ILPA proposed amendments and briefing to amendments tabled for House of Lords Committee Stage of the Immigration Bill: Part Three Enforcement

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations. ***For further information please get in touch with Alison Harvey, Legal Director or Zoe Harper, Legal Officer, on 0207 251 8383, Alison.Harvey@ilpa.org.uk; Zoe.Harper@ilpa.org.uk***

This briefing proposes amendments. We shall produce a briefing to amendments tabled.

Clause 20 Powers in connection with examination, detention and removal

PROPOSED AMENDMENT

Clause 20, page 25, line 8, at end insert -

"(2A) In paragraph 2(2) after "examine" insert "at the point of entry into the United Kingdom."

Purpose

Schedule 2, paragraph 2 of the 1971 Act (ostensibly a power dealing with individuals on arrival in the UK for the purposes of determining whether they have, or should be given leave to enter or remain) has been used by the Home Office as justification for conducting speculative, in-country spot-checks involving 'consensual interviews'. This proposed amendment would expressly limit this power to examination at the point of entry.

Briefing

This amendment was debated in Commons Committee (3 November 2015, pm col 323 ff). The Home Office Enforcement Guidance and Instructions at Chapter 3124 rely on the (dubious) authority of Singh v Hammond [1987] 1 All ER 829, [1987] Crim LR 332 as authority for its stop and search operations, for example at tube stations.

The Home Office takes the 1987 case of *Singh v Hammond* as authority for the proposition that Schedule 2, paragraph 2 examinations in relation to those 'who have arrived in the United Kingdom'30 can be carried out in-country. Its enforcement guidance and instructions provide at Chapter 31

In Singh v Hammond, the Court held that:

'An examination [under paragraph 2 of Schedule 2 to the Immigration Act 1971] … can properly be conducted by an immigration officer away from the place of entry and on a later

date after the person has already entered … if the immigration officer has some information in his possession which causes him to enquire whether the person being examined is a British citizen and, if not, … whether he should be given leave and on what conditions.'

The Enforcement Guidance and Instructions go on to provide

Reasonable suspicion that an individual may be an immigration offender could arise in numerous ways but an example might be where an individual attempts to avoid passing through or near a group of IOs who are clearly visible, wearing branded Immigration Enforcement clothing, at a location which has been targeted based on intelligence suggesting that there is a high likelihood that immigration offenders will be found there. This behaviour could not necessarily be considered to be linked to, for example, evading payment of the train fare if IOs are wearing body armour or other items of work wear which clearly show which agency they belong to. In such circumstances the IO could legitimately stop the individual and ask consensual questions based on a reasonable suspicion that that person is an immigration offender

IOs should not engage with and question all persons in an attempt to demonstrate that they are undertaking these operations in a non-discriminatory manner. Stopping or requesting identification from all individuals in a particular location is not consistent with stopping only those people in relation to whom the IO has a reasonable suspicion that they may be an immigration offender. Instead, IOs must be able to demonstrate and record the objective evidence on which they base the 'reasonable suspicion' which forms the basis for their initial engagement with an individual in all cases. The reasons recorded should be sufficient to demonstrate that their actions are compliant with the Equality Act 2010 (see 31.19.5).

In short, any of us, anywhere, if we so much as seek to avoid crossing the path of an immigration officer, can be subject to such powers unless and until such time as we are able, if we are, to establish that we are British Citizens or Commonwealth citizens with a right of abode (see Section 143 of the Immigration and Asylum Act 1999 as amended by Schedule 8).

The Solicitor General, relying on *Singh v Hammond* said

My concern is that if the power of examination is limited only to the point of entry, we could have—perversely—an increase in people being arrested, because the power to ask questions is, as I said, not a power of arrest, but a different type of power. It allows people to give a reasonable explanation before we get to the stage of any apprehension or arrest, which I think is a good thing. I would not want to see a perverse situation where, in effect, the immigration authorities are shooting first and asking questions afterwards.[1]

This is confused. It would only be true that the power obviates the need for an arrest were it the case that the desire to ask questions can be a ground for arrest. It is not. A person can only be arrested where there are grounds for arrest. This power stands to be used in circumstances where immigration officials have no grounds for arrest.

