BINGHAM CENTRE FOR THE RULE OF LAW

Border Security, Asylum and Immigration Bill – Clause 41

Rule of law analysis report for House of Lords Committee stage

3 September 2025

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British Institute of International and Comparative Law

Executive Summary

The Bingham Centre welcomes provisions in the Border Security, Immigration and Asylum Bill that respond to rule of law problems arising from two recent Acts by repealing the Safety of Rwanda (Asylum and Immigration) Act 2024 and many provisions of the Illegal Migration Act 2023.

The focus of the present report is on a clause that gives rise to new rule of law issues, distinct from the problems caused by the two Acts that are being repealed. Our focus is on Clause 41 and specifically its provisions on detention, rather than those relating to biometrics and searches for nationality documents. The clause is of extremely broad application. It applies to any person who is not a UK national, enabling their detention to be ordered when the Home Office is merely considering whether to deport them on the basis that their presence is not conducive to the public good (a long-established deportation ground). Until now, a 'decision to make a deportation order' has been a pre-condition for detention.

We are particularly troubled that this expanded detention power is made fully retrospective. That is the first rule of law issue we discuss, both as a matter of constitutional principle and in view of its impact on past and present detainees whose unlawful detention would be validated by this measure. Further rule of law problems are considered in relation to the breadth of the discretion granted to detain people, including the dangers of abuse given the lack of effective safeguards.

It appears that the drafting of Clause 41(2)-(5) and its authorisation of detention when merely 'considering' whether to make a decision to deport goes far beyond the limited aim of the Home Office to establish the lawfulness of its current practice of detention following a Stage 1 initial decision to deport a person. The Government's claim that the existing law authorises not only this but also detention during pre-decision consideration, so that it merely confirms rather than expanding the scope of the power, is unhelpful. It complicates parliamentary consideration of the rule of law issues arising, and is responsible for the lack of justification that has so far been provided for the Bill's retrospective effect.

We have recommended that the retrospective elements of the detention power be removed, and its scope restricted, particularly if some more limited power to detain persons before making a deportation decision is required. We express no view on the policy question of whether such a power is indeed required, but if it is our proposed restrictions include specifying that this power is limited to persons who pose a national security risk, and introducing a time limit for detentions on this basis.

About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law 'in the interests of good government and peace at home and in the world at large.' The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society -too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high-quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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This report is a publication of the Bingham Centre's Rule of Law Monitoring of Legislation project. Research and drafting was undertaken by Senior Fellow, Lucy Moxham, who leads the project, and Nandini Mitra, Researcher. The final version of the report was prepared by the Centre's Director, Jan van Zyl Smit.

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Table of Contents

Introduction

The Border Security, Asylum and Immigration Bill was introduced into the House of Commons on 30 January 2025 and moved to the House of Lords on 13 May 2025. Committee stage in the Lords began on 26 June 2025 and will resume following the summer recess on 3 September 2025.

We welcome key provisions of the Bill that address rule of law problems arising from two recent Acts. First, Clause 37 would repeal in its entirety the Safety of Rwanda (Asylum and Immigration) Act 2024. During its passage through Parliament, significant concerns were raised about the Act by the House of Lords Constitution Committee and the Joint Committee on Human Rights ('JCHR'). At the time, Bingham Centre reports provided detailed rule of law analysis of the Safety of Rwanda Bill and these are available on our website here. Our view was that the Bill in its essence was a major infringement of the rule of law and the separation of powers, and ought not to have been passed.

Secondly, Clause 38(1) would repeal most of the Illegal Migration Act 2023 ('IMA'). During the IMA's passage through Parliament, it was subject to serious criticism on rule of law grounds, in light of the rule of law principle, recognised by Lord Bingham, that a state should comply with its international obligations. The JCHR concluded that 'the Bill would deny the vast majority of refugees access to the UK's asylum system'. The JCHR also found that the Bill 'breaches a number of the UK's international human rights obligations and risks breaching others'. In a report, 'Delivery vs Deliberation: Lessons in Law-Making from the Last Parliament', co-authored by researchers from the Bingham Centre and the Institute for Public Policy Research, we discussed the IMA as a case study of the 'growing tendency towards closed and unaccountable law-making', highlighting how concerns about compliance with international law and judicial oversight were overridden and ignored during a rushed legislative process.

