Immigration Act 2014

Alison Harvey, Legal Director ILPA for AVID 12 June 2015

The Immigration Act 2014 has changed the way bail operates. It has put a definition of Article 8 of the European Convention on Human Rights into primary legislation. It has also changed the way removal operates and the way appeals operate. The appeals and removal changes are subject to complex transitional provisions so you will continue to see persons under the old regime for some time to come. A person who falls under the new appeals regime is subject to the new removals regime.

Section 1 – Removal of persons unlawfully in the United Kingdom

The idea of the new measures on removal is that the letter refusing a person will be their notice of removal; they will become liable to removal as soon as they get it and should not expect any separate notice of removal within three months. Only if they are not removed within three months, will they get a separate letter. Again, this will open up a three-month "window" and they could be removed at any time within that window.

In cases not subject to the new regime, persons can normally expect to get a copy of the removal directions sent to the carrier who is to remove them, thus to know the precise date and time of the intended removal. In such cases the refusal letter alone is not enough.

See further Chapter 60 of the Home Office Enforcement Instructions and Guidance.

Section 7. Immigration bail: repeat applications and effect of removal directions

This makes two, separate changes to the bail regime. First, it provides that if a person is due to be removed within 14 days starting with the date of the decision, the person cannot be released on bail without the consent of the Secretary of State. Second, that Tribunal Procedure Rules must secure that where bail has been refused any further application made within 28 days must be refused on the papers unless the person demonstrates that there has been a material change in circumstances. This the rues now do.

Consent of the Secretary of State

There is no bar on the immigration judge's hearing the bail application. Where there are grounds for a challenge to the lawfulness of detention, be it an application for judicial review or for habeas corpus, this would appear to be the preferable option. However, in a case of a client not eligible for legal aid it may be desirable to seek findings of fact in a bail hearing which would found a challenge of unlawful detention and then rely on those in a pre-action protocol letter (the letter written before an application for judicial review is issued) and in any application for Chief Immigration Officer bail. In any event, where it is clear that a challenge to the lawfulness of detention is being made (and that damages are being sought), this may make representatives of the Secretary of State more cautious about using their powers to withhold their consent to bail.

Where the date of removal is not known, or is known and is more than 14 days away (although this would be rare) one option is to make haste to make any bail application. This is particularly the case where a charter flight has been cancelled and no new date has yet been set. However, if removal directions are set the power to withhold consent to release arises and it may be that in some cases an application for bail will spur the Secretary of State to try to bring forward removal.

Andrew Elliot, head of the Bill team for the Immigration Act 2014 in the Home Office told Alison Harvey of ILPA on 17 October 2014 in an email:

> *I think our position is that wherever possible we want to try and avoid refusing consent. We'll try and consider the new matter before hearing, or failing that we'll seek an adjournment to allow consideration to happen. But if the Tribunal wants the hearing to proceed and we need to verify evidence or do essential checks then we will refuse consent.*

The Home Office Modernised Guidance Bail applications – action before and during a bail hearing or decision v 7 was subsequently published on 20 October 2014. It sets out that a bail summary includes details of "the notice of removal" ("or removal directions for cases not dealt with under the Immigration Act 2014") which "has been served on the applicant within 14 days of the bail hearing and the Secretary of State's intention to refuse consent".

The guidance contains a section "How to consider the grant of consent for immigration bail." This indicates that the number of cases per year in which the power could be applicable is in the low hundreds and that in the vast majority of such cases the immigration judge will refuse bail. They envisage the immigration judge announcing their decision in open court and the Presenting Officer then being asked if the Secretary of State will consent. We are told "The PO will take instruction and relay the decision to the court" by requesting a short adjournment and getting in touch with the "nominated senior civil servant" detailed in the bail summary. The guidance states that it is the senior civil servant's responsibility to grant or refuse consent "immediately" and to provide reasons for the decision. It is stated that

> *"The PO will relay the decision to the judge who will explain to the court and the applicant that although bail has been granted, the Home Secretary has refused to grant consent to their release and they will therefore remain in custody."*

