK does not set a statutory time limit on the maximum length of immigration detention, despite repeated calls from international and domestic bodies to introduce such a measure (SP12: Maximum). The absence of a statutory time limit undermines legal certainty and has been proven to have profound psychological effects on individuals detained under immigration powers. It has also been identified as a factor contributing to immigration casework inefficiencies, resulting in the unnecessary prolongation of detention while individuals' immigration status is resolved (SP11: Diligence). Accordingly, there have been widespread calls to introduce a 28-day statutory limit on the maximum period of immigration detention, extendable in exceptional cases following judicial approval. This should be accompanied by a system of periodic court control to ensure that the maximum is not routinely applied (SP22: Automatic Court Control).

Relevant Safeguarding Principles

SP11. DILIGENCE. Detention must be for the shortest time that is reasonably practicable. This requires the legitimate aim to be pursued diligently and expeditiously.

SP12. MAXIMUM. The period of detention cannot exceed what is reasonably necessary to achieve the immigration control aim and should be subject to a statutory maximum time limit resulting in immediate release.

SP22. AUTOMATIC COURT CONTROL. Detained persons must be brought promptly before a court to review the lawfulness of their detention. Such reviews must be conducted periodically by a judicial body until detention ceases.

Analysis

As the Safeguarding Principles point out, the period of detention cannot exceed what is reasonably necessary to achieve the relevant immigration control aim. This is reflected in the principle of proportionality applicable under Article 5(1)(f) of the ECHR and forms part of the *Hardial Singh* test in determining the lawfulness of immigration detention at common law (SP12: Maximum). Nonetheless, imposing a test of 'reasonableness' to determine whether the period of immigration detention has become excessive is necessarily context-specific, and thus fails to provide legal certainty to individuals detained under these powers. This has repeatedly been proven to have profound psychological effects on individuals held in immigration detention.⁹⁵ Relying exclusively on a test of reasonableness may also in practice result in very lengthy periods of detention under immigration powers. This presents as a particular issue for individuals detained in connection with a deportation process, whose detention for

⁹⁵ The British Medical Association (BMA), for instance, found that '[t]he indeterminate nature of immigration detention is a key cause of distress and anxiety': BMA, ['Locked Up, Locked Out: Health and Human Rights'](#) (2017), p. 28.

long periods has frequently been accepted as ‘reasonable’ owing to the threat that they are deemed to pose to the public.⁹⁶

In light of these challenges, the Safeguarding Principles advocate for statutory time limits on the length of immigration detention—an approach supported by extensive international authority (SP12: Maximum). In the UK, strict limits to the maximum length of immigration detention have been introduced for pregnant women,⁹⁷ unaccompanied children⁹⁸ and families with children.⁹⁹ However, the UK remains the only country in Europe which has not set a statutory limit on the maximum length of detention for the general population detained under immigration powers. As noted in the Brook House Inquiry report, the fact that individuals do not know how long they will be detained for under immigration powers means that detention is, by definition, indefinite.¹⁰⁰ This is borne out by the fact that immigration detention continues to be imposed for very long periods of time. The most recent statistics issued by the Home Office indicate that, in the year ending September 2025, approximately one third of the individuals leaving immigration detention had been detained for at least one month, with a worrying number detained for a period of over six months (2.1%, or 462 persons).¹⁰¹ Three individuals leaving immigration detention in that year had been detained under immigration powers for over 4 years.¹⁰²

This situation has been subject to widespread criticism, both internationally and domestically. Following its most recent visit to the UK in 2023, the European Committee for the Prevention of Torture (CPT) reiterated its concerns around ‘the negative impact that the open-ended nature of detention caused in individuals’, highlighting how ‘[t]he very fact that there is no maximum period of detention and that persons may be held for several years is a trigger for becoming mentally unwell regardless of the fact that the vast majority of persons spend fewer than 28 days in detention’.¹⁰³ The CPT also drew attention to the fact that, in the absence of a statutory time limit, immigration detention continues to be imposed for lengthy periods even where there appears to be no realistic prospect of the individual being returned (SP10: Achievability).¹⁰⁴ Calls for a statutory time limit on immigration detention were echoed in the United Nations Human Rights Committee’s 2024 report on the UK, which raised similar concerns around the length that some individuals have been detained under immigration powers in the absence of an upper limit.¹⁰⁵

⁹⁶ Graham Denholm and Rory Dunlop, *Detention under the Immigration Acts: Law and Practice* (Lisa Giovannetti QC ed, Oxford University Press 2015) para. 15.45.