While we welcome the Bill's repeal of most provisions of the IMA, we are concerned about significant provisions which the Bill will leave untouched. One of these is IMA section 12, which deals with the duration of immigration detention and appears to reduce the scope for judicial scrutiny of such detention. The rule of law problems of this section and certain other IMA provisions that are being retained, including those relating to modern slavery, have been much debated. Although IMA section 12 is relevant to some of the issues in the present report, we do not offer a full analysis of that provision here – it will be the subject of a further Bingham Centre publication in the context of our work on legislation that has been detrimental to the rule of law in the UK in recent years.

The focus of the present report is on a clause that gives rise to new rule of law issues, distinct from the problems caused by the two Acts that are being repealed. Our focus is on Clause 41 and specifically its provisions on detention, rather than those relating to biometrics and searches for nationality documents. The clause is of extremely broad application. It applies to any person who is not a UK national, enabling their detention to be ordered when the Home Office is merely *considering* whether to deport them on the basis that their presence is not conducive to the public good (a long-established deportation ground). Until now, a 'decision to make a deportation order' has been a pre-condition for detention.

We are particularly troubled that this expanded detention power is made fully retrospective. That is the first rule of law issue we discuss, both as a matter of constitutional principle and in view of its impact on past and present detainees whose unlawful detention would be validated by this measure. Further rule of law problems are considered in relation to the breadth of the discretion granted to detain people, including the dangers of abuse given the lack of effective safeguards. We propose several types of safeguards that could be considered to reduce

these dangers and make it more likely that the provision will satisfy proportionality in relation to its impact on fundamental rights, including the Article 5 right to liberty and the Article 8 right to respect for private and family life. Finally, we observe that without clear limitations and safeguards the provision risks creating serious legal uncertainty as it will lead to complex disputes about its interpretation.

The amendment at issue: detention while 'considering' whether to deport

Our focus is on Clause 41(1)-(5), which amend Immigration Act 1971, Schedule 3. Clause 41(2) amends the para 2 of that Schedule, which permits detention of a person who is not a national of the UK (we follow the shorthand 'P') in certain circumstances. Detention under this provision must have *some link* to future deportation of P on the ground that their presence in the UK is not 'conducive to the public good'[1]. These are sometimes known as 'conducive deportations'.[2]

Clause 41(2) will replace para 2 with new wording in relation to the link to future conducive deportation – there is disagreement about whether this will widen or, as the Government contends, merely 'confirm' or 'clarify' the circumstances in which detention is permitted.

The current para 2 permits deportation if P has been given notice 'of a *decision to make* a deportation order against him'.[3]

Clause 41(2) will replace this with provision authorising P to be detained (following written notice in either case):[4]

> (a) while the Secretary of State *considers whether to make* a deportation order against P, and
>
> (b) where the Secretary of State *decides to make* a deportation order against P, pending the making of the deportation order.

On the face of it, this amendment appears to widen the circumstances in which detention is permitted. It does so by loosening the link to the future action of deportation. Ordinary language draws a clear distinction between considering whether to take an action (which could still result in not taking that action), and deciding to take that action. The drafting of Clause 41(2) seems to recognise that distinction, as para 2(2)(b) preserves the existing ground ('decides'), while para 2(2)(a) adds a new ground of 'considers whether'. If 'decides' were broad enough to encompass the stage of consideration that precedes it, there would be no need for both. Furthermore, Clause 41(3)-(5) makes amendments to subparas 2(3A),(3B) and (3D), all of which envisage that it will be lawful to detain someone before a decision is made whether to deport them.

Finally, the amendment is made fully retrospective (retroactive) by Clause 41(17), which provides that it is to be 'treated as always having had effect'.

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[1] Immigration Act 1971 section 3(5).
[2] These are distinct from the 'automatic deportations' which are provided for in section 32 of the UK Borders Act 2007.
[3] Immigration Act 1971 Schedule 3 para 2(2), emphasis added.
[4] Clause 41(2), text to be substituted for Immigration Act 1971 Schedule 3 para 2(2).

Disputed scope of existing and amended power: will Clause 41(2) change the law?

