

CHILDREN AND THE ILLEGAL MIGRATION ACT 2023

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In *Seen and Heard* 33(2), I set out details of the Bill, as it is likely to impact children. Introduced by the Home Secretary, Suella Braverman, on 7 March 2023, the Bill received Royal Assent on 20 July 2023. Despite attempts by the House of Lords to make extensive amendments to this legislation, the Act is largely in the form of the original Bill.

Although now an Act of Parliament, only a small number of its sections have currently been brought into force. The sections brought into force when the Act was passed are:

- Sections 30–37 (dealing with entry, settlement and citizenship);
- Section 52 (dealing with the powers of judges of the First-Tier Tribunal and Upper Tribunal); and
- Sections 63–69 (dealing with regulation-making powers, definitions, geographical extent and the Act's short title).

On 11 September 2023, Robert Jenrick signed the Illegal Migration Act 2023 (Commencement No 1) Regulations 2023. These regulations bring into force six sections, including section 12 of the Act, dealing with the period for which individuals may be detained.

The duty to remove from the UK

Subject to the provisions being brought into force, section 2 is the key provision in the Act, which imposes a duty on the Secretary of State to remove from the UK anyone who satisfies the four conditions set out in that section. Those conditions are, essentially, that the individual arrived in the UK:

- without leave to enter;
- on or after 20 July 2023;
- did not travel to the UK directly (and without stopping in a safe country) from a country in which their life and liberty were threatened;
- requires leave to enter the UK but does not have it.

The duty to remove applies to individuals of any age. Children who arrive with their parents or other adult relatives will be subject to the section 2 duty to be removed and the Act's powers of detention.

Section 4 of the Act provides that *unaccompanied* children are not subject to a *duty* to remove them. They *may*, however, be removed for the purpose of:

- reunion with the child's parent;
- removal to a 'safe State', listed in s80AA(1) of the Nationality, Immigration and Asylum Act 2002, if the child is a national of that state or has a passport from that State;

- where the child has not made a protection claim or human rights claim and they are removed to a country of which they are a national or passport holder or 'in which they embarked for the United Kingdom'; or
- 'in such other circumstances as may be specified in regulations made by the Secretary of State'.

Once an unaccompanied child reaches the age of 18, regardless of any asylum claim, the Home Secretary will have a duty to remove them from the UK.

Once an individual, whether adult or child, falls within the section 2 criteria they are treated as outside the protections of the Human Rights Act. Section 5 of the Act states that, for anyone subject to the Secretary of State's duty to remove them from the UK, any human rights claim or claim that they are a victim of slavery or human trafficking must be declared inadmissible.

Accommodating and detaining children

Sections 16 to 21 of the Act deal with the accommodation and 'other support' for unaccompanied children. Section 16(1) says that the Secretary of State 'may provide' accommodation for unaccompanied children in England and (under section 20) may make regulations to apply these provisions in Wales, Scotland and Northern Ireland. Importantly, these provisions do not amend the existing provisions of the Children Act 1989 and do not confer parental responsibility for such children on the Secretary of State. The Act retains the provisions of the Bill giving the Secretary of State power (but no obligation) to transfer children into the care of local authorities and to direct local authorities to return the same children into Home Office accommodation.

The Act contains details about the detention of those affected by the Act. For those, including children accompanied by adult family members, affected by the duty under section 2 of the Act to remove them from the UK, section 11 sets out powers of detention. Under section 12 (now in force), the period of such detention is 'such period as, in the opinion of the Secretary of State, is reasonably necessary'. According to the Home Office press release, the measure will 'clarify that the Home Secretary, rather than the courts, will determine what constitutes a reasonable time period to detain a person for immigration purposes'.

Under section 13, for the first 28 days of detention, the decision to detain 'is final and is not liable to be questioned or set aside in any court or tribunal'. The powers of detention exercised by an immigration officer or the Secretary of State 'are not to be regarded as having been exceeded by reason of any error made in reaching the decision' and the decision is not susceptible to an application for judicial review during that initial 28-day period.

The picture regarding the detention of children is more complex. For those accompanied by a parent or other adult carer, the scheme for detention will apply equally to those children as it will for the adults. According to Coram Children's Legal Centre, there were 8,000 children who entered the UK in the year to March 2023 and who would be locked up indefinitely under the new Act. For unaccompanied children, there is, as we have seen, a discretionary power to remove under section 4 of the Act. Children who are awaiting a decision about whether they should be removed, or who are waiting to be removed, may be held under detention under circumstances to be 'specified in regulations made by the Secretary of State'.

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