Despite the unfortunate syntax it is assumed that the court will not remain in custody. It is provided that a detention review must be considered at the same time as the consideration of consent and "If detention is not lawful consent must not be refused." As to the substantive matter of consideration of context it is stated that the power (understood from the context as the power to refuse consent)

> *"…should only be exercised in exceptional circumstances, where, for example, it is considered that the judge has not correctly weighed the high risk of absconding…or given enough weight to the public protection risk (if appropriate). This is not an exhaustive list of reasons why consent may be refused."*

It is further stated that "A letter setting out why consent was refused must also be provided to the applicant within a reasonable time frame." No letter will be provided if consent is given. The "IS151F consent letter" (IS151FCCD for those handled by criminal casework) must be served on both applicant and tribunal within 48 hours of the Bail hearing

One effect of the provisions may be to assist in confining the notion of an imminent removal. The Enforcement Guidance and Instructions provide at paragraph 55.3.2.4

> *"…If removal is imminent, then detention or continued detention will usually be appropriate. As a guide, and for these purposes only, removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks."*

There is now additional scope to argue, relying on the provisions of this section by analogy, that while removal is scheduled to take place in less than four weeks, it is envisaged that there will be circumstances in which an immigration judge will order release.

28 days

Examples were given of a material change of circumstances in debates in parliament. It was agreed that the passage of time could constitute a material change of circumstances.

> *…if there were procedural flaws in a previous bail hearing and evidence of that came to light—…—it would be open to the tribunal to conclude that that was a material change in circumstances and therefore to allow a full hearing on that application. … it would be open to the detainee to bring forward evidence that there had been a procedural problem and to present it to the tribunal. … it would be open to the tribunal to conclude that there had been a flaw that amounted to a change in circumstances and to allow a full hearing, rather than making a decision on the papers.* Mark Harper MP, Minister of State, Public Bill Committee, 6th sitting, col 181

Section 15 Appeals

The Immigration Act 2014 makes sweeping changes to the appeals regime. Complex transitional provisions apply.

What is the new regime?

The only persons subject to the new regime who continue to enjoy rights of appeal will be those who are appealing decisions about their rights of free movement as EEA nationals have made a protection (broadly asylum, humanitarian protection) or human rights (for example on the basis of Article 8, the right to private and family life) which the Secretary of State has "decided to refuse" or whose leave granted for protection reasons (recognition as a refugee, humanitarian protection), has been revoked. Those who have made applications within the immigration rules will be worse off. Overstayers who have advanced human rights claims will arguably be better off, as under the old regime they have to wait for removal directions to be set to have an appeal, whereas under the new system if a human rights application is refused, there will be a right of appeal.

EEA decisions can be appealed on the grounds that they breach EEA law. Protection cases where a person has applied for asylum or humanitarian protection can be appealed on protection or human rights grounds; an appeal against revocation of protection status can be brought on protection or on human rights grounds. Human rights cases can be appealed only on human rights grounds. So there is no scope for leaping in and saying "by the way, I was wrongly refused as a student", unless you repackage this as a human rights claim. The Home Office may however conclude that the case is sufficiently weak that it can be certified as "clearly unfounded", in which case there is no right of appeal until the person has left the UK. Appeals on race discrimination grounds are gone.

What are the transitional provisions?

Broadly the following are subject to the new regime.

- A person who makes an application on or after 20 October 2014 for leave to remain, on or after 6 April 2014 for leave to enter or entry clearance, under Tier 4 (students), or on or after 2 March 2015 for leave to remain under Tiers 1, 2 or 5 of the Points-Based System, as a principal or as a dependant. The new regime applies to any asylum, human rights or protection claims made by the person subsequent to their (on or after 20 October 2014/2 March 2015) application, or made on or

after 6 April 2015 and in these circumstances applies to any other claims refused by the decision refusing the asylum, human rights or protection claim. Otherwise the old regime applies.

- A "foreign criminal" as defined who is subject to a decision to make a deportation order, to refuse to revoke a deportation order or to automatic deportation where the decision is made on or after 10 November 2014, and their family members facing deportation.