The House of Lords Constitution Committee, in its report on the Bill, described the new para 2(2) as an 'expanded power of detention … [which] would provide the legal basis for significant interferences with individual liberty'.[5] The JCHR in its report took the same view, rejecting the Government's argument that the measure is merely clarificatory.[6]

The Government position that Clause 41(2) will merely clarify the law involves an ambitious claim about the scope of the existing para 2(2) detention trigger, a 'decision to make a deportation order'. The Explanatory Notes argue that the provision '*confirms* that the Home Office may detain someone subject to conducive deportation from the point at which the Home Office serves notification that deportation *is being considered*.'[7]

Part of this argument concerns current practices. The Impact Assessment accompanying the Bill notes that deportation decision-making is divided into two stages. Stage 1 consists of the Home Office notifying an individual that of their initial decision to make a deportation order against them, giving reasons for the decision, and providing the person with an opportunity to make representations against this initial decision.[8] These representations may include human rights or asylum claims. After the Home Office has received and considered these representations, and refuses any raised claims, the Home Office serves a Stage 2 'final' deportation decision on the person notifying them of the conclusions they have reached on the representations.[9] A Stage 2 decision carries a right of appeal.[10] The Impact Assessment, admits that 'current drafting of the detention…power does not clearly reflect the two-stage process', but still insists that Clause 41(2) merely '*clarifies* … that the trigger for the power to detain is at the earlier stage in the deportation process and is not tied to the appeals framework.'[11]

In other words, the Government argues that detention following a Stage 1 decision is currently lawful. This point is disputed by a number of organisations, including the Immigration Law Practitioners Association (ILPA), whose evidence the JCHR cited with approval.[12] Their view is that insofar as Stage 1 initial decisions are not appealable, they do not qualify as a 'decision to make a deportation order' for purposes of detention under the existing para 2(2). It is not clear to us whether this general point has been established by case law, but the courts have indicated that detention under para 2(2) can be unlawful for lack of a qualifying 'decision' to deport.[13] The Supreme Court stated in *DN (Rwanda) v Home Secretary* that the decision to detain in the making of a deportation order, is 'entirely dependent on the decision to deport. Without that decision the question of detention could not arise, much less be legal.'[14]

In any event, the Government's argument about the existing law is far more ambitious than this, as it claims that detention is lawful not just after a Stage 1 initial decision, but even earlier,

[5] Legislative Scrutiny: Border Security, Asylum and Immigration Bill – 10th report of session 2024-2025 (HL Paper 139), para 14
[6] Legislative Scrutiny: Border Security, Asylum and Immigration Bill – Fourth Report of Session 2024-25 (HL Paper 143 / HC 789) para 130-131
[7] Explanatory Notes to the Border Security Bill as introduced in the House of Lords (13 May 2025), para 318, emphasis added.
[8] Impact Assessment (30 January 2025), para 121
[9] Ibid para 122
[10] Ibid para 125
[11] Ibid para 125, emphasis added.
[12] Legislative Scrutiny: Border Security, Asylum and Immigration Bill - Fourth Report of Session 2024–25 (HL Paper 143 / HC 789) para 130.
[13] *DN (Rwanda) v Secretary of State for the Home Department* [2020] UKSC 7, para 18-19.
[14] Ibid para 18

when the Home Office has given notice to a person that their deportation is being considered. This severely stretches the ordinary meaning of 'decision to make a deportation order' in the existing para 2(2). The Impact Assessment seems to admit some doubt here, as it refers to Clause 41(2) providing 'comprehensive cover to permit use of the deportation detention power, subject to the Home Office giving written notice, from the point of considering making a deportation order, to having decided to make the order'.[15] The phrase 'comprehensive cover' seems to recognise that, at very least, the cover provided by the existing provision is arguably not so extensive.

Retrospectivity – constitutional principle, and impact on past and present detainees

This brings us to the first rule of law issue, the retrospective expansion of detention power by Clause 41(2) read with Clause 41(17), as identified by the Constitution Committee among others.[16] The JCHR, also, described the effect on detention powers as 'retrospective not clarificatory'.[17]

We have here both an issue of constitutional principle, and a problem for past and present detainees. Past detainees who were held unlawfully lose their legal claims for compensation. Worse, persons still in detention cannot contest the basis on which they were incarcerated, whereas they should be able to argue that it was void *ab initio*. Instead, such detainees now find themselves with limited powers to challenge their detention as a result of IMA section 12, which we discuss below. This sends a message that government can act unlawfully, even to the extent of incarcerating people, and afterwards absolve itself – the antithesis of government under law, the bedrock the rule of law.

