Joint Committee on Human Rights – Legislative Scrutiny of the Border Security, Asylum and Immigration Bill 2025

Joint submission by Medical Justice and Bail for Immigration Detainees

Introduction

1. This submission addresses Question 4(a) of the Joint Committee on Human Rights' (JCHR) call for evidence on the Border Security, Asylum and Immigration Bill, namely: "**The Bill will repeal the majority of the Illegal Migration Act 2023 (IMA), but will retain various provisions. Is the retention of Section 12 IMA compatible with the requirements of Article 5 ECHR, previously guaranteed by the common law application of the *Hardial Singh* principles?"**

2. Medical Justice[1] ("MJ") and Bail for Immigration Detainees[2] ("BID") have campaigned for many years on these issues and have produced this joint submission to assist the JCHR with how Section 12 of the Illegal Migration Act 2023 ("Section 12") has worked in practice and provide our view on whether it should be repealed.

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[1] Medical Justice is the only charity in the UK to send independent clinicians into all Immigration Removal Centres across the UK to visit detained people, to document their physical and mental scars of torture, serious medical conditions, the impact of detention on their health and injuries sustained during violent removal attempts. Evidence from this casework informs our research into systemic failures in healthcare provision, the harm caused by these shortcomings, and the toxic effect of immigration detention on the health of people in detention.

2 Bail for Immigration Detainees (BID) is an independent national charity established in 1999 to challenge immigration detention. We assist those held under immigration powers in removal centres and prisons to secure their release from detention through the provision of free legal advice, information and representation.

3. In summary, our position is that while Section 12 has yet to be the subject of detailed judicial examination, there are in reality only two possibilities: (i) that the provision is contrary to Article 5 ECHR; or (ii) that the provision has no effect at all. To date, the Home Office appears to have accepted in its policy documents that Section 12 does not expand the power to detain beyond what is already authorised by Article 5 ECHR and the department has appeared unenthusiastic about relying on it when defending unlawful detention claims. Nonetheless, we consider that Section 12 should be repealed because, even if the Home Office does not currently rely on it, it is causing significant uncertainty about the law. Moreover, if it were relied upon and had the effect that is contended for it in the Explanatory Notes to the Act, it would be clearly incompatible with Article 5 ECHR.

Background – Immigration Detention powers and the *Hardial Singh* principles

4. The government has, in theory, the power to detain people, for an indefinite period, pending their deportation and removal from the UK.[3] Save as regards to detention of children and pregnant women, there are no express statutory limits on the exercise of immigration detention powers, by contrast with the demanding requirements imposed on other administrative powers of detention such as police detention (under the Police and Criminal Evidence Act 1984), mental health detention

[3] There are a variety of statutory powers across different Immigration Acts, but the main powers are contained in Schedules 2 & 3 to the Immigration Act 1971.

(under the Mental Health Act 1983) and the detention of adults lacking mental capacity (under the Mental Capacity Act 2005).

5. In the absence of any explicit statutory limitations on the power to detain, the courts have implied four restrictions on the power to detain. These are known as the *Hardial Singh* principles after the leading case in which Lord Woolf (then a High Court judge and now a member of the House of Lords and previously a member of the JCHR) determined that immigration detention powers are subject to implied limitations.[4] The most important of the *Hardial Singh* principles is arguably *Hardial Singh* 3, which requires that the Home Office must release someone if and when it becomes apparent that it will not be possible to remove or deport the detained person within a reasonable period.

The Court as Primary Decision-Maker

6. Following the *Hardial Singh* case, judges in the Administrative Court have reviewed the legality of detention by applying the *Hardial Singh* principles and in each case decided for themselves whether or not those principles had been breached.[5] In a later case before the Court of Appeal, the Home Secretary argued that in fact the Court should limit itself to reviewing the decision taken by the Home Secretary on *Wednesbury* grounds i.e. whether the Home Office had taken a reasonable decision regarding whether the reasonable period of detention had expired. However, the

[4] *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704.
[5] For an early example, see Re Mahmod [1995] Imm AR 311.