Clause 24 *Search for nationality documents by detainee custody officers etc.*

PROPOSED AMENDMENT

[1] 3 November 2015 Col 329

Clause 25, page 32, line 13, leave out lines 13 to 16

PROPOSED AMENDMENT

Clause 25, page 32, line 17, at beginning insert "A full search and/or"

Purpose
The first amendment removes the power to conduct a strip search. The second amendment introduces an express prohibition.

Briefing
Give the very grave concerns about the treatment of immigration detainees, including about sexual abuse (see further the annex), it is not acceptable to give detainee custody officers powers of strip search. The potential for abuse is enormous and those being searched might previously have been stripped as a prelude to torture or other treatment. The powers can be exercised in a young offenders' institution and it was confirmed in the debates on the amendment in Commons committee that they could lead to a child being strip searched[2].

The specific mention of reasonable force (not in connection with this power) in paragraph ((10) provides no reassurance as in the Immigration Act 2014 immigration officers were given powers to use reasonable force in carrying out any of their functions. Commenting on that power, Lord Ramsbotham, former HM Chief Inspector of Prisons and former chair of an independent commission on enforced removals said at second reading of the Bill that became the Immigration Act 2014:

> *"I do not believe that paragraph 5 of Schedule 1 which allows untrained and unlicensed immigration officers to use unspecified but allegedly 'reasonable force' when there is such an authentic catalogue of unreasonable force being used by those on Home Office contracts, including a charge of unlawful killing, should be allowed to stand. I go further by suggesting that it would be wholly irresponsible of this House not to try and ensure that current practice is wound up in favour of something more akin to our claim to be a civilised nation"*[3]

PROPOSED AMENDMENT

Clause 24, page 33, line 5 leave out from "might" to the end of line 8 and replace with "—

(a) establishes a person's nationality or citizenship"

Purpose
To narrow the definition of nationality document to mean a passport or identity card.

Briefing
By Clause 24 detainee custody officers, prison officers and prison custody officers are given powers to search for nationality documents. "Nationality document" is broadly defined to mean a document which "might" establish a person's nationality, identity or citizenship or indicate the place from which a person has travelled to the UK or to which they intend to go.

[2] Public Bill Committee 3 November 2015, col 339.
[3] Hansard, 10 February 2014: Column 515.

Under this definition an air ticket could be a "nationality document". So could a diary. So could a tourist brochure or a lonely planet guide.

The powers in clause 24 exist if "the Secretary of State has reasonable grounds to believe a relevant nationality document" will be found if the power is exercised" (clause 24(4)). Given the breadth of the definition, clause 24 (4) appears to provide no restriction or safeguard at all. If what the Secretary of State wants is the power to rifle through the possessions of detainees at will, then that is what she should ask parliament for and that is what should be discussed.

What is a document which "might" establish a person's nationality, identity or citizenship? Is it what we should understand as an identity document, with the "might" indicating that the document may not be genuine? Or are a broader range of personal documents envisaged: a signed letter purporting to be from a parent or sibling etc.? Powers to search, including to strip search, persons in detention, where there have been allegations of the most serious abuse, as detailed in the annex are being given to search for nationality documents. When the point was debated in the Commons the Solicitor General suggested that the definition could encompass

> *…birth, marriage or civil partnership certificates; divorce documents; adoption papers; maritime or military discharge certificates; tickets for travel in and out of the UK; stubs of boarding passes; resident status documents; and visas and vignettes.*[4]

A power to strip search for the stub of a boarding pass or the documents mentioned above is a untrammeled power.

Lord Ramsbotham, former HM Chief Inspector of Prisons and former chair of an independent commission on enforced removals said at second reading of the Bill that became the Immigration Act 2014:

> *"I do not believe that paragraph 5 of Schedule 1 which allows untrained and unlicensed immigration officers to use unspecified but allegedly 'reasonable force' when there is such an authentic catalogue of unreasonable force being used by those on Home Office contracts, including a charge of unlawful killing, should be allowed to stand. I go further by suggesting that it would be wholly irresponsible of this House not to try and ensure that current practice is wound up in favour of something more akin to our claim to be a civilised nation"*[5]

We provide further details of abuse and other problems in immigration detention in the annex to this briefing to try to give some sense of what the cases involved and also commend to you the evidence submitted to the detention inquiry conducted by the All Party Parliamentary Groups on Refugees and Migration.[6]

It is against this background that the proposals extensions to enforcement powers in Part 3 should be evaluated.