  You may see a person who "became" a "foreign criminal on or after 20 October 2014 and persons liable to deportation as a family member of such a person where the decision to make a deportation order, to refuse to revoke a deportation order or an "automatic deportation" decision was made after 20 October 2014 and before 10 November 2014. The position of these persons is somewhat ambiguous. On the face of the legislation, probably due to drafting errors, they do not have a right of appeal under the new regime, but it seems likely that this will be ignored in practice.

- A person who makes an application on or after 6 April 2015 for leave to enter, for entry clearance, for a certificate of entitlement to a right of abode, or to vary leave in circumstances where the result of a refusal will be that the person has no leave to enter or remain.

- A person who receives a decision, on or after 6 April 2015 on claim that is solely a protection or human rights claim, whenever made.

- A person who receives a decision on or after 6 April 2015 on an application made after 20 October 2014 for leave to enter, for entry clearance, for a certificate of entitlement to a right of abode, or to vary leave in circumstances where the result of a refusal will be that the person has no leave to enter or remain where the refusal of the application is also a refusal of an asylum, human rights or protection claim. These persons will have a right of appeal, but it will be limited to the protection and human rights aspects of the claim.

What happens to persons whose human rights claim was refused before 6 April 2015 but who did not get a right of appeal (because they were overstayers and had to wait for a decision to remove them to get any appeal at all)? The Home Office has published a new policy *Requests for reconsiderations of human rights or protection based claims refused without right of appeal before 6 April 2015*. This provides that they will reconsider decisions on cases involving

- Dependent children who are British citizens or had been resident in the UK for at least three years when the application was made
- Persons receiving NASS or local authority support
- Where there are exceptional or compelling reasons to do so
- When it is "operationally expedient to do so

It appears that such reconsiderations will generate a right of appeal, because the new policy talks about certification. However, everyone is struggling with the decision of the Upper Tribunal in *R(Wagar) v SSHD IJR [2015] UKUT 169 (IAC)* where the Upper Tribunal held that only a refusal of further submissions that amount to a fresh claim will generate a right of appeal under the new regime. Most lawyers think *Wagar* is wrong but the confusion it has generated has yet to be sorted out.

Administrative review

Administrative review, an internal review by the Home Office, is the alternative to an appeal. The person refused cannot choose between an administrative review and an appeal; they are allocated to one track or another. If their case does not involve any human rights or protection claim, they must use administrative review to challenge the decision. A number of applications under the immigration rules

are deemed to encompass a human rights claim, for example all the family applications in Appendix FM, with the (bizarre) exceptions of domestic violence and bereavement cases. So they carry a right of appeal. Administrative reviews are thus mostly for students, and workers. There is no administrative review for those whose leave is curtailed.

An administrative review costs £80, repaid if you succeed. The grounds on which an administrative review can be based and the evidence that can be submitted are closely circumscribed in the immigration rules.

Section 17 – Place from which appeal may be brought or continued

In both the old and new systems, not all appeals are "suspensive" (suspensive means that they halt any removal from the UK). Appeals can be certified as clearly unfounded, or as founded on matters that could have been raised at an earlier stage. Asylum claims can be certified on the basis that they should have been made in a country other than the UK. Under the new system certificates suspend an appeal until you leave the UK.

There is a new ground of certification: deportation appeals can be certified on the basis that removal during the appeal (with return at the State's expense if you succeed) would not breach your human rights and in particular would not cause you serious, irreversible harm. The new provision section does not apply in the case of those facing deportation on the basis of their family relationship to someone who is being or has been deported; it only applies to the principal.

The Home Office guidance indicates that this new certificate is not to be used in respect of Article 2 (right to life) or Article 3 (prohibition of torture) claims. They might still be certified under other powers, i.e. as clearly unfounded or as matters which could have been raised before.

Where children are to be affected by the deportation of the principal there may be additional considerations since section 55 of the Borders, Citizenship and Immigration Act 2009 will require the Secretary of State to have regard to the need to have regard to the safety and welfare of any children.

Challenge to a certificate is by way of judicial review.

