

Refugee Children's Consortium

The Asylum & Immigration (Treatment of Claimants etc...) Bill Committee Stage

DETENTION OF CHILDREN

THE AMENDMENT

New Clause 8

Detention by Secretary of State

(1) Section 62 of the Immigration, Nationality and Asylum Act 2002 (c41) (detention by the Secretary of State) shall be amended as follows.

(2) In subsection (1) insert the words "over the age of eighteen" after the word "person" in the first line

(3) After subsection (3) insert-

"(3A) A provision of Schedule 2 to that Act about a person who is detained or liable to detention under that Schedule shall only apply to a person over the age of eighteen.

(3B) Nothing in Schedule 2 to that Act or in this section shall permit the detention of a person if the result of that detention would be the detention of a person under the age of eighteen."

PURPOSE

The purpose of these amendments is to remove all powers to detain children under the age of 18 under immigration law and to ensure that children are not detained as the consequence of an adult being detained.

This amendment is supported by the members of the Refugee Children's Consortium: The Asphaelia Project, Association of Visitors to Immigration Detainees (AVID), Bail for Immigration Detainees (BID), Barnardo's, British Agencies for Adoption and Fostering (BAAF), Children's Legal Centre, Children's Rights Alliance for England, The Children's Society, FSU, The Immigration Law Practitioners' Association (ILPA), The Medical Foundation for the care of Victims of Torture, NCB, NCH, NSPCC, Refugee Council, Refugee Arrivals Project and Save The Children UK. The British Red Cross, UNICEF UK and UNHCR all have observer status.

INTRODUCTION

The Asylum and Immigration Bill contains proposals that will significantly reform the asylum and immigration system in the UK. The Bill fails to address the considerable concerns about children being held in immigration detention centres that have been highlighted most recently in reports by Her Majesty's Inspectorate of Prisons (HMIP). Government announcements made on 16 December 2003¹ do little to allay concerns about detention and in fact reinforce current practice that children are held for overly long periods of time and not just prior to removal, contrary to stated Government policy.

The Nationality Immigration and Asylum Act 2002 amended schedule 2 of the Immigration Act 1971 to introduce extended powers for the Home Secretary to detain both adults and children. The Refugee Children's Consortium opposed these new powers and sought to remove the power of immigration officers to detain children under Schedule 2 of the 1971 Act.

¹ Home Office Stat054/2003, 16 December 2003

The Refugee Children's Consortium remains opposed to the detention of any child on the grounds that it is incompatible with the principles of the United Nations Convention on the Rights of the Child (UNCRC) and other human rights instruments. Removal centres cannot afford children the care and protection which they need, nor uphold their rights under human rights law – in particular, the child's rights to freedom, to a normal social life, and to education. Detention facilities are never the best environment for children and may have a serious negative impact on their physical and emotional health and well-being. There are insufficient legal safeguards to prevent children and their families from being held in detention at the discretion of immigration officials and for longer periods without just cause.

KEY FACTS

Children of asylum seekers and migrants can be detained with one or both of their parents under immigration law. They can be held for an unspecified period in a 'removal centre'² at any stage of the process determining their own or their parent's claim to remain in the UK.

There are currently approximately 150 family spaces in centres run by the Immigration Service in Dungavel (Scotland), Tinsley House (nr. Gatwick airport) and Oakington (Cambridgeshire)³. Harmondsworth and Yarl's Wood have also been used to detain families in the past and may be used again in the future.

The Government has estimated that 30 or 40 families may be detained at any one time⁴, but do not routinely publish statistics as to the numbers detained, the length of detention or the status of detainee's case. Instead snapshot answers have occasionally been given⁵. At November 2003, 81 children were detained, according to figures given by civil servants⁶. More detailed information, albeit still snapshots, has been gleaned from the inspection reports by HMIP⁷.

There is no statutory limit on detention, nor any special criteria outlining the circumstances in which children may be detained. This is in contrast to instructions which exist for vulnerable groups such as pregnant women or the mentally ill, who are "*normally only considered suitable for detention in very exceptional circumstances*" according to the Operational Enforcement Manual (OEM).

Prior to October 2001, the policy regarding families was that detention should be "*as close to removal as possible so as to ensure that families are not normally detained for more than a few days*" (White Paper, *Fairer, Faster, Firmer*, 1998). The policy was changed in October 2001, and the 2002 White Paper states that families may be detained "*for longer periods than immediately prior to removal*".