Justifying retrospectivity – a matter of constitutional principle

The impact on real lives should inform the application of constitutional principle. Retrospective legislation is not complete anathema to the UK constitution, but invariably requires justification when it is proposed. The Bingham Centre has previously explained why this principle is a safeguard for the rule of law, for instance in our comment last year on the Litigation Funding Agreements (Enforceability) Bill.[18]

In 2002, the Solicitor General set out the approach of the then Labour Government when proposing retrospective legislation:

> The Government's policy before introducing a legislative provision having retrospective effect is to balance the conflicting public interests and to consider whether the general public interest in the law not being changed retrospectively may be outweighed by any competing public interest. In making this assessment the Government will have regard to relevant international standards including those of the European Convention for the Protection of Human Rights and Fundamental

[15] Explanatory Notes (n 7), para 127.
[16] Constitution Committee (n 5) para 13-16.
[17] JCHR (n 12) para 130
[18] Lucy Moxham, 'Retrospectivity and access to justice in the Litigation Funding Agreements (Enforceability) Bill [HL]' (26 April 2024).

> Freedoms which was incorporated into United Kingdom law by the Human Rights Act 1998.[19]

This statement is helpful as it highlights that the justification for a retrospective provision should consider how it will affect human rights (among other impacts). The Venice Commission's Rule of Law Checklist – a key international standard – identifies a principle of non-retroactivity that should permit only limited exceptions.[20] In its view, retroactivity 'goes against the principle of legal certainty, at least in criminal law … since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests'.[21] A civil deprivation of liberty heightens this concern, and the European Court of Human Rights has stated that, 'where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied', holding that 'it is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application'.[22]

The Constitution Committee has expressed strong concern that the Government has not yet discharged this justificatory responsibility in relation to Clause 41's expansion of detention powers. The Committee reiterated the constitutional principle that 'retrospective provisions must have the strongest possible justification' because retrospective legislation 'is unacceptable other than in very exceptional circumstances'.[23] The Committee noted the effect of the clause in expanding the power of executive detention, and recommended that Clause 41's retrospective provisions be removed should the Government fail to provide further justification for the retrospectivity to the House's satisfaction.[24]

Simply put, the reason why adequate justification has not yet been provided is that that the Government insists that Clause 41(2) is merely a clarificatory provision and so makes no change to the law, either for the future or the past. The Impact Assessment somewhat equivocally acknowledges retrospectivity, stating that Clause 41 'provides retrospective statutory authority to the power to detain … . This is to preserve the consistency of decision making for historic and contemporary uses of the powers.'[25] At the same time, however, the Impact Assessment contends that the existing scope of the power already authorises detention as early as when the Home Office is considering whether to deport someone, as we have seen above.[26]

The ECHR Memorandum does not mention retrospectivity in relation to Clause 41, as it closely adheres to the position that this provision merely clarifies the law.

In the House of Commons committee stage proceedings on the Bill, SNP MP Pete Wishart expressed concern that Clause 41 'is to apply retrospectively, meaning it would legally validate past detentions that were previously unlawful'.[27] In her response, the Minister, Dame Angela Eagle MP, stated:

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[19] *Official Report*, 6 March 2002; Vol. 381, c. 410W.
[20] Benchmark B6 'Non-retroactivity', Council of Europe Venice Commission Rule of Law Checklist (2016) at p.27
[21] Ibid para 62
[22] *Medvedyev v France* (App No. 3394/03 [2010]), para 80
[23] Constitution Committee (n 5) para 15
[24] Ibid para 16
[25] Impact Assessment (n 8) para 126
[26] Ibid.
[27] Report of Public Bill Committee (Bill 173) 2024-2025 (27 February 2025) at p. 233.