⁹⁷ Immigration Act 2016, section 60.

⁹⁸ Immigration Act 2014, section 5.

⁹⁹ *Ibid* section 6.

¹⁰⁰ Kate Eves, [‘Brook House Inquiry Report: Volume 2’](#) (HC 1789-II), September 2023, Chapter D.4, para. 54. As other sources have noted, this approach stands in contrast to the strict time limits imposed on other forms of administrative detention in the UK, such as police and mental health detention. [‘Written Submission by Medical Justice and Bail for Immigration Detainees to the Joint Committee on Human Rights \(BSAI0033\)’](#), 22 May 2025, para. 4.

¹⁰¹ Home Office, [‘Immigration System Statistics, Year Ending September 2025’](#), 21 August 2025.

¹⁰² *Ibid*.

¹⁰³ [‘Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\) from 27 March to 6 April 2023’](#), CPT/Inf (2024) 08, 8 February 2024, para. 11.

¹⁰⁴ *Ibid*.

¹⁰⁵ Human Rights Committee, [‘Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’](#), CCPR/C/GBR/CO/8, 3 May 2024, paras. 42–43. See also the UNHCR, noting that ‘the lack of a time limit for detention has a significant impact on the welfare of detainees, in terms of their mental and physical health’ and calling for the UK to set a maximum in law on this basis. UNHCR, [‘Written Evidence submitted to the Home Affairs Committee \(IDD018\)’](#), 1 May 2018.

24 Applications in the UK Legal and Policy Context

Similar recommendations have emerged from domestic inquiries into immigration detention in the UK. Inquiries conducted by the All-Party Parliamentary Group on Refugees and the All-Party Parliamentary Group on Migration,¹⁰⁶ the Home Affairs Committee¹⁰⁷ and the Joint Committee on Human Rights¹⁰⁸ have all resulted in recommendations for the Government to introduce a maximum cumulative period of immigration detention of 28 days, extendable only in exceptional circumstances upon approval by a judge. More recently, recommendations for a 28-day limit on immigration were reiterated in the Brook House Inquiry report.¹⁰⁹ The Home Affairs Committee (among others) has highlighted that the lack of a statutory maximum not only ‘traumatises those who are being held, [but] also means that there is no pressure on the Home Office and immigration system to make swift decisions on individuals’ cases’, thereby contributing to a situation where ‘Home Office caseworking inefficiencies are unnecessarily prolonging people’s detention’ (SP11: Diligence).¹¹⁰ This is particularly relevant for individuals detained pending deportation after serving a custodial criminal sentence. As noted in the most recent annual report of the Independent Monitoring Boards (IMB), the Home Office frequently fails to initiate arrangements for removal while individuals are still serving their prison sentence, with the result that lengthy (and costly) periods of detention under immigration powers often ensue for those individuals.¹¹¹ A statutory limit on immigration detention could therefore precipitate a change in approach to ensure the swifter processing of these kinds of cases.