There is no automatic provision for bail hearings for detained families and no time limit on their detention. There is also no provision for independent visitors to ascertain the views of the child after a period in detention.

² The Nationality, Immigration and Asylum Act 2002 changed the name of detention centres to removal centres.

³ Oakington was originally set up to detain individuals and families for 8 to 10 days whilst their asylum applications were "fast tracked". However, if a family's application is refused but they cannot be removed to their country of origin, they sometimes remain in detention for far longer (130 days in a recent case). Oakington is now also used as a removal centre for families who are not in the fast track system but are being detained pending the determination of their application or an appeal or removal.

⁴ House of Lords Official Report, October 10 2002, Col.435

⁵ According to information given in Parliament, on 2 April 2003, there were 56 children in detention, on 20 May 2003, 35 children were detained and on 8 December, 38 children were detained.

⁶ On 9 December 2003, at a meeting of the Detention User Group convened by the IND, attendees were informed that statistics on the number of children are being collected and that at 29 November 2003, 81 children were detained. It was also stated that detailed statistical reports are received by Ministers on a weekly basis. The Deputy Director of IND has also publicly confirmed that data is being collected (as reported in the Independent on Sunday, 7 December 2003)

⁷ Inspections took place on the following dates: Dungavel (7-10 October 2002) Scotland, Harmondsworth (16-18 September 2002) Nr Heathrow, Oakington (4-6 March 2002) Cambridgeshire, Tinsley House (18-20 February 2002) Gatwick

CHILDREN'S RIGHTS

There is international consensus that children should not be detained. The UNHCR Guidelines on Refugee Children states in its preamble (page 37):

"Refugee children are children first and foremost, and as children, they need special attention... "It is UNHCR's policy that refugee children should not be detained."

The detention of children is incompatible with key articles of the United Nations Convention on the Rights of the Child (UNCRC)⁸. In particular, immigration detention policy is in violation of Article 37(d) of the UNCRC, which states that:

"Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action."

The current legal framework for detention makes no provision for automatic legal representation or automatic, prompt access to an independent body to challenge detention. Debate during the passage of the 2002 NIA Act highlighted the lack of safeguards in place to protect children. The Government conceded that social services have no formal role within removal centres and that local authorities currently do not have access to removal centres despite the fact that local authorities are responsible under the Human Rights Act 1998 for children within their jurisdiction⁹ and the Children Act 1989 for those in need of care and protection.

The Refugee Children's Consortium believes that detention is a wholly inappropriate measure in situations involving children, and one that gives rise to a range of child protection concerns. Despite this, immigration officers are not required to consider the Children Act 1989 or the principles of the UNCRC before deciding to detain. In effect, no one is actively considering the best interests of the child when deciding to detain a family.

Other children in the UK who are deprived of their liberty are children convicted of a criminal offence, those subject to a secure accommodation order made by a family court and those detained under the Mental Health Act 1983. In the case of secure accommodation orders, statutory criteria must be fulfilled before detention is permitted¹⁰. There are no such statutory criteria to fulfil before the decision is made to detain a child in a removal centre. Indeed, dependent children of asylum seekers are sometimes not even detained under immigration powers, in cases where no detention orders are served upon them. In such cases they are subject to constructive detention. The question of the detention of the parent is considered first, without giving attention to the best interests of the children, and it is then presumed that it is in their best interests to remain with their parents. If their parents are consulted on this issue, they are told that the alternative will be the placement of the child in care whilst they remain in detention.

REPORTS BY HM INSPECTORATE OF PRISONS 2002/3¹¹

HM Inspectorate of Prisons carried out inspections of five immigration removal centres in 2002. The four centres detaining families at the time of inspection were Dungavel, Tinsley, Oakington and Harmondsworth. In Dungavel in Scotland, HMIP were accompanied by HM Inspectorate of Education who conducted a follow up visit in the summer of 2003.

⁸ Non-discrimination (Article 2), The duty on the state to ensure to the maximum extent possible the development of the child (Article 6), Freedom of association (Article 15), Interference with privacy and family (Article 16), Access to education on the basis of equal opportunity (Article 28),

⁹ Hansard Commons: 12 June 2002; Column 888

¹⁰ It is useful to look at the official guidance given in the Children Act 1989 Guidance and Regulations Volume 1 Court Orders in relation to the making of secure accommodation orders for children. It states that: "Restricting the liberty of children is a serious step which must be taken only when there is no genuine alternative which would be appropriate. It must be a "last resort" in the sense that all else must first have been comprehensively considered and rejected." Furthermore, children can only be placed in secure accommodation for a maximum of 72 hours in any 28-day period unless a court order is obtained.