The Government has announced in its latest proposals for an immigration bill that it intends to extend the new system of certifying appeals to permit removal before the appeal is heard, which currently applies only in deportation cases to all cases. We assume this to mean all cases where the person does not have leave and that it will not affect persons who have made an in-time application, although we shall study the draft legislation with care.

The guidance suggests that 'serious irreversible harm' means harm that reaches a minimum level of seriousness (undefined) and which will be either permanent or of very long-lasting effect.

Questions that will need to be considered will include the capacity of an out-of-country appellant to adequately present evidence and submissions, in support of his or her (Article 8) human rights grounds of appeal and in response to any submissions (and evidence) presented on behalf of the Secretary of State A prior concern, however, is whether judicial review will provide an adequate safeguard by means of which a certificate may be challenged.

The new regime also seeks to emphasise the Home Office role as primary decision-maker, constraining the matters the First-tier Tribunal (Immigration & Asylum Chamber) may consider on an appeal to the

tribunal. The Home Office Presenting Officer will have to consent to the Tribunal's dealing with a ground that has not already been dealt with by the Secretary of State.

The amendments made by this section to "manifestly unfounded" certificates, "safe third country certificates" and the new powers to certify a pending appeal introduce something novel. Not only do they permit the Secretary of State to issue the relevant certificate after an appeal has been brought in-country, but rather than bringing the appeal to an end they suspend the appeal so that it may only be continued after the appellant has left the UK.

This does not sit easily with the prohibition on the removal of a person who has brought an in-country appeal. This provision, which affects those who have leave at the time of appealing (i.e. made an "in-country" appeal) appears to have been overlooked. It appears that people will be in limbo: their appeal freezes but they cannot be made to leave the UK. The result will be a stand-off: who cracks first? The appellant, by leaving, or the Secretary of State by withdrawing the certificate. In any event, during the limbo period, since there can be no removal where would appear to be no power to detain.

If a person has leave (as opposed to being an overstayer) during this limbo period, does their leave continue? The answer appears to be no, where an "ordinary" deportation order is made, because the making of a deportation order will invalidate any leave the appellant has. However, bizarrely, those subject to 'automatic deportation' seem to be better off, because the making of the order does not invalidate leave. In cases that are not deportation cases it appears that the leave of a person who made an in-time application continues on the same terms and conditions. The results suggested here are the very opposite of what the Secretary of State Intends (as is clear from her Certification guidance for non-EEA deportation cases: section 94B' published on 20 October 2014) and we wait to see what the courts will do with this mess.

19. Article 8 of the ECHR: public interest considerations

The Immigration Act 2014 appears to set out the meaning of Article 8 of the European Convention on Human Rights. The immigration rules have been amended to reflect this. The Government considers that its approach is compatible with Article 8: that the balance it has struck reflects the jurisprudence. The provisions of the Act are dispositive of all or most cases as far as Home Office staff are concerned as confirmed by the amendments effected by Statement of Changes in Immigration Rules HC 532 and HC 693 and by the Home Office Guidance, Immigration Directorate Instruction Chapter 13: criminality guidance in Article 8 ECHR cases, 28 July 2014.

The courts have taken the view that the provisions "... *do not divest a judge of the need to apply established principles of case law dealing with considerations not covered*" (paragraph 32) and are not *any kind of radical departure from or 'override' of previous case law on Article 8 (Dube* [2015] UKUT 90 (IAC)). Thus, win under the provisions of the Act if you can; if you cannot, and you think you win under the case law on Article 8, argue that.

Criteria

The Act provides that maintenance of effective immigration controls is in the public interest. It is then stated that it is in the public interest and in particular in interests of the economic well-being of the United Kingdom, that persons seeking to enter or remain in the UK can speak English. A justification is given: that such persons are less of a burden upon "taxpayers" and are "better able to integrate" into "society". Home Office guidance lays emphasis on the provision of "original, independent and verifiable documentary evidence" to support the contention that a person speaks English and other requirements. While acknowledging that there is no required standard some of the suggested evidence (citizenship of a majority English-speaking country, a degree taught in English, giving evidence in English at appeal) does seem to point decision-makers toward a high standard.

