Detention Action
END INDEFINITE DETENTION

Detention Action's Briefing on The Nationality and Borders Bill (July 2021)

Background

Successive Governments have failed to operate an effective and efficient asylum system, by failing to deliver timely and high quality decision-making. As a result, while asylum applications have decreased in recent years, delays in decision-making have hugely increased, leaving people in limbo, unable to work and re-settle, and causing unnecessary expense to the State through the use of detention and the costs associated with high numbers of successful appeals.

It is political will – rather than legislation – which is needed to deal with this issue. Nothing in the Nationality & Borders Bill will make the necessary improvements. Instead, taken together, the Bill's provisions will slow the process down, increase delays, increase destitution and mental illness, and will cost the country more while it destroys lives.

Yet while the Bill fails to deal with the real problems that exist in the system, it pretends that the problems lie elsewhere and proposes a host of regressive, authoritarian & discriminatory policies that will cause deep harm to our society. **Most worryingly the Bill gives the Government powers to establish off-shore detention centres to imprison asylum seekers indefinitely**, including pregnant women, torture & trafficking survivors. **It proposes an unprecedented expansion in the use of detention by treating all spontaneous asylum-seeking arrivals as inadmissible and criminal. It also proposes re-introducing a dangerous system of fast –tracked appeals which was ruled unlawful by the Court of Appeal in 2015, following a legal challenge by Detention Action.**

A U-turn on immigration detention

The Bill represents a U-turn on Government commitments to decrease the use of immigration detention, made initially following Stephen Shaw's Review into Immigration Detention in 2016 and repeated following his second review in 2018. This commitment was restated last year following cross party support for an immigration detention time limit, debated as an amendment to the Immigration and Social Security Coordination (EU Withdrawal) Bill in June 2020. Then, as now, MPs from all parties supported the need for a statutory time limit. Immigration Minister, Kevin Foster acknowledged the significant concern raised by many members of the House, saying, "*probably the strongest and most passionate speeches we have heard relate to detention time limits*." He also confirmed to the House of Commons on 30th June last year "*We are committed to keeping the use of immigration detention to a minimum."* [1] It is hard to see how this Bill is not in direct conflict with his assurances.

Currently, our system routinely detains people only to release them again, their detention having served no purpose in successfully concluding their immigration case. Consistently,

[1] 30th June 2020, www.Hansard.parliament.uk

each year, the majority of people detained will be released back into the community. The system is ineffective, inefficient, harmful and costly. Immigration detention costs the country over £30,000 per person detained per year, averaging about £100 million each year. In addition, unlawful detention claims are frequently settled or lost by the Home Office, which paid out £9.3m in compensation for 330 cases of unlawful detention in 20/21.[2]

The absence of a time limit rewards inefficient practice by the Home Office. This Bill's proposals will have the effect of drastically increasing the number of people who can be detained leaving them stuck in detention for longer. This will inevitably give rise to a huge surge in costs and unlawful detention payments.

Where detention is required detainees are entitled to accommodation that meets basic minimum standards. Again Kevin Foster on 30th June 2020 told the House of Commons, "*we are committed to ensuring that anyone who is detained is treated with dignity and housed in accommodation that is fit for purpose*." And yet, the Government's Independent Monitoring Board wrote in May 2021 after an inspection of Brook House IRC "*Brook House was not a safe place for vulnerable detainees… this amounted to inhumane treatment of the whole detainee population by the Home Office in the latter months of 2020*."[3] A separate public inquiry into abuse at Brook House in 2017 is currently ongoing.

How the Bill will increase detention

One of the main effects of Brexit on the asylum system is that the UK can no longer remove those who arrive in the to claim asylum to a European country that they travelled through on the way under the "Dublin III Regulation". This is a positive development. The Dublin III removals system is deeply flawed, allowing highly vulnerable (and often self-harming) people to be shunted around European countries, returning people to destitution and other unsafe situations. For logistical reasons the number of removals from the UK under the Dublin III Regulation was always relatively low but frequently included deeply traumatised survivors of torture and trafficking. In 2020 Detention Action supported 48 people who were detained for removal under this system and 35 of them (73%) had indicators of trafficking and modern slavery. The Dublin III returns system also undermined the spirit of the Refugee Convention which recognises the rights of people fleeing persecution to have some agency in choosing where they seek asylum. The UK courts have upheld this principle.[4].