¹¹ HMIP's responsibility is the conditions in which people are detained, rather than the decision to detain them.

The Inspectorate recommended that:

“...the detention of children should be an exceptional course, and only for a very short period – no more than a matter of days. We also believe that the guiding principles that underlie international and domestic law on children should be brought into decisions to detain, and to continue to detain, children and families.”¹²

The HMIP reports set an important context for the recommendation on children, with their findings that detainees did not perceive themselves to be safe; were unable to obtain reliable information from the immigration authorities about their detention and had difficulty in obtaining competent independent legal advice; and that staff in most centres were not sufficiently alert to, or trained in, the specific needs of immigration detainees, while interpreter provision was poor. Inspectors at Tinsley House concluded that it was *“impossible to deliver appropriate mental health care”* and that *“more awareness of the needs of children was required”*.

THE IMPACT OF DETENTION ON CHILDREN & CHILDREN’S WELFARE

The findings of HMIP accord with the experience of the member organisations of the Refugee Children’s Consortium working with detained families. **It is clear that children suffer mental and physical harm as a direct result of being detained.** The Children we work with have reported feelings of fear, anger and confusion that they are detained without having done anything wrong. **The process of detaining a family can be very distressing and frightening for children.**

In recent cases, children’s medical complaints have included eczema, anaemia, headaches, nosebleeds, lack of appetite, asthma and trouble sleeping. Several parents have reported depression, one mother attempted suicide in detention, others were on suicide watch, three mothers were on anti-depressant medication, and at least two mothers had been raped in their country of origin.

In a significant number of cases, detention has been maintained for long periods (ranging between 7 and 161 days) and has included several moves between centres. Member organisations have also found that detention is used for families who have always maintained contact with the immigration authorities (i.e. have not absconded) and that in many cases, detention does not result in removal. Families may be detained when they still have outstanding matters on their cases (BID know of two families who have won their case to stay in the UK following their eventual release from detention).

Inadequate healthcare and treatment has damaging physical and emotional consequences resulting in a child aged five months missing key vaccinations and another experiencing a severe mouth infection and weight loss. One child had not been given the right medication for his severe form of acne and another elected to become mute following his and his family’s detention.

Education provision is reported as being *ad hoc* and inadequate. Parents and children report experiencing violent treatment both in the process of being detained and in the process of attempted removals. Many families have no legal representation or have been victims of very poor quality representation and many experience great difficulty in accessing an independent review of their detention by way of a bail application.

THE GAP BETWEEN PRACTICE AND POLICY

During the passage of the Nationality, Immigration and Asylum Act 2002, the Government made assurances that the implementation of the policy of child detention would be careful and restricted.

Ministers stated that children would be detained only for short periods¹³ and that detention would only take place in narrowly defined circumstances¹⁴. Ministers defended the policy by stating that

¹² HMIP report on Dungavel, published August 2003, p 45

¹³ Hansard Lords Official Report, 31st October 2002, Col. 347

¹⁴ Lord Filkin: *“They may need to be detained while their identities or basis of claim are established..”*. Hansard Lords Official Report, 10th October 2002, Col 347

if they weren't permitted to detain families, or if the law restricted the permissible duration of detention, that this would make the operation of immigration controls "...*impracticable and ...open to widespread abuse...it would be known that a family with children would be unlikely to be detained for long and would be able simply to disappear into the community.*"¹⁵ However, there is no statistical basis for concerns that families are unlikely to comply with the terms of temporary admission or release.

On 8th May 2003, Home Office Minister, Beverley Hughes stated:

*"... in reality, the longer periods of detention are not the fault of those who are detained in the sense that he has outlined, but a consequence of decisions that they have taken, particularly in relation to absconding and not abiding by immigration law and decisions applied to them. Clearly, that is to do with the decisions taken by adults in those families—I accept that—but those adults have to comply with what is required of them. That is fair and reasonable. It is regrettable that the consequences of their actions also apply to any children in the family, but the thrust of the policy, especially when children are involved, is that detention will be as brief as possible."*¹⁶

The Minister's statements do not reflect members' experience of working with families, the majority of whom have always maintained contact with the immigration authorities. In addition, the Refugee Children's Consortium considers it wholly inappropriate to seek to blame parents for the detention of their children. If a parent has the safety of their child at the forefront of their mind, and a serious threat exists on return, they are faced with an impossible dilemma. If they accept removal they are placing their child in danger, if they refuse to leave the UK they may face prolonged periods of imprisonment.