Court of Appeal determined that it was for a court to determine for itself whether the principles had been breached.[6]

7. That distinction is important for both common law legality and Article 5. If the court's job is merely to review the decisions taken by the Home Office, then there might theoretically be situations where the court considers that the detention is unreasonable but it cannot find the detention to be unlawful because the Home Office has taken a reasonable decision about it which cannot be challenged on public law grounds (i.e. taken account of all the relevant facts and not reached an irrational conclusion).[7] That would mean that the court was deprived of its obligation to consider independently of the Home Office whether detention is justified and necessary.

Indeed, it is therefore unsurprising that the ECtHR agreed with the previous Government's arguments in the case of *J.N. v. the United Kingdom* that "in principle the system in the United Kingdom should not give rise to any increased risk of arbitrariness as it permits the detainee to challenge the lawfulness and Convention compliance of his ongoing detention at any time. In considering any such challenge, the domestic courts are required to consider the reasonableness of each individual period of detention"[8] The fact the Government then reversed its position despite its

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[6] *R(A (Somalia)) v Secretary of State for the Home Department* [2007] EWCA Civ 804 at §61.

[7] The possibility that this argument might be circular is addressed below.

[8] *J.N. v. The United Kingdom (Application no. 37289/12) 19/5/2016* at [30].

arguments before the ECtHR and that Court's decision in its favour, is extremely worrying to say the least.

Intention Behind Section 12 and Practical Impact

8. The previous government's intention behind Section 12 was to seek to reverse the impact of that Court of Appeal case. The Explanatory Notes to Section 12 stated:

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

9. On the face of it, it might be thought that Section 12 extends the power to detain by allowing the Home Office to detain people in situations where the court considers the detention to be unreasonable but the Home Office has a rational basis upon which to disagree. The possibility that the previous government introduced Section 12 in an attempt to obtain Parliamentary authorisation to detain individuals who an independent court, scrutinising the justification for detention, would consider should be released is alarming. Hence the obvious conflict with article 5(4), which requires access to an independent court or tribunal to challenge the legality of detention including whether it is justified and necessary.

10. There has not yet been an authoritative determination by the courts on the interpretation of Section 12. In some recent applications to the High Court for release from immigration detention, the court has made reference to Section 12 but has still

ordered the Home Office to release the detained person.[9] In other cases, the Home Office has not sought to rely on Section 12 and the application for release has proceeded as if the legislation did not exist.[10] MJ and BID have consulted with barristers who routinely appear in applications for release before the High Court and they have informed us that the Home Secretary often does not rely on Section 12 and that when she does raise it her representatives often appear reluctant to place much weight on it.

Home Office Uncertainty About Meaning of Section 12

11. It is possible that the reason why the Home Office appears to be so hesitant to rely on Section 12 is that it recognises that Section 12 does not comply with Article 5 ECHR and that it would be highly likely to be either read down under Section 3 of the Human Rights Act 1998 or declared to be incompatible under Section 4. It is, moreover, incoherent.

12. This view is reinforced by consideration of the Home Office's published policy which attempts to explain the interaction between Section 12 and Article 5 ECHR:

Although it is for the Secretary of State to determine what is a reasonable period to detain an individual for the specific statutory purpose, Article 5(1)(f) does not permit, periods of

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[9] *R(IS (Bangladesh)) v Secretary of State for the Home Department* [2023] EWHC 3130 (Admin) and *R(ER) v Secretary of State for the Home Department* [2023] EWHC 3187 (Admin).

[10] R*(Nakrasevicius) v Secretary of State for the Home Department* [2024] EWHC 1856 (Admin) and *R(Barizi) v Secretary of State for the Home Department* [2023] EWHC 3491 (Admin).

detention where there is no prospect of a decision or removal within a reasonable period of time. ***This change 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.***[11] (emphasis added)

12. In this passage, the Home Office appears to acknowledge that Section 12 does not have any real effect because Article 5 ECHR requires that no one can be lawfully detained where there is no prospect of removal within a reasonable period of time. That is because the permissible statutory purpose for the detention would not in such a case be made out.

13. The Home Office position illustrates the fundamental problem with Section 12. Either it is a piece of legislation which expands the Home Office's power to detain in circumstances which are impermissible under Article 5 ECHR, in which case it does not comply with Article 5 ECHR. Or, owing to its incoherence, it must be 'read down' by a court in order to ensure compliance with Article 5 ECHR, in which case it has no real effect at all.