Before Clause 29 Immigration Bail

[4] Public Bill Committee 3 November 2015 col 341.
[5] Hansard, 10 February 2014: Column 515.
[6] http://detentioninquiry.com/

PROPOSED AMENDMENT

Before Clause 32, page 38 line 7

Leave out heading "Immigration Bail"

Clause 29 Immigration Bail

PROPOSED AMENDMENT

Clause 32, page 38 line 8

Leave out name of clause "Immigration Bail" and replace with "Temporary admission"

CONSEQUENTIAL AMENDMENTS (including to Schedule 5 Immigration Bail)

Clause 32, page 38 line 9 leave out "immigration bail" and replace with "temporary admission"

Clause 32, page 38 line 11 leave out Bail" and replace with "temporary admission"

Schedule 7, page 101, line 6 rename the schedule "Temporary admission"

Schedule 7, in all places in schedule 7 where the words "immigration bail" or "bail" appear, rename this "temporary admission.

Purpose
To rename immigration bail temporary admission. Further consequential amendments (to the Immigration Act 1971 and thence to secondary legislation e.g. the Tribunal Procedure Rules) would be required fully to achieve the proposed change but these amendments will suffice to debate the point.

Briefing
The Bill creates a single status to replace bail, temporary admission and temporary release. Temporary admission is used for persons at liberty on the territory of the UK who have applied for leave but do not have it. While it can be used generally for persons in cases where an immigration officer is deliberating whether to admit them to the UK and does not detain them while these deliberations are taking place, it is used most often for persons seeking asylum. Turning someone back at port of entry is likely to take hours or at most days whereas the determination of an asylum claim takes months so many of those who remain on temporary admission for any significant period are persons seeking asylum.

The terminology of "immigration bail" suggests that detention is the norm and liberty an aberration. It also suggests that persons those with this status, in particular those seeking asylum are a form of criminal. In international law, Article 31 of the 1951 Refugee Convention expressly protects those who claim asylum from being treated as criminals and UNHCR and other international guidance recognises that detention of persons seeking asylum must always be the exception.

Persons seeking asylum have greeted with consternation the notion that they might be termed "on bail." These are persons who have presented themselves to the authorities and asked to regularize their status: they have applied for leave as a person seeking asylum. They include refugees, children, survivors of torture and trafficked persons. Anything that increases the possibility that they will be treated as criminals, by anyone, should be strenuously avoided. If one unified term be given to all those awaiting a decision we ask that it not be "immigration bail." We carry no special torch for "temporary admission," if the Government wishes to propose other neutral terms without connotations of criminality.

When the terminology was debated in the Public Bill committee, the Minister said

> *I note the point on the terminology of immigration bail. We reflected on the language and determined to choose it, because we believe that it is already commonly understood among practitioners in the system and should therefore aid attempts to understand the system better. It is not in any sense an effort to give some sort of criminal context nor to change policy in any way. It is, rather, using a term that is already used in many contexts that would continue to be covered in respect of the provisions that clause 29 and schedule 5 seek to operate.*
>
> *… I take on board the genuine sentiment behind the amendments, but with the clarity that I have given on there being no change in emphasis, policy or the manner in which anyone would be viewed or treated under the provisions, I hope that Members will withdraw their amendment.* [7]

The problem however is not whether the Minister is clear but whether those on the ground are clear. To achieve this, clear language is needed. The use of the term "immigration bail" risks changing the way persons under immigration control are treated in a way that the Minister has indicated that he does not desire.