Part 2 of the Bill tries to replicate the Dublin III returns system and apply it to the whole world. It declares asylum claims by EU nationals and anyone else who has travelled through a deemed safe third country, to be inadmissible. The HO will be able to pursue a person's removal not only to the particular third countries through which the person travelled, but to any safe country that may agree to receive them. These rules have been in place since January 2021 and nobody has been removed under this system as no bilateral arrangements have yet been agreed with any other country to accept people. Since this entire system

[2] Home Office Annual Report & Accounts 2020-21, available at - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1000127/HO_Annual_Report_and_Accounts_2020-21_FINAL_AS_CERTIFIED__accessible_.pdf

[3] Annual Report of the Independent Monitoring Board at Brook House IRC May 2021

[4] See ex parte Adimi [1999] EWHC Admin 765.

depends on the agreement of third countries, and none is forthcoming, the provisions are currently unworkable. Instead the main impact of this provision is to prolong the asylum process and will add to the detention estate since applicants will be forced into either accommodation centres or immigration removal centres while their case remains in limbo. Detention Action is already seeing those whose cases would have been liable to Dublin III returns, being detained.

The Bill also includes proposals to re-introduce a fast track system for appeals made by people held in detention under immigration powers. The power permits the Secretary of State to expedite certain cases, whilst providing minimal legal support and harshly penalising any delays in submitting evidence. Detention Action brought a successful legal challenge[5] to the last Detained Fast Track system which the Court of Appeal struck down as "structurally unfair and unjust" in 2015. The Fast Track system proposed by the Bill is likely unlawful, deeply harmful and will lead to serious miscarriages of justice.[6] Over 10,000 cases were heard under the old unlawful system between 2005-2015. By way of example, a young Ugandan lesbian woman was unsafely returned to Uganda after a DFT appeal where she was then subjected to gang rape.[7]

A new DFT will inevitably increase the number of cases deemed suitable to be expedited, cases will be clogged up in the court system and, for those whose cases fail, removal is unlikely to take place imminently. The use of immigration detention, and the length of its use, is therefore very likely set to expand.

The Bill introduces provisions to criminalise certain asylum claims where a person 'knowingly' enters the UK without prior permission to enter. However there are no visa arrangements in place to seek permission to make an asylum claim, and no exception has been made in the Bill for people who make genuine claims for asylum or who are genuine refugees. This criminalisation of asylum will affect tens of thousands of people, leading to people with legitimate cases serving time in prison for these new offences followed by continued immigration detention under immigration powers, again hugely adding to the numbers in the detention estate.

Offshore Detention and Processing

We are unreservedly opposed to the proposals contained in the Bill to send asylum seekers offshore for processing. The UNHCR reported on 8 July 2021 that the "*United Kingdom looking at the same ideas [as Australia] is a matter of deep concern to UNHCR because we see it as almost a neo-colonial approach. You pass it off to …African countries and you wash*

[5] R (Detention Action) v First Tier Tribunal and others [2015] EWCA Civ 840

[6] For a detailed explanation of the injustice that will be caused by a new DFT please see Detention Action's response to the Tribunal Procedure Committee consultation on the subject, available here - https://detentionaction.org.uk/wp-content/uploads/2018/11/Detention-Actions-response-to-the-TPCs-consultation-on-Tribunal-Rules-in-relation-to-detained-appellants-October-2018-1.pdf. The TPC concluded that there was no case for a Detained Fast Track

[7] The Guardian, 15 July 2020, Asylum seeker at centre of landmark case over UK's 'unfair' fast-track system https://www.theguardian.com/uk-news/2020/jul/15/asylum-seeker-at-centre-of-landmark-case-over-uks-unfair-fast-track-system

your hands with it. You might pay a lot of money… but nonetheless to shift the burden in that way without the safeguards is a problem."[8]

Such a plan for offshore processing would include all people arriving by boat, or other spontaneous means, to seek safety including women, pregnant women, the disabled, the elderly, victims of trafficking and children.