MJ and BID's View on the Meaning of Section 12

[11] *Detention: General Instructions, Version 3.0*, published on 28 September 2023, Page 10. Accessible online at: https://assets.publishing.service.gov.uk/media/6509c3af22a783000d43e8cf/Detention+General+instructions.pdf

14. MJ and BID have consulted with lawyers who have advised that, if a court were required authoritatively to determine the meaning of Section 12, it would be highly likely to decide that it is of no effect. That outcome might be reached in a variety of ways:

1. The Court might 'read down' the legislation using Section 3 of the Human Rights Act 1998.
2. The Court might determine that any decision made by the Home Office about the reasonableness of determination should still be re-made by the Court because of the need for the Home Office to comply with Article 5 ECHR under Section 6 of the Human Rights Act 1998.
3. The Court might rely on the common law principle of legality in interpreting Section 12 and find that it is insufficiently clear to curtail a fundamental right.[12]

15. In addition, the Court might simply find that Section 12 does not have any effect on its own terms, contrary to the view expressed in the Explanatory Notes.

16. The Court is still required to review the Home Office's decision to detain using traditional public law principles i.e. that the decision must be *Wednesbury* reasonable and comply with the statutory purpose. However the *Hardial Singh* test is simply an expression of those principles in the particular context of immigration detention.[13]

[12] For an example illustrating the approach to statutory construction in this field, see *B (Algeria) v Secretary of State for the Home Department* [2018] UKSC 5; [2018] AC 418.
[13] *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [30].

Where the state is authorised to detain a person without an order of the court, upon challenge the court must be able to scrutinize whether the statutory purpose for detention exists and whether, if it exists, the power to detain is exercised reasonably in all the circumstances.

17. Whether a decision was *Wednesbury* unreasonable or not is a binary question: reasonableness is an objective concept in respect of which there is no room for discretion.[14] Whether the Secretary of State's decision that detention is reasonable is itself reasonable depends, therefore, on the question of whether the Court thinks detention is reasonable in the abstract. The Court must decide that on the facts: it is impossible to conceive of another way of deciding it. It follows that in the end Section 12 might fail to have any effect because it is circular; all it does apart from introducing unnecessary confusion is get the Court to re-phrase what it was already doing.

Reasons for Repeal

18. MJ and BID strongly support the repeal of Section 12 for the following reasons:

1. As the Supreme Court held in *Lumba* at [30], "*all that the Hardial Singh principles do is that which article 5(1)(f) does: they require that the power to detain be exercised reasonably and for the prescribed purpose of facilitating deportation*".[15] As the Lord Chief Justice, Lord Thomas held in *Fardous*, "*[i]t is this objective approach of the*

[14] *R v Department for Education and Employment ex p Begbie* [2000] 1 WLR 1115 at 1130B
[15] https://supremecourt.uk/uploads/uksc_2010_0062_judgment_6e523d0a53.pdf

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".[16] If therefore Section 12 does limit the jurisdiction of the High Court to protect the liberty of the subject then that would be a significant intrusion on one of the most important rights recognised by the ECHR and the common law. Parliament should not authorise detention in circumstances where the courts consider it to be unreasonable.

2. Section 12 generates considerable uncertainty. It is now over 18 months since the legislation came into force and even the Home Office itself does not appear to have a clear position on what Section 12 actually means and how it should be applied in practice. Section 12 has introduced uncertainty about the Court's role in reviewing the legality of detention, which had previously been settled.
3. Uncertainty is particularly harmful in the context of immigration detention (see e.g. *Lumba* at [34]). Detained people need to understand the basis on which they are held. Home Offide caseworkers need to know the law that they are applying. Putting to one side issues around legal aid funding, there are not enough lawyers with sufficient expertise in both immigration law and public law to represent everyone in immigration detention. Many detained people will not have access to accurate advice about the impact of Section 12 and may

[16] *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931 at [43]

be inappropriately dissuaded from bringing claims which challenge the legality of their detention.

4. As a matter of principle, Parliament should not seek to reverse judgments in which the Courts determine their own jurisdiction. Doing so offends against the UK constitution whereby Parliament makes the law and the Courts interpret the law. The *Hardial Singh* principles are a straightforward by-product of that process; Parliament legislated to create immigration detention powers and the Courts have interpreted the extent of those powers. Any changes to the scope of those powers should be made explicitly rather than by seeking to interfere with the Court's jurisdiction (particularly in so incoherent a manner).