> The clause seeks to put beyond any doubt that the Home Office has the power to detain, in conducive deportation cases, at the earliest point. It has been doing that for many years. The clarification in the clause applies retrospectively to ensure that those who have been detained in the past have not been detained unlawfully. We do not believe they have, but this puts it beyond doubt.[28]

The Minister went on:

> To clarify, this is not an extension of deportation powers; it is putting beyond doubt in the Bill the understanding of how and when these powers can be used—at the earliest opportunity, if it is a conducive deportation. The powers, including to detain at the earliest opportunity, have always existed.[29]

The reference to not extending *deportation* powers is unfortunate, as that is not the issue – the issue is which circumstances allow *detention* with some link to a future deportation.

Overall, there has been very little justification provided for the retrospective expansion of detention power. We agree with the Constitution Committee that these explanations do not amount to adequate justification, particularly given the impact on individual liberty. Further, we agree with the Immigration Law Practitioners' Association who expressed concern about 'the dangerous precedent which would be set if unlawful deprivation of liberty were to be treated as lawful – such retrospectivity undermines the rule of law and remains wholly unjustified in the materials accompanying the Bill'. We also agree with JUSTICE, who have stated that this is 'a significant retrospective power and limited information has been provided by the Home Office as to why it is required. It would be inappropriate to use this legislation to retrospectively authorise the unlawful detention of individuals, if this is the intention'.

Fundamental rights and international obligations – validating unlawful detention

As Lord Bingham set out in his account of the rule of law, protection of fundamental rights and adherence to international obligations are aspects of the rule of law.[30] We do not need to probe the boundaries of these rule of law principles here, as the infringement of a core right is clear – at least in the scenario where a previously unlawful detention would be retrospectively validated by Clause 41.

Suppose P was detained under the existing para 2(2) powers but his detention was unlawful, as the condition of a 'decision to make a deportation order' had not been satisfied. Ordinarily, P would be entitled to release (if still in detention) and could bring a claim for false imprisonment. However, if Clause 41 is passed, the Home Secretary would be able to invoke its retrospective effect to defeat P's claims for redress on the basis that P's detention must now be treated as always having been lawful.

This scenario presents a clear-cut breach of Article 5 the right to liberty. Article 5(1) does allow a limited set of circumstances in which persons may be deprived of liberty 'in accordance with a procedure prescribed by law'. The ECHR Memorandum argues that detentions under the law as amended by Clause 41 will be authorised within Article 5(1)(f), which provides for 'the lawful arrest or detention of … a person against whom action is being taken with a view to deportation'. Whether or not this is correct for future detentions, for past detentions the argument appears to fall at the first hurdle: at the time P was detained, there was no legal

[28] Ibid at p. 235.
[29] Ibid.
[30] *The Rule of Law* (Allen Lane, 2010).

basis for doing so, and the deprivation of liberty would not be 'in accordance with a procedure prescribed by law', nor 'lawful' for purposes of Article 5(1)(f).

Article 5(5) grants an 'enforceable right to compensation' to any person 'who has been the victim of arrest or detention in contravention of the provisions of this Article'. Clause 41 would nullify such compensation claims by deeming P's detention to have been lawful. The JCHR argues that Clause 41 'risks violating' the Article 5(5) right to compensation, and the Article 13 right to an effective remedy.[31] Our view is that for retrospective validation of unlawful detention, it would be hard to deny such breaches.

Other ECHR rights are also likely to be engaged, notably Article 8, as the ECHR Memorandum recognises. Here too, the application of Clause 41 to situations of past unlawful detention would struggle to satisfy Article 8(2) which permits interference to be justified only if it is 'in accordance with the law'. In the absence of a legal basis at the time of P's detention, the subsequent question of whether the interference is proportionate will not be reached.

Conclusion on retrospectivity

The Government has not provided adequate reasons for the retrospectivity provision in Clause 41(17) of the Border Security Bill as it applies to detention under Clause 14, nor has it demonstrated that it has weighed the public interests on all sides. The breach of fundamental rights, and specifically ECHR rights which impose international obligations on the UK, seems clear. **We note that Lord German and Baroness Brinton have tabled an amendment proposing that Clause 41(17) be removed, which they explain would have the effect of 'remov[ing] the retrospective element of the changes made by this clause'. The Bingham Centre agrees with this reasoning and recommends that Clause 41(17) be removed from the Bill.**

Broad discretion in the future use of detention powers

If we turn away from retrospectivity to consider future uses of the Clause 41(2) power to detain while the Home Secretary 'considers whether' to report someone, we still find rule of law problems. Their root cause is the breadth of the discretion conferred – any person who is not a UK national is subject to these powers, and the new requirement that deportation need only be 'considered' significantly lowers the threshold for their use. What will count as 'considering' – how much evidence is required at this stage, or will the slightest suspicion that someone's presence in the UK may not be conducive to the public good suffice? Will the Home Office be entitled to act upon such suspicion to detain a person for further investigation, to build a case for deporting them?