One argument often leveraged against the introduction of a statutory maximum length for immigration detention is that such a period will become normalised, thereby resulting in the routine application of the maximum in cases where only shorter periods of detention are justified.¹¹² Critically, however, setting a maximum period of detention does not mean that this should be routinely applied (SP12: Maximum). Indeed, the European Court of Human Rights has recognised that adherence to the legal maximum defined in national law ‘cannot automatically be regarded’ as justifying the length of detention under Article 5(1)(f) of the ECHR.¹¹³ A statutory maximum is therefore an upper limit that aims to avoid excessive detention and to provide certainty for detainees. It is not a ‘permission’ to detain that individual for the specified period—for instance, where it becomes evident at an earlier stage that there is no realistic prospect of deportation before the maximum is reached (SP10: Achievability). To this end, it has been suggested that the implementation of a statutory maximum must be accompanied by safeguards ‘to ensure that this maximum does not become a default period of detention that is routinely applied’, including by ensuring ‘that a robust and individualised review of detention occurs on a regular basis’.¹¹⁴

¹⁰⁶ All-Party Parliamentary Group on Refugees and the All-Party Parliamentary Group on Migration, [‘Report of the Inquiry into the Use of Immigration Detention in the United Kingdom’](#), 3 March 2015, p. 33.

¹⁰⁷ Home Affairs Committee (n 59) para. 244.

¹⁰⁸ JCHR (n 61) para. 68.

¹⁰⁹ The latter recommendation was expressly rejected by the Government on the basis that ‘[a] time limit would significantly impair the ability to remove those who have breached immigration laws and refused to leave the UK voluntarily’: [‘Government Response to the Public Inquiry into Brook House Immigration Removal Centre’](#), 19 March 2024, para. 6.3.2. However, Detention Action, Medical Justice and Bail for Immigration Detainees (n 14) have noted that, generally speaking, ‘[t]hose spending longer in detention go on to be released into the community at high rates’ (para. 17). This calls into question the need for lengthy periods of detention to ensure removal.

¹¹⁰ Home Affairs Committee (n 59) paras. 221, 166. See also JCHR (n 61) para. 68, noting that ‘the lack of a time limit on immigration detention reduces the incentive for the Home Office to progress cases promptly which would reduce both the impact on detainees, and detention costs’.

¹¹¹ Independent Monitoring Boards (IMB), [‘National Annual Report 2024: Adult Prisons, Young Offenders and Immigration Detention’](#), June 2025, p. 36.

¹¹² See, for instance, McFarlane LJ’s comments in *R (JS (Sudan)) v Secretary of State for the Home Department* [2013] EWCA Civ 1378, para. 51.

¹¹³ *Auad v Bulgaria* App No 46390/10 (ECtHR, 11 October 2011) para. 131.

¹¹⁴ Home Affairs Committee (n 59) para. 226.

5. Places of Detention

In the UK, prisons continue to be widely used to detain foreign nationals under immigration powers, often following the completion of a custodial sentence for a criminal offence. This contradicts the basic principle that prisons should never be used for immigration detention (SP13: Environment)—a position which is consistent with the administrative and necessarily non-punitive nature of any deprivation of liberty imposed for immigration purposes (SP7: Legitimate Aim).

The practice of using prisons for immigration detention in the UK has also given rise to equality concerns (SP2: Equality), particularly when it comes to ensuring access to legal services (SP20: Legal Representation), permitting contact with the outside world (SP16: Contact) and preventing the detention of those at risk of harm (SP6: Individualisation).

This part of the Commentary additionally draws attention to the fact that special facilities reserved for immigration detention often reproduce elements of a carceral environment in terms of the physical design and regime applied. This contravenes the requirement under the Safeguarding Principles not only to avoid the use of prisons for immigration detention, but also to ensure that facilities used for this purpose do not otherwise reproduce aspects of a carceral environment (SP13: Environment).

Relevant Safeguarding Principles

SP2. EQUALITY. The right to liberty must be enjoyed without discrimination of any kind, including on the basis of immigration status.

SP6. INDIVIDUALISATION. Detention must be based on due appraisal of the individual's circumstances.

SP13. ENVIRONMENT. Detention must take place in a suitable, non-carceral setting, while also ensuring appropriate separation based on the age, gender and sexual orientation of detained persons.

SP14. CONDITIONS. Detention conditions must be humane and dignified.

SP16. CONTACT. Detained persons must not be held *incommunicado* and must be provided with the means to maintain contact with the outside world.