Schedule 7 Immigration Bail

PROPOSED AMENDMENT

Page 101, line 9 before subparagraph 1(1) insert

(*) The following provisions apply if a person is detained under any provisions set out in paragraph (* - current Schedule 5 paragraph 1(1))

(a) the Secretary of State must arrange a reference to the First- tier Tribunal for it to determine whether the detained person should be released on bail;

(b) the Secretary of State must secure that a first reference to the First-tier Tribunal is made no later than the eighth day following that on which the detained person was detained;

[7] Public Bill Committee col 352.

(c) if the detained person remains in detention, the Secretary of State must secure that a second reference to the First-tier Tribunal or Commission is made no later than the thirty-sixth day following that on which the detained person was
detained and every twenty-eighth day thereafter;

(d) the First-tier Tribunal hearing a case referred to it under this section must proceed as if the detained person had made an application to it for bail; and

(e) the First-tier Tribunal must determine the matter—

(i) on a first reference, before the tenth day following that on which the person concerned was detained; and

(ii) on a second and subsequent reference, before the thirty-eighth day
following that on which he was detained.

(*) For the purposes of this paragraph, "First-tier Tribunal" means—

(a) if the detained person has brought an appeal under the Immigration Acts, the chamber of the First-tier Tribunal dealing with his appeal; and

(b) in any other case, such chamber of the First-tier Tribunal as the Secretary of State considers appropriate.

(*) In case of a detained person to whom section 3(2) of the Special Immigration Appeals Commission Act 1997 applies (jurisdiction in relation to bail for persons detained on grounds of national security) a reference under sub-paragraph (3)(a) above, shall be to the Commission and not to the First-tier Tribunal.

(7) Rules made by the Lord Chancellor under section 5 of the Special Immigration Appeals Commission Act 1997 may include provision
made for the purposes of this paragraph."

Purpose
To make provision for automatic bail hearings, after eight days, 28 days and every 28 days thereafter.

Briefing
The amendment is modelled on Part III of the Immigration and Asylum Act 1999, never brought into force and repealed in 2002. A version of it was tabled at House of Lords Committee stage of the Bill that became the Immigration Act 2014. It is in simplified form but what appears suffices to debate the principle of automatic bail hearings.

Detention under Immigration Act powers is by administrative fiat, without limit of time and a detained person is not brought before a tribunal judge or a court unless s/he instigates this. The

lack of any time limit adds greatly to the stress of the detention. It may render the detention arbitrary.

The Bingham Centre for the Rule of Law's publication, written by Michael Fordham QC, *Immigration Detention and the Rule of Law: Safeguarding Principles* provides as principle 21

> *SP21. AUTOMATIC COURT-CONTROL.*
> *Every detainee must promptly be brought before a court to impose conditions or order release.*

As set out in that publication, this is in accordance with international standards.

Article 5(4) of the European Convention on Human Rights provides:

> *'everyone who is deprived of his liberty by arrest or detention shall be entitled 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'.*

The UN Commission on Human Rights Resolution 2004/39: *Arbitrary Detention* of 19 April 2004, E/CN.4/RES/2004/39 provides:

> *"3. Encourages the Governments concerned: (c) To respect and promote the right of anyone who is deprived of his/her liberty by arrest or detention to be entitled to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful, in accordance with their international obligations".*
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> Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle VI: *"Competent, independent, and impartial judges and tribunals shall be in charge of the periodic control of legality of acts of the public administration that affect, or could affect the rights, guarantees, or benefits to which persons deprived of liberty are entitled, as well as the periodic control of conditions of deprivation of liberty"*
> .
> UNHCR Detention Guidelines (2012), Guideline 7 §47: *"asylum-seekers are entitled to the following minimum procedural guarantees: … (iii) to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. The review should ideally be automatic, and take place in the first instance within 24–48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release".*

In 1999 the then Government introduced provision for routine bail hearings. At second reading Lord Williams of Mostyn for the then Government said

> *Part III introduces important new safeguards for immigration detainees.* [see below for full passage, quoted by Baroness Anelay] .[8]

He later explained:

[8] *HL Deb 29 June 1999 vol 603 cc176-257.*

Perhaps I may set out our intention in setting time-limits for routine bail hearings and their determination. One element that is lacking in the present system—I do not disagree with what has been said in part—is any degree of certainty or structure with regard to bail hearings. We intend that the first routine bail hearing—to use the word "routine" is not to play down its importance, but to underline the fact that it must be regular—should take place about seven days after the original detention. In practice, the reference will normally be made much earlier.[9]