Introducing such a broad discretion seems unnecessary if the principal reason for the amendment, as the Impact Assessment suggests, is to put beyond doubt that a 'Stage 1' initial decision to deport P provides lawful grounds for detention. **That result could be achieved through a more modest amendment to redefine 'decision' in para 2(2) so it includes Stage 1 decisions.** We express no view about this reframing as a policy choice, but note that it will avoid some of the problems we are about to describe.

As it stands, the Clause 41(2) power to detain someone when 'considering' deportation poses multiple problems for the rule of law, which overlap and potentially exacerbate each other. We

[31] JCHR (n 12) para 135.

can conveniently discuss these under the headings of fundamental rights, prevention of the misuse of powers, and legal certainty.

Fundamental rights – Articles 5 and 8 revisited

As we have already noted, the Government's ECHR Memorandum argues that detention under Clause 41 will be a permissible deprivation of liberty within the meaning of Article 5(1)(f), 'the lawful arrest or detention of … a person against whom action is being taken with a view to deportation'. If the detention occurs after the amendments made by Clause 41 have entered into force, the Government's position will be somewhat stronger than in retroactive applications of the new provision, which we discussed above.

For a start, the Government will find it easier to argue that the detention is 'lawful', and has taken place 'in accordance with a procedure prescribed by law'. Yet it is not a foregone conclusion that these requirements will be met, as the meaning of 'considers whether to make a deportation order' is vague as to the threshold for 'considering' (we have already queried whether a slight suspicion be regarded as grounds for considering someone's deportation, and will discuss problems of legal uncertainty further below). A further problem is whether the European Court of Human Rights, or UK courts applying Convention rights through the HRA, will accept that detention at a very early stage of consideration is still 'with a view to deportation' in the Article 5(1)(f) sense, given that detaining someone before a decision has been made to deport them is more remote from this objective.

Assuming these requirements are met, and that similarly for purposes of Article 8 the interference with private and family life is 'in accordance with the law', further questions arise as to proportionality. The ECHR Memorandum addresses proportionality issues for both Articles 5 and 8, albeit briefly in each case, and these arguments can be taken together.[32] Revealingly, the objective of the measure is described in ways that do not require the breadth of discretion conferred. First, there is an objective that is concerned only with the lawfulness of detention following Stage 1 decisions, where the argument is that the 'clause clarifies the statutory basis for the current use of the power and there is a strong public interest in not disrupting the detention power for the purposes of effective immigration control and public safety'.[33]

The second objective mentioned in the proportionality analysis is scarcely wider: 'There are some cases where the power to detain pending deportation is necessary because of a *real and significant national security risk* where no alternative detention power exists.'[34] **National security is not the same as the prevention of ordinary crime, let alone non-criminal conduct that may be relevant to whether someone's presence in the UK is conducive to the public good. If this is the only category of risk for which an early detention power is thought to be needed, then the language of 'considers whether to make a deportation order' could be amended to limit it to consideration of making a deportation order on national security grounds.** As before, we express no view on the policy value of such an amendment but note that by narrowing the scope of early detention under Clause 41 it would reduce the proportionality problem. It is doubtful whether pre-decision detention would be needed even in these cases, if a more modest amendment establishes that Stage 1 decisions to deport are grounds for detention, as the seriousness of a perceived national security risk

[32] Border Security, Immigration and Asylum Bill - ECHR Memorandum (30 January 2025) para 131-132, 136, 139.
[33] Ibid para 131.
[34] Ibid, emphasis added.

may allow for a Stage 1 decision to be reached fairly rapidly, bearing in mind that it is not a final decision to deport.