SP20. LEGAL REPRESENTATION. Every detained person is entitled to prompt legal assistance, together with guarantees of access to their legal representatives. Such legal assistance must be funded by the State.

Analysis

A broad international consensus points to the unsuitability of prisons to detain individuals under immigration powers (SP13: Environment). As outlined in the Safeguarding Principles, States must ensure an environment and regime that is consistent with the administrative and non-punitive nature of immigration detention—a requirement that can never be met in prisons, given their function within the criminal justice system. Importantly, States cannot circumvent this requirement by separating those detained under immigration powers from the general prison population. Nor is it acceptable to reserve

the practice of using prisons for time-served foreign national offenders (TSFNOs) pending their deportation. In such cases, the individual concerned has completed their criminal sentence and should be transferred to a facility that reflects their legal situation as someone detained under immigration powers.

Despite clear international standards on this issue, the practice of using prisons for immigration detention continues to be a widespread practice in England and Wales, operating under a service level agreement between His Majesty's and Probation Service (HMPPS) and the Home Office.¹¹⁵ According to the Home Office's Detention Guidance, '[t]he normal expectation is that the prison beds made available by HMPPS will be used to hold time served foreign national offenders (FNOs) who are assessed as unsuitable for detention within the immigration removal estate'.¹¹⁶ However, *any* foreign national detained under immigration powers may be transferred to the prison estate if they meet the relevant risk criteria.¹¹⁷ Moreover, there is a 'normal expectation' that any remaining prison bed spaces made available under this agreement will be allocated to TSFNOs regardless of whether they meet the relevant risk criteria.¹¹⁸ In the year ending September 2025, 2,847 individuals were recorded as entering the prison estate under immigration powers, representing approximately 13% of the total population entering immigration detention over the course of that year.¹¹⁹

The policy of detaining foreign nationals in prisons under immigration powers has attracted sustained criticism, including from international monitoring bodies. Following its most recent visit to the UK, the CPT reiterated that:

as a matter of principle, it considers that persons who have served their prison sentence should not continue to be held in prison under immigration legislation but should be transferred to an IRC. This is because immigration detention should not be punitive in character: it is not a sanction or a punishment. Therefore, persons in immigration detention should be afforded both a regime and material conditions appropriate to their legal situation.¹²⁰

The CPT also raised specific concerns around cases where individuals detained under immigration powers were 'held for prolonged periods in prison, locked up 23 hours a day in their cells in poor conditions with little prospect of removal', highlighting that such factors taken cumulatively could amount to inhuman or degrading treatment or punishment in violation of the UK's international human rights obligations (SP14: Conditions).¹²¹

The use of prisons for immigration detention also raises issues around equality of treatment (SP2: Equality). Various observers have drawn attention to the fact that 'immigration detainees held in prisons [are] substantially disadvantaged in terms of legal safeguards and welfare when compared with those in IRCs'.¹²² A report by HM Chief Inspectorate of Prisons highlighted how, unlike persons detained in IRCs, persons detained under immigration powers in prisons are not given mobile phones or access to

¹¹⁵ Detention Guidance (n 7) p. 50. The use of prisons for detention under immigration powers is authorised by the Immigration (Places of Detention) Direction 2021, para. 3(f).

¹¹⁶ Detention Guidance (n 7), p. 50.

¹¹⁷ The criteria are set out in pp. 50–51 of the Detention Guidance. These cover, among other things, threats to national security, previous criminality of a sufficiently serious nature and violent or disruptive behaviour during custody.

¹¹⁸ *Ibid* p. 50.

¹¹⁹ Home Office (n 101).

¹²⁰ CPT (n 103) para. 96.

¹²¹ *Ibid* para. 97.