The Home Office Should Focus on How It Uses Existing Powers

19. Even prior to Section 12, the Home Office had extremely broad detention powers. While the Courts protect the liberty of the subject using the *Hardial Singh* principles, they do so with careful consideration of the difficulties faced by the department. For example, even after the Courts have determined that detention is in breach of the *Hardial Singh* principles, the Courts permit a further period of lawful detention while the Home Office takes the necessary steps to allow a detained person to be released.[17]

[17] *AC(Algeria) v Secretary of State for the Home Department* [2020] 1 WLR 2893.

20. MJ and BID are concerned that the development of this 'grace period' of further detention is itself in breach of Article 5 ECHR and have intervened in a case before the European Court of Human Rights (ECtHR) to make submissions on that issue.[18] Section 12, if it has any effect as explained above, expands these powers in a manner that would be a further breach of Article 5 ECHR.

21. It is important to note that there is consistent evidence that immigration detention can cause serious, and in some cases irrevocable, damage to often vulnerable people,[19] and that this negative effect has been shown to be proportionate to the time spent in detention.[20]

22. There can be no question that, even before Section 12, the Home Office had sufficient powers to detain and remove people from the UK. MJ and BID believe that the real problem is how the Home Office uses its current powers to breach Convention and common law rights. The Brook House Inquiry, which published its final report on 19 September 2023, identified 19 instances where there was credible evidence that a detained person was subject to inhuman and degrading treatment, alongside a litany of systemic failings. The previous government's response to the Inquiry report,

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[18] *ASK v UK* Application no: 43556/20.

[19] For a summary of research on the effect of immigration on mental health for example, see Medical Justice (2022) Harmed Not Heard: Failures in Safeguarding for the Most Vulnerable People in Immigration Detention, 11-12.

[20] See M Von Werthern, K Robjant, Z Chui et al (2018) *The impact of immigration detention on mental health: a systematic review*, BMC Psychiatry 18: 382

published in March 2024, was notably poor[21]. Whilst the current government has accepted most of the Inquiry's recommendations,[22] there is little evidence available of progress on implementation; rather, it has chosen to keep in place changes made by its predecessors that run counter to the Inquiry's recommendations.[23]

Clause 41

23. BID and MJ also have grave concerns regarding the legality of paragraph Clause 41(17).

24. Clause 41 appears to be attempting to create a new power to detain those who are being considered for deportation, but in respect of whom no decision to deport has been made, and who either have not committed a sufficiently serious offence to trigger the automatic deportation powers, or who are otherwise not eligible for automatic deportation.

25. While BID and MJ consider that the creation of any further detention power is an unnecessary and retrograde step in light of the swingeing powers already on the

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[21] See Medical Justice (2024) *Government's Response to the Brook House Inquiry report – Analysis for Parliamentarians*

[22] https://questions-statements.parliament.uk/written-questions/detail/2025-01-10/23170

[23] For example, in April 2024 the previous government made changes to a key detention safeguard (the Adults at Risk in Immigration Detention policy) that reduced the protections for vulnerable detained people. These changes have been kept in place by the current government. For further details see: Secondary Legislation Scrutiny Committee (2024) *25th Report of Session 2023–24*; and Medical Justice, Bail for Immigration Detainees et al (2024) *Briefing on the revised Adults at Risk in Immigration Detention Statutory Guidance*

statute book, the provision in Clause 41(17) that the power should be "*treated as always having been in effect is*", insofar as it is intended to avoid liability for previous detention without a lawful power, is clearly contrary to Article 5 ECHR as well as well-established common law principles. As Lord Kitchin held in *R (Hemmati) v Secretary of State for the Home Department* [2019] UKSC 56:

It can be no answer to a claim for damages for unlawful imprisonment that the detention would have been lawful had the law been different.

Conclusion

26. In conclusion, MJ and BID ask that the JCHR recommends that the Bill should repeal Section 12. That would mark a return to, or confirmation of, the orthodox constitutional position whereby the High Court determines the lawfulness of a period of detention ordered by a civil servant. BID and MJ also consider that the government should refrain from introducing further detention powers via Clause 41.

27. MJ and BID would welcome the opportunity to provide further information or clarify anything in these submissions if asked to do so by the JCHR.

17 April 2025