TARGETTING FAMILIES FOR DETENTION?

The Refugee Children's Consortium is concerned that families are being targeted for removal, due to the Government's desire to increase asylum removals and reduce asylum spending.

A May 2003 memorandum from the union representing immigration staff, the Public and Commercial Services Union (PCS), to the Home Affairs Committee Inquiry into Asylum Removals states that:

The media focus on failed asylum seekers and the resultant "government imperatives" has led to the removal of families being prioritised whilst offenders, sometimes violent criminals, remaining [sic] untouched. This ordering of business is largely a "business" decision, in that families deliver huge cost savings in asylum support, compared to the negligible savings from removing single males. Immigration Service staff are under pressure not to investigate non-asylum offenders...

The Refugee Children's Consortium is concerned that this target is leading to attempts to remove families who shouldn't be removed, and is likely to be contributing to long periods of detention.

PROTECTING CHILDREN – MEANINGFUL SAFEGUARDS?

The report of the Joint Committee on Human Rights into the 2002 NIA Bill (now Act) stated that:

*"safeguards are meaningful and effective only if appropriate legal advice and information are available to detainees" and concluded that "these matters should be carefully monitored...[as to the] effectiveness of safeguards for the human rights of detainees."*¹⁷

We are concerned that existing safeguards are neither meaningful nor effective for detained families.

On 16 December 2003, the Home Office announced some measures designed to respond to criticisms of child detention¹⁸. The Refugee Children's Consortium believe that these

¹⁵ Hansard Lords Official Report, 10th October 2002, Col 347

¹⁶ Hansard Commons Official Report, 8 May 2003, Col.927

¹⁷ Nationality, Immigration and Asylum Bill, Seventeenth Report of Session 2001-2, House of Lords, House of Commons, Joint Committee on Human Rights HL Paper No 132, HC 961, p 32

¹⁸ *ibid*

measures are woefully inadequate and fail to take serious steps to protect children because they fail to provide an *independent* and prompt review of detention. A requirement for the 'express authority of the immigration minister' to maintain detention after 28 days does not meet the UK's domestic and international obligations towards children and is no guarantee that the rights of the child will be upheld¹⁹. A period of 28 days far exceeds the limit of a 'few days' recommended by the Chief Inspector of Prisons.

The announcement also contained special measures to be introduced at Dungavel to assess 'welfare and educational needs' of children after 21 days. We do not have sufficient detail to assess this change, but are concerned that these measures are also inadequate; it is not clear who will undertake the assessment. Furthermore, the announcement makes no reference to children detained at Oakington or Tinsley House. BID has worked with several families this year who were detained for long periods at Oakington. In a recent case, a woman was finally bailed by her solicitors after over 130 days in detention at Oakington with her school aged child.

In particular, we are disappointed that the new measures announced in December do not address the issue of access to quality legal representation for detained families. This is of particular concern in the light of proposed 'financial thresholds' on legal aid proposed by the Department for Constitutional Affairs (DCA) and the Legal Services Commission (LSC). Legal aid changes will make it even more difficult for detainees to find representatives willing to do the work necessary to represent them in their substantive case, let alone challenge their detention. The proposals do not allow any additional time for representing detained clients and it appears that most publicly funded applications for bail cannot be made without prior agreement from the LSC²⁰.

CONCLUSION

It is now two years since the change in policy to allow for longer detention of families and despite assurances by the government and the recommendation of HM Inspectorate, children are still being detained for long periods. This is in violation of internationally recognised human rights standards in relation to detention of children and apparently without proper consideration of alternatives.

Removal centres are already incarcerating desperate families who are terrified of return, have not had their case fairly heard and are left without hope in the confines of a prison environment. Proposed changes to legal aid and the measures contained in the Immigration and Asylum Bill will exacerbate the situation in removal centres. **These amendments will ensure that children are not detained and that their welfare and needs are safeguarded.**

FOR FURTHER INFORMATION PLEASE CONTACT:

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¹⁹ In a case in 2002, when BID made representations to the Minister to release a woman who was detained for six months with her young child, detention was maintained. This woman was finally bailed and has since gone on to win refugee status.

²⁰ The initial consultation in June 2003 proposed an additional thirty minutes for representing detained clients, and two hours for making a bail application. At present, legal representatives apply the merits test for publicly funding in bail applications.