¹²² HM Chief Inspector of Prisons (HMCIP), ['The Experience of Immigration Detainees in Prison'](#), September 2022, p. 3.

the internet and have fewer opportunities for visits (SP18: Contact).¹²³ They are also unable to benefit from specific safeguarding procedures applicable in IRCs, and particularly the Rule 35 process, which requires identified risks of deteriorating health, suicidal ideation or signs of torture to be communicated to the Home Office to trigger an administrative review of the suitability of detention (SP6: Individualisation).¹²⁴ Concerns around unjustified differences in treatment are exacerbated by inconsistencies that have been reported in the application of the criteria for detaining foreign nationals in prisons under immigration powers, together with the lack of any opportunity to challenge this decision.¹²⁵

A recurring issue of concern has been discrepancies in access to legal advice between people detained under immigration powers in prisons and IRCs (SP20: Legal Representation). As several observers have noted, effective access to quality legal advice remains challenging for the immigration detention population generally.¹²⁶ However, these challenges are exacerbated for individuals detained under immigration powers in prisons, who have historically been deprived of arrangements comparable to the Detention Duty Advice Scheme (DDAS) available in IRCs.¹²⁷ A High Court ruling found that this discrepancy amounted to unlawful discrimination under Article 14 of the ECHR.¹²⁸ That decision resulted in HMPPS introducing a similar legal advice scheme for persons held under immigration powers in prisons. However, reports indicate that the implementation of this scheme has been 'patchy', with limited awareness of this entitlement among detained persons and prison and Home Office staff.¹²⁹ The CPT's recent monitoring visit highlighted that access to legal advice in prisons continues to be 'far more challenging than in an IRC where there is a welfare team on site and clear support to access legal advice'.¹³⁰

In addition to categorically avoiding the use of prisons for immigration detention, the Safeguarding Principles underline that active steps should be taken to ensure that immigration detention facilities do not reproduce elements of a carceral environment (SP13: Environment). In this regard, it is concerning that most UK IRCs are either converted prisons or have been built to Category B prison standards.¹³¹ These concerns were echoed in the public inquiry into treatment at the Brook House IRC, which concluded that '[t]he prison-like environment was harmful and inappropriate for all detained people, even for those who had served a prison sentence'.¹³² Criticisms have also been aimed at the use of carceral methods of population management in IRCs, and particularly the use of so-called 'lock-ins' (during which detained persons are restricted to their cells for extended periods). This was highlighted by the Brook House Inquiry, which found that the excessive confinement of the population in cells was inappropriate in light of the administrative nature of immigration detention.¹³³ Such restrictions are also

¹²³ Ibid para. 1.2.

¹²⁴ Ibid paras. 2.50–2.52. See Part 6 below for a discussion on shortcomings of the Rule 35 process in IRCs.

¹²⁵ CPT (n 103) paras. 98, 104.

¹²⁶ Anna Lindley, 'Hit and Miss'? Access to Legal Assistance in Immigration Detention' (2021) 13 *Journal of Human Rights Practice* 629.

¹²⁷ This policy is designed to ensure access to an initial 30-minute consultation with a legal aid solicitor for individuals held in IRCs.

¹²⁸ *R (SM) v Lord Chancellor* [2021] EWHC 418 (Admin).

¹²⁹ HMCIP (n 122) paras. 2.39–2.41.

¹³⁰ CPT (n 103) para. 105.

¹³¹ APPG on Migration and APPG on Refugees (n 65) p.41.

¹³² Brook House Inquiry Report (n 100) Chapter D.3, para. 10. This continues to be an issue of concern. See, for instance, the most recent annual report of the HMCIP, noting that '[a] longstanding and fundamental problem was that all immigration detainees at Brook House, who should be held in relaxed conditions with minimal restrictions, were instead in an institution that looked and felt like a prison': HMCIP, 'Annual Report 2024–2025' (HC 1030), 8 July 2025, p. 48.

¹³³ Brook House Inquiry Report (n 100) Chapter D.4, paras. 46–47.

not in keeping with the DCR, which expressly state that '[t]he purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible'.¹³⁴

¹³⁴ Detention Centre Rules 2001, Rule 3(1).