The ECHR Memorandum's final argument on proportionality of detention (as opposed to proportionality of the power to take biometrics and search for nationality documents, which is justified at greater length) harks back to the claim that Clause 41 will not change the law. The Memorandum asserts that the clause is 'proportionate … on the basis that it does not increase the use of detention pending deportation, rather it clarifies the law, and any decisions to detain will be case-specific and subject to … safeguards'.[35] We will address the issue of safeguards – such as the ability of detainees to bring judicial review, or other challenges to their detention – in a separate section as it affects the important rule of law principle of prevention of the misuse of powers. Safeguards are important for proportionality, and also for the specific provision in Article 5(4) which grants every detainee the right 'to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. Here, they will operate in a difficult proportionality context where a proverbial sledgehammer (the broad discretion to detain when merely considering deportation) is being set up to crack a nut (the more limited situations in which the objectives mentioned in Memorandum argue that there is a need for a detention power).

Prevention of the misuse of powers – including judicial review

Among Lord Bingham's rule of law principles, the control of discretionary power is prominent.[36] 'Questions of legal right and liability,' he argued, 'should ordinarily be resolved by application of the law and not the exercise of discretion'. Further principles require that those who exercise public powers do so 'in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably', and that the law must provide 'adequate protection of fundamental human rights' and access to justice for civil disputes. The Venice Commission's Rule of Law Checklist foregrounds 'prevention of abuse (misuse) of powers' as one of its five benchmarks.[37]

Plainly, dangers of abuse are created by a discretion as broadly worded as the Clause 41 power to detain persons while the Home Office 'considers whether' to deport them. The present Government may be committed to making a restrained use of the power, but its wide scope leaves a great deal of room for future Governments with different political priorities to use the power differently. We have already noted that 'consideration' of deportation could start with slender suspicions about a person's conduct, which would make it convenient to detain them while investigating further whether their deportation would be conducive to the public good. As to persons who might be targetted, it is possible to imagine a Government hostile to particular nationalities or religions, or those holding and expressing views with which it disagrees. In the worst case scenario, detention while considering deportation would be a powerful tool to use against such unpopular groups or individuals, and in the case of detention based on expression of views, would also have a significant chilling effect. All this would be within the ordinary meaning of detention while the Secretary of State 'considers whether' to make a deportation order.

Given these dangers, effective safeguards are vital. The ECHR Memorandum mentions both *habeas corpus* and the judicial review of immigration detention under the *Hardial Singh*

[35] Ibid para 139.
[36] Bingham (n 30)
[37] Venice Commission (n 20), Benchmark C, 'Prevention of abuse (misuse) of powers', asks whether there are legal safeguards against arbitrariness and abuse of power by public authorities. Also relevant are Benchmark A (legality), which among other things asks whether public authorities act on the basis of and in accordance with standing law, and Benchmark B (legal certainty).

principles.[38] Before the IMA, the European Court of Human Rights had held that UK law provided adequate procedural safeguards against arbitrary interference with Article 5 rights because of the availability of judicial review to challenge detention and the existence of the *Hardial Singh* principles.[39] However, the *Hardial Singh* principles were diluted, or 'partially codified' as the ECHR Memorandum puts it, by IMA section 12.[40]

This provision has been extensively criticised for making it harder for courts to review the 'reasonableness' of immigration detention, which is now framed more subjectively as a matter for the Secretary of State's opinion. We cannot review those criticisms in detail here, nor the extent to which common law presumptions and HRA section 3 interpretation may be used to interpret the changes made by IMA section 12 to maintain robust judicial scrutiny. We plan to cover these matters in a future Bingham Centre publication. Of present significance is that Clause 41 contains provisions that will further weaken the standard of review. Notably, Clause 41(3) modifies para 2(3A), which IMA section 12 inserted into the Immigration Act 1971 Schedule 3, to provide that a person detained under para 2:

> … may be detained for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the decision whether to make a deportation order, or the deportation order to be made, or the removal to be carried out.[41]

This amendment further damages the prospects for effective judicial scrutiny. Whereas previously courts could review the lawfulness of para 2(2) detention by scrutinising the decision to make a deportation order, under the *Lumba*[42] principles confirmed in *DN*,[43] now all that the court has to scrutinise is whether the Secretary of State is considering whether to make a deportation order, which will be very hard for challengers to disprove as a matter of evidence. Furthermore, the Secretary of State is able to take as much time as is reasonable, in her opinion, to consider this matter. That is an extension of the problem with IMA s12 shifting to the Secretary of State's subjective discretion. In the specific context of detaining someone before making even an initial decision to deport them, a much more robust safeguard would be appropriate.