Australia began mandatory offshore detention of people arriving by boat in 2013 but had filled capacity (3,127 people) within a year. Since 2014 no new arrivals have been sent to the offshore detention facilities and instead the Australian navy has been deployed extensively to turn boats back. The policy of offshore detention did not deter people from making the crossing. Instead the navy was deployed to turn back boats. The Australian government has made a decision not to release details of "on-water" matters so it is impossible to know exactly how many boats are sent back to Indonesian waters.

Since 2013 the vast majority (over 70%) of those processed offshore have since been recognised as refugees, but Australian law prohibits them being given refugee status in Australia due to their mode of arrival by boat, so most remain hopelessly in limbo.

The costs of this system are astronomical. Processing costs alone since 2013 (for the total 3,127 people) amounted to $7,618 billion. But actual spending is even greater. For example, additionally in the same period, $87 million was paid to the Nauruan Government for visa fees to host refugees at a rate of $2,000 per person per month, and $40 million to Cambodia to resettle just seven refugees.[9]

There are well-documented extensive violations of human rights attributed to this policy. The International Criminal Court observed "*These conditions of detention appear to have constituted cruel, inhuman, or degrading treatment ("CIDT"), and the gravity of the alleged conduct thus appears to have been such that it was in violation of fundamental rules of international law.*"[10]

The Australian Government lacks control over the accommodation and treatment of refugees whose care it has delegated. It cannot prevent abuses taking place and remains accountable for the damaged incurred as a result.

This system does not save lives, it kills people more slowly and more remotely, starving them of hope and denying them a future.

Even setting aside humanitarian/civil liberties concerns, the UK cannot simply ape the Australian offshore scheme and deploy the navy to return asylum seekers to France or any

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[8] UNHCR's Guide to Asylum Reform in the United Kingdom, available at - https://www.unhcr.org/uk/609123ed4/unhcrs-guide-to-asylum-reform-in-the-united-kingdom

[9] https://www.kaldorcentre.unsw.edu.au/news/australia-and-uk-focus-costs-detention

[10] https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf

other neighbouring country because they do not have and will not be able to get agreement from those countries to do so.

A more humane and effective alternative approach

The apparent trigger for this Bill is the rise in the numbers of people seeking protection across the Channel. The Home Secretary vowed to make this route "unviable" in 2019 and this claim now lies in tatters, as numbers have increased and continue to do so. This Bill provides a political distraction to this political failure and is promoted on the entirely baseless premise that people seeking asylum can be deterred from doing so.

The COVID pandemic & the closure of other safe routes to reach the UK has led to the increase in numbers of Channel crossings. However, the broader context is that UK asylum applications have decreased in recent years and contrary to popular myth, the UK is relatively low down the pecking order as a chosen asylum destination compared to our neighbours, for example France which receives four times the number of applications as the UK.

The reason why people cross the Channel is because of the UK-French juxtaposed controls which mean the UK operates a "border" at ports in France and pushes back and detains those who attempt to cross for the purpose of claiming protection. Unlike at every other point on the UK border, there is no working mechanism allowing people to make an asylum claim. The Home Office has confirmed that the nationalities of those making this crossing are overwhelmingly those for whom the majority of asylum applications will be upheld either at first instance or on appeal for example, Iran, Syria. [11]

A better way to 'take back control' of the UK border post Brexit would be to create a mechanism allowing those who have a realistic prospect of gaining protection in the UK to travel onwards to the UK to make a claim. By way of example a humanitarian vias could be issued at the UK border in France that would then allow those qualifying to make a substantive asylum claim in the UK. This would deal with the issue of small boat crossings, restore order and improve public confidence.

[11] See the annex to the Home Secretary's letter to the Home Affairs Select Committee, available here - https://committees.parliament.uk/publications/2333/documents/22962/default/