6. Vulnerable Populations in Immigration Detention

The lack of effective mechanisms for preventing the detention of vulnerable individuals under immigration powers continues to be widely recognised as a matter of major concern. Formal mechanisms are in place to prevent individuals at risk of harm from being detained under immigration powers (SP6: Individualisation). However, in practice, these mechanisms have proven largely ineffective in identifying vulnerabilities among the detained population and ensuring their release. This is exacerbated by broader shortcomings in the legal and policy framework. Contrary to the standards expounded in the Safeguarding Principles, the Home Office lacks a clinical procedure for identifying vulnerabilities prior to issuing a decision to impose detention under immigration powers. It also conducts a policy which allows for individuals accepted as being at risk of harm to remain in detention where this is outweighed by immigration or public security considerations (SP6: Individuals).

Relevant Safeguarding Principles

SP6. INDIVIDUALISATION. Detention must be based on due appraisal of the individual's circumstances.

SP14. CONDITIONS. Detention conditions must be humane and dignified.

SP15. HEALTHCARE. Detained persons must be medically assessed and must receive timely and appropriate treatment.

SP17. PRIVATISATION. (a) Where detention management is outsourced to a private actor, the State must ensure that human rights standards are upheld and protect detained persons against any violations. **(b)** A private actor managing any aspect of detention must respect human rights standards.

SP18. MONITORING. Independent monitoring of immigration detention facilities must be ensured, together with access to mechanisms for detained persons to complain about treatment in detention.

Analysis

As noted elsewhere in this Commentary, immigration detention powers must be used sparingly—that is, only when the same objective cannot be achieved through less coercive means (SP8: Necessity). Notwithstanding this general principle, immigration detention can *never* be justified where this would expose the individual concerned to a risk of serious harm to their mental and/or physical health. Detention will therefore be arbitrary when imposed without due regard for any vulnerabilities that individual may have. As set out in the Safeguarding Principles, States must also put procedures in place to identify these vulnerabilities and ensure that they are communicated to the authorities responsible for imposing and/or maintaining detention (SP6: Individualisation).

In the UK, these general principles are reflected in the AAR Guidance, which requires the authorities to assess the appropriateness of imposing or maintaining immigration detention when an individual is

identified as vulnerable to harm.¹³⁵ Under the AAR Guidance, decision-makers are required to categorise relevant indicators of risk according to three different levels of supporting evidence, weighing this against specific immigration control or public security considerations which favour the (ongoing) use of detention. This policy is supported by **Rule 35 of the DRC**, which obliges general practitioners (GPs) operating in IRCs to submit a report in the case of ‘any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention’ (Rule 35(1)); in the case of detained persons suspected of having suicidal intentions (Rule 35(2)); and in the case of detained persons who are possible victims of torture (Rule 35(3)).¹³⁶ Reports submitted under Rule 35(1) and (3) will trigger an automatic administrative review by a Home Office caseworker on whether to maintain detention under the AAR Guidance, while such reviews may also be carried out in response to a Rule 35(2) report if this contains information that engages the AAR Guidance.¹³⁷ **Rule 34**, meanwhile, is intended to contribute to the early identification of any risks of harm by guaranteeing a physical and mental examination by the onsite GP within 24 hours of an individual’s admission to an IRC.¹³⁸

Despite the existence of these formal safeguards, flaws in their practical implementation have been widely documented. In their most recent annual report, the IMB identified ‘systematic failures in these safeguards [...] across the [immigration] detention estate’,¹³⁹ while Medical Justice has similarly highlighted ‘the continuing systematic failure of clinical safeguards to effectively protect vulnerable people in [immigration] detention’.¹⁴⁰ A persistent issue of concern remains the chronic underutilisation of the Rule 35 mechanism for reporting risks of harm in immigration detention, with several sources highlighting how this procedure is used almost exclusively for communicating indicators of torture to Home Office decision-makers.¹⁴¹ Cases are therefore rarely flagged where the individual’s health is likely to be ‘injuriously affected’ by continued detention (under paragraph 1 of Rule 35) or where individuals are suspected of having suicidal intentions (under paragraph 2).¹⁴² This includes a failure to submit reports under Rule 35(2) in a large number of cases where individuals are being monitored by the Assessment Care in Detention Team (ACDT) as a result of being identified as at risk of self-harm and/or suicide.¹⁴³ Reports also point to substantial delays in organising Rule 35 appointments within IRCs, as well as delays in responses to these reports by the responsible team within the Home Office.¹⁴⁴