If the power to detain while considering whether to deport someone is retained, which we do not support, then a robust safeguard could take the form of a time limit on the period of such detention, expressed as a number of days. Arguments about the disadvantages of placing a time limit on immigration detention can be met by noting that if the Home Office wishes to detain someone for longer they should only be able to do so if willing to make at least an initial decision to deport that person. **We consider that some form of limitation on the power to detain someone while the Secretary of State 'considers whether' to make a deportation order is essential in order to satisfy proportionality for purposes of Articles 5 and 8 as this would offer a less restrictive means of achieving the stated objectives of the amendment.**

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[38] *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 74
[39] *JN v United Kingdom* (Application no. 37289/12), para 97-101.
[40] ECHR Memorandum (n 32) para 136.
[41] Text to be inserted by the amendment is underlined.
[42] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12.
[43] *DN* (n 13).

Legal certainty

Legal certainty is a key principle of the rule of law. As currently drafted, Clause 41 risks creating serious uncertainty because of the interpretation disputes that are likely to arise.

This point can be briefly explained as it draws on our analysis above. On the one hand, the ordinary meaning of the 'considers whether to make a deportation order' provision appears to be clear. It establishes a broad discretion and could encompass situations where the Home Office merely suspects that someone has engaged in conduct which makes their presence in the UK not conducive to the public good, and wishes to investigate this further.

In practice, however, legal arguments can be mounted in favour of a narrower interpretation. Such arguments could rely both on assertions in the admissible parliamentary background materials (such as Explanatory Notes) to the effect that Clause 41 merely confirms the existing law. This could support a purposive interpretation that relies on the purpose being to restate the existing law. Unfortunately that argument would then require analysis of the Government's view of the existing law, which we have suggested is overambitious.

Other techniques could be used to curtail the scope of the 'considers whether' detention power, including common law rights presumptions and sections 3 and 6 of the Human Rights Act, as tools to protect the Article 5 and 8 rights that are at stake. Such arguments may have a fair prospect of success, albeit constrained by the willingness of courts to depart from what they ascertain to be Parliament's intention.

It is highly unsatisfactory, however, that these issues of interpretation should have to be contested in court, by detainees whose access to legal aid to fund advice and representation cannot be assumed, as many parts of the country either lack legal aid practitioners in the field of immigration and asylum law or suffer from extremely limited provision.[44] If Parliament enacts Clause 41 as currently worded, it will have missed an important opportunity to limit the expansion of detention powers and enshrine appropriate safeguards into clear and accessible statute law.

Conclusion

We have identified multiple rule of law problems that will arise from the provision made in Clause 41 for detention while the Home Office considers whether to make a deportation order. These include unjustified retrospectivity, broad discretion with inadequate safeguards against abuse of power, and legal uncertainty.

It appears that the drafting of Clause 41(2)-(5) and its authorisation of detention when merely 'considering' whether to make a decision to deport goes far beyond the limited aim of the Home Office to establish the lawfulness of its current practice of detention following a Stage 1 initial decision to deport a person. The Government's claim that the existing law authorises not only this but also detention during pre-decision consideration, so that it merely confirms rather than expanding the scope of the power, is unhelpful. It complicates parliamentary consideration of the rule of law issues arising, and is responsible for the lack of justification that has so far been provided for the Bill's retrospective effect.

We have recommended that the retrospective elements of the detention power be removed, and its scope restricted, particularly if some more limited power to detain persons before

[44] However, accessing representation to navigate the immigration and asylum system can be difficult, with Law Society research highlighting that 63% of the population across England and Wales do not have access to an immigration and asylum legal aid provider.

making a deportation decision is required. We express no view on the policy question of whether such a power is indeed required, but if it is our proposed restrictions include specifying that this power is limited to persons who pose a national security risk, and introducing a time limit for detentions on this basis.

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