



## **Border Security, Asylum and Immigration Bill**

### **Briefing for MPs – Public Bill Committee**

#### **About Us**

The Bar Council represents approximately 18,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

#### **Summary**

The Bar Council welcomes the parts of the Border Security, Asylum and Immigration Bill that will repeal those parts of previous legislation which served to undermine the rule of law and access to justice.

Although the Bar Council takes no position on the substantive policy choices underlying the Bill, it remains concerned about some of the provisions as they have implications for the rule of law, and limit access to justice. In summary these concerns focus on:

- Detention
- Fast-track immigration appeal procedures
- The crimes of arrival
- Border Security Commander
- Seizure of phones and use & retention of data from phones

#### **The Bill**

##### **Detention**

The Bar Council is concerned about the continuing legislative deviation from the well-established common law right to liberty (as well as from Article 5 of the European Convention on Human Rights (ECHR)) that may be best found in the principles set out in the case of *Hardial Singh*. Applying those principles, it is judges who decide whether detention is for a permitted purpose, whether it is reasonable in all the circumstances, and so on. With liberty being a fundamental right, judges are well-suited to protect it on grounds of expertise and their role in the constitutional order. Continuing legislative deviation from these standards in immigration laws perpetuates and extends the deviation from the common law, and, also from Article 5 ECHR standards.

In UK courts, this legislative deviation may limit the scope of the common law and the ECHR. However, Article 5 ECHR still applies and may lead those detained to seek recourse from the Court of Human Rights in Strasbourg rather than our domestic courts to secure its full protection. The Bill (which does not repeal the detention provisions of the last government's legislation, the Illegal Migration Act 2023) permits open-ended detention beyond what a High Court judge may consider

reasonable. This radical departure from common law standards of protection is of serious concern to the Bar Council both in terms of the rule of law and, specifically, access to justice.

### **Fast-track immigration appeal procedures**

The prospective use of the fast-track appeal regime which has not yet been deployed but which has attracted criticism and warrants particular focus is also of great concern to us. While the Bill repeals the Safety of Rwanda (Asylum and Immigration) Act 2024 and most of the Illegal Migration Act 2023, it leaves the Nationality and Borders Act 2022 with its new fast-track appeal regime (yet to be deployed) intact. Earlier fast-track schemes have been impugned by domestic courts for want of fairness and, if used, the 2022 fast-track provisions will fall to be tested for procedural fairness on the same basis.

Moreover, it is hard to see how such a system would not infringe the fundamental right to access to justice. Barristers who will be the guardians of this precious principle and at the coal face if the fast-track appeal scheme is deployed, will not be resourced well enough in terms of time or reasonable fees to be able to service this work. Without legal representation those who are already likely to be vulnerable will be further exposed to the risk of serious and potentially irreparable injustice and harm.

### **The crimes of arrival**

The Bill and its antecedents (especially the Nationality and Borders Act 2022) create cross-channel, extra-territorial crimes/interdiction regimes that inhibit the effective operation of the Refugee Convention and its role in allowing people to seek protection in the UK. Without adequate defences and safeguards, the UK's commitment in international law to applying the objects and purpose of that Convention in good faith is in jeopardy.

### **Border Security Commander (Part 1, Chapter 1, Clauses 1 to 12)**

The Bill makes provision for a designated Border Security Commander (Commander) to carry out the functions to change the UK's approach to border security. However, the proposed legislation is silent as to whether the Border Security Commander is subject to independent oversight. The Independent Chief Inspector of Borders and Immigration (ICIBI) was established by Parliament by section 48 of the UK Borders Act 2007, to monitor and report on the efficiency and effectiveness of immigration and customs officials at the border. The government has recently said that "the ICIBI role is a crucial, independent position, responsible for monitoring and reporting on the efficiency and effectiveness of the UK's border, immigration and citizenship system."<sup>1</sup> with which statement the Bar Council agrees. It is therefore important to ensure that the new proposed Border Security Commander is subject to the oversight of the ICIBI and that the Bill should be amended to make that clear. The lack of an express and appropriate oversight mechanism in this context may be said to represent a further incursion on the rule of law.

Second, the Border Security Commander's strategic priorities will impact the human rights of vulnerable persons, including refugees, children and victims of trafficking. This makes it important for the strategic priority document (Clause 3(2)) to be informed by experts. The Bill should be amended to require the Commander to consult with relevant statutory bodies (in particular, the Commission for Equality and Human Rights, the Equality Commission for Northern Ireland, the

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<sup>1</sup> <https://www.gov.uk/government/news/john-tuckett-named-as-preferred-candidate-for-icibi-role>

Independent Anti-Slavery Commissioner, the Victims Commissioners, and the Children's Commissioners for England, Wales, Scotland and Northern Ireland) and with civil society bodies concerned with the welfare of vulnerable migrants.

Third, to ensure public oversight of the Border Security Commander, the Home Office should publish directions and guidance for the Commander under Clause 9, save for good reason.

### Seizure of phones and use & retention of data from phones

The Bill would allow civil servants to access and keep information found on phones of persons who arrived at any port without a visa, or who entered without leave (Clause 23(1) and Clause 19). While police constables only have this power when authorised by a superintendent (Clause 23(2)), the Bill allows junior Home Office civil servants and immigration officers to do so without oversight. Clause 25 would allow Ministers to extend these powers to privately employed staff. The Bill does not require Ministers to issue directions on the exercise of these powers.

This also raises serious concerns as to the potential for violation of the rights of privacy and legal privilege of persons who may have entered the UK years ago and are engaged in legal proceedings against the Home Office. In *R(HM) v SSHD* [2022] EWHC 695 (Admin)<sup>2</sup> the Home Office conceded that it had adopted a secret blanket policy of seizing phones from persons arriving on small boats to harvest intelligence. It conceded that this policy was unlawful and contrary to Article 8 and Article 1/1 ECHR.

The Bill should be amended to limit the power to immigration officers with authorisation from at least immigration inspector level. If Home Office civil service staff are to be given this power, they should have equivalent authorisation. The Bill should require that, before the power is commenced, Ministers consult on and publish guidance on the exercise of the powers to uphold GDPR, human rights and legal professional privilege.

### Conclusion

The Border Security, Asylum and Immigration Bill requires greater scrutiny to ensure that it does not offend against the important principle of access to justice and the rule of law, especially insofar as detention is concerned. This requires a greater focus on the potential for breaching fundamental human rights, civil servants overstepping their function or usurping that of judges, and ensuring that a baseline of access to justice is afforded to those in most need of legal advice and representation. None of this is intended to be, nor should it be taken as, a challenge to the overall policy of the government which is not a matter upon which the Bar Council seeks to opine.

**The Bar Council**

**March 2025**

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<sup>2</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2022/695.html>