Even where risks of harm are identified and reported by medical staff, this rarely results in release.¹⁴⁵ Observers have noted that the Rule 35 reports themselves frequently provide limited details on the

¹³⁵ Home Office, [‘Adults at Risk in Immigration Detention’](#) Version 10.0 (21 May 2024), adopted in accordance with section 59 of the Immigration Act 2016.

¹³⁶ As noted in Part 5 of this Commentary, this does not apply to persons detained under immigration powers in prisons.

¹³⁷ AAR Guidance (n 135) pp. 28–29.

¹³⁸ As noted in the Brook House Inquiry Report (n 100) Chapter D.5, para. 9: ‘the two rules are designed to work together as a safeguard for vulnerable detained people at the start of detention’.

¹³⁹ IMB (n 111) p. 29.

¹⁴⁰ Medical Justice (n 89) p. 5.

¹⁴¹ See, for instance, Independent Chief Inspector on Borders and Immigration (ICIBI), [‘Third Annual Inspection of “Adults at Risk in Immigration Detention”: June—September 2022’](#), January 2023, para. 3.2. The continuation of this trend is supported by the Home Office’s own statistics. These demonstrate that, in the year ending September 2025, reports submitted under subparagraphs (1) and (2) of Rule 35 together comprised only 7% of all Rule 35 reports submitted over this period (190 out of a total of 2,667 reports).

¹⁴² Medical Justice (n 89) p. 34–36.

¹⁴³ CPT (n 103) para. 49; Medical Justice (n 89) p. 36.

¹⁴⁴ Medical Justice (n 89) pp. 42, 47.

¹⁴⁵ Figures presented by Medical Justice for 2024 indicate that the Home Office decided to maintain detention in 76% of cases where a Rule 35 report was submitted across all IRCs. Medical Justice (n 89) pp. 40–41.

impact of detention and/or inaccurate accounts of the individual's medical needs.¹⁴⁶ However, the low rate of release is also attributable to the fact that, under the applicable AAR policy, detention may be maintained if indicators of a risk of harm are deemed to be outweighed by immigration factors.¹⁴⁷ In this respect, the Safeguarding Principles stipulate that detention for immigration purposes can *never* be justified if this is likely to cause serious harm to the individual's physical and/or mental health, and that maintaining detention in such cases will *always* be disproportionate (SP6: Individualisation).¹⁴⁸ Furthermore, even where the Home Office has approved release following a Rule 35 report, multiple cases have been reported where individuals continue to be detained for extensive periods due to delays in making arrangements for appropriate accommodation.¹⁴⁹ As Medical Justice concludes, such delays effectively 'render[] the safeguarding function of Rule 35 meaningless'.¹⁵⁰

Concerns have also been raised around the effectiveness of existing mechanisms in the UK for identifying risks of harm in immigration detention. Contrary to the standards expounded in the Safeguarding Principles (SP6: Individualisation), the Home Office does not operate a clinical procedure for screening vulnerabilities *prior* to the initial decision to detain, with an initial health screening by a nurse and subsequent medical examination by a GP (pursuant to Rule 34 of the DRC) conducted only after an individual has been admitted to an IRC.¹⁵¹ The lack of such a procedure severely undermines the effectiveness of the Detention Gatekeeper (DGK) function in preventing the detention of vulnerable individuals at first instance, resulting in 'many highly vulnerable individuals not being identified and subsequently routed into detention'.¹⁵² Concerns have also been raised around the timeliness and thoroughness of Rule 34 examinations conducted in IRCs. While Rule 34 requires an appointment within 24 hours of an individual's admission to an IRC, in practice, it has been reported that these appointments often occur much later¹⁵³ or do not take place at all.¹⁵⁴ Despite the critical importance of this procedure in identifying needs that may trigger a Rule 35 report, where an individual fails to attend their appointment, it has been noted that there is generally a lack of follow-up on this by the Home Office or IRC healthcare staff.¹⁵⁵ Observers have also noted that Rule 34 appointments are often not scheduled for long enough to effectively identify any safeguarding needs,¹⁵⁶ while more general concerns have