The Act states that financial independence is in the public interest and in particular in interests of the economic well-being of the United Kingdom for the same two reasons. It is then stated that the financially independent are not a burden on taxpayers and are better able to integrate into society. There is no prescribed financial threshold and no prescribed evidence.

It is stated that little weight should be given to private life or a relationship with a "qualifying partner" established at a time when a person is in the United Kingdom unlawfully and that little weight should be given to a private life established when a person's status is 'precarious'. A qualifying partner is defined as a partner who is a British citizen or settled.
The statute does not define "precarious"; the Home office has indicated that it means by it, not settled.

An exception is made for a person who has been who have been "lawfully resident" for most of their life and is socially and culturally integrated in a case where there would be significant obstacles to integration in the country to which they face deportation. Home Office guidance specifies that "most" means "more than half".

In the case of children a different approach is taken and it is stated that in the case of person who is not liable to deportation the public interest does not require a person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. A qualifying child is described as a child who is a British citizen or who has lived in the UK or a continuous period of seven years or more. Settled children are thus not included.

This approach appears to leave open the possibility of arguing why the public interest does not require deportation in a broader range of cases and this was what Ministers said that the provisions mean:

> "*The best interests of a child in the United Kingdom will continue to be a primary consideration in all cases, whether or not the child is a "qualifying" one. I do not think that I can make it any clearer than that for the record*." Lord Wallace of Tankerness HL 5 March 2014, col 1382

In the end the Government did make it clearer for the record by inserting s 71 *Welfare of Children* into the Act.

Foreign criminals

The Act then sets out additional considerations in cases of "foreign criminals". These are defined as persons who are not British citizens, who have been convicted in the UK of an offence and who have been sentenced to at least 12 months, or convicted of an offence that has caused serious harm or are "persistent offenders". While the Act makes a distinction between convictions in the UK and other convictions, the guidance seeks to elide these. Serious harm is not defined in the Act.

The Act It provides that the public interest requires their deportation unless they fall within one of the exceptions:

- The first exception is where the person has been lawfully resident in the UK for most of their life; is socially and culturally integrated into the UK and there would be very significant obstacles to integration in the country to which the person is proposed to be deported.

- The alternative exception is where there is a genuine and subsisting relationship with a qualifying child or partner as defined and the effect on that child or partner would be "unduly harsh".

Provision is then made that when a person is sentenced for over four years deportation is required unless there are "very compelling circumstances" over and above the exceptions.

Paragraph 398 of the Immigration Rules and the *Criminality Guidance* (at 2.4.4) at provide that when the partner or child is not a "qualifying" partner or child then a person sentenced to between 12 months and four years will be required to demonstrate "very compelling circumstances just as a person sentenced to more than four years would be.

The over-whelming impression is that a heavy evidential burden will be placed on those who wish to rely on a relationship with a child.

Transitional provisions

Transitional provisions are that in deciding whether the Tribunal made an error of law, the Upper Tribunal or court looks at the situation before the provisions came into force. However, the provisions when they did come into force took immediate effect and in determining whether the appellant succeeds under Article 8 or not, the law as currently in force applies: *YM (Uganda) v SSHD* [2014] EWCA 1292

71. Duty regarding the welfare of children

Summary explanation
Provides that any conflict between any section of the 2014 Act, with section 55 of the Borders, Immigration and Citizenship Act 2009 is to be resolved in favour of the latter.

Commencement: 28 July 2014 **(**Immigration Act 2014 (Commencement No. 1, Transitory and Saving Provisions) Order 2014, SI 2014/1820, article 3(w)).

This little section provides that that any conflict between any section of the 2014 Act, with section 55 of the Borders, Immigration and Citizenship Act 2009, the duty to have regard to the need to safeguard and promote the welfare of children, is to be resolved in favour of the latter. It was intended to be a sop to concerns expressed as to whether the provisions on Article 8 were compatible with the duty to safeguard and promote the welfare of children. However, it applies to every section of the Act.