¹⁴⁶ Brook House Inquiry Report (n 100) Chapter D.5, paras. 34–41; Medical Justice (n 89) p. 34; CPT (n 103) para. 75. For a list of factors understood to contribute to the prevalence of poor quality of Rule 35 reports, see ICIBI (n 141) para. 7.20.

¹⁴⁷ The Home Affairs Committee has noted how the AAR Guidance introduced a lower threshold for maintaining the detention of vulnerable individuals when compared to the previous safeguarding policy operated by the Home Office. Accordingly, it has urged the Government 'to abolish the three AAR levels of risk and to revert to its previous policy of a presumption not to detain vulnerable individuals except "in very exceptional circumstances"': Home Affairs Committee (n 59) para. 199.

¹⁴⁸ As noted in the CPT report (n 103) para. 75: 'if the Rule 35 mechanism is to be an effective safeguard for persons detained in IRCs, Home Office officials should not be in a position to overrule the assessment of a healthcare professional that detention is injurious to the welfare of a particular person'.

¹⁴⁹ See, for instance, IMB (n 111) p. 29, noting that '[m]any people [...] remained in detention for months after a doctor had assessed that they would be at risk of harm from detention, despite the Home Office having decided that the risk of harm outweighed immigration control considerations and that they should be released. This was often due to the lack of effective pathways to appropriate support for them'. See also CPT (n 103) para. 74.

¹⁵⁰ Medical Justice (n 89) p. 41.

¹⁵¹ Brook House Inquiry Report (n 100) Chapter D.5, paras. 8.1–8.2.

¹⁵² Medical Justice, '[If He Dies, He Dies: What Has Changed since the Brook House Inquiry?](#)', December 2023, p. 26.

¹⁵³ IMB (n 111) p. 28; Brook House Inquiry Report (n 100) Chapter D.5, para. 14.

¹⁵⁴ Brook House Inquiry Report (n 100) Chapter D.5, para. 12.

¹⁵⁵ ICIBI (n 141) para. 3.4. As noted in the Brook House Inquiry Report, a detained person is free to refuse a Rule 34 appointment. However, given a lack of awareness of its function as a safeguarding mechanism, this decision is often not properly informed. Brook House Inquiry Report (n 100) Chapter D.5, para. 13.

¹⁵⁶ Brook House Inquiry Report (n 100), Chapter D.5, para. 15.

been raised around the lack of any procedures within IRC healthcare to systematically identify indicators of modern slavery to engage the AAR Guidance and prompt a referral to the National Referral Mechanism (NRM).¹⁵⁷

The issues identified around safeguarding in the UK go beyond a failure to route vulnerable persons out of immigration detention. Multiple sources have reported that staff working in IRCs continue to resort to the use of physical force and removal from association to manage individuals at risk of self-harm or with mental health disorders—for instance, the 2024 annual report of the IMB highlighted how '[p]eople with complex mental health issues were [...] held in CSUs [care and separation units] for prolonged periods due to the lack of alternative, appropriate means to care for them, and as they were often unable to cope amongst the general population'.¹⁵⁸ This underlines how systematic failures in the operation of the safeguards contained in Rule 34 and Rule 35 has not only resulted in the inappropriate detention of vulnerable individuals, but has also exposed such persons to mistreatment in the form of unlawful use of force and segregation.¹⁵⁹

¹⁵⁷ Medical Justice (n 89) p. 23.

¹⁵⁸ IMB (n 111).

¹⁵⁹ Brook House Inquiry Report (n 100) Chapter D.5, para. 21.

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