What has changed since 1999 so that a sense the gravity of the shortcomings of the system of immigration detention, and the urgency of addressing them, has gone so entirely? In 2002 the then Government, decided to repeal that part of the Immigration and Asylum Act 1999 that would have introduced a new bail regime. Baroness Anelay of St Johns, with support from all around the house, tried to stop them. She said:

In another place the then Home Secretary, Mr Straw, said in a debate on 22nd February 1999 at col. 39 of the Official Report: Part III fulfils the commitment in the White Paper to introduce a more extensive judicial element in the detention process. That will be achieved by introducing routine bail hearings for those detained under immigration legislation." In this House the noble and learned Lord, Lord Williams of Mostyn, when moving the Second Reading of the same Bill on 29th June 1999, at col. 178, said,

> *Part III introduces important new safeguards for immigration detainees. It introduces a more extensive judicial element into the detention process by means of a system of routine bail hearings, but the Government have decided that we should go further. The Government intend to bring forward amendments during the proceedings in this House to provide for a statutory presumption of bail, with exceptions to ensure effective immigration control and enforcement. Part VIII of the Bill provides a proper statutory framework for all aspects of the management and administration of detention centres and for the escort of detainees. Taken together, the provisions regarding bail and detention centres will provide significant additional safeguards for immigration detainees".*

I am sure Members of the Committee will recall that the noble and learned Lord moved the amendment of which he spoke at Second Reading on 19th July in Committee when he said,

> *I hope that the amendment will meet with the universal acclamation of the Committee".*—[Official Report, 19/7/99; col. 725.]
>
> *That amendment is now Section 46 of the 1999 Act and it is those very provisions in Part III of the Act, so eloquently spoken to by the noble and learned Lord, Lord Williams, three years ago, which today the Government propose to repeal under Clause 57(6) of this Bill. We acclaimed it; the Government now dispose of it.*
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> *There was an extensive debate on this matter in Standing Committee in another place. But the justification given at that time by Miss Angela Eagle was unconvincing. Members of the Committee will note that the provisions have never been brought into force. The Minister said that they were not brought into force because*
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> > *"we have been trying since the 1999 Act to work out the frequency and logistical implications of automatic bail hearings for each detainee. We concluded that it would be a logistical nightmare that would divert scarce resources from processing asylum applications … Implementing the Part III bail provisions would significantly increase the burden on the Immigration Appellate*

[9] HL Deb 19 Jul 1999 : Column 707.

Authority".—[Official Report, Commons, Standing Committee E, 14/5/02; co1.256.]

I cannot believe that the provisions in the 1999 Act which were described as important and significant by the noble and learned Lord, now the Leader of the House, and the implications of which were doubtless considered in detail by the Home Office when the White Paper was drawn up, when the 1999 Bill was drafted and when the amendments were proposed, are now to be dismissed as a logistical nightmare. I cannot believe that the noble and learned Lord, Lord Williams, would have put his name to such a measure and spoken in favour of it if he were not entirely certain that it was eminently workable and its implications had been fully thought through by the time the Act was passed by this House.

One final but important point on Amendment No. 173 is this. In another place my honourable friend Mr Malins moved an amendment which would have brought the provisions of Part III of the 1999 Act into effect. The Minister argued in response that to do so would be administratively unworkable and would cause chaos and catastrophe in the system. Amendment No. 173 meets the Government's point. It would not bring the provisions into effect but it would stop their repeal. The effect of that would be to allow the Government to bring them into force at a time when the administrative concerns which the Minister cited in another place had been allayed.

If the Minister were to resist the amendment, surely he would have to cast aside the mask of administrative unworkability that was taken up in another place and reveal the real policy reasons behind the Government's change of position. I invite him today to give us better justification on this matter than in another place. I beg to move[10].

In 1999 Lord Hylton[11] put forward an amendment that would have meant regular reviews throughout the period of detention. All speakers, with the exception of the Minister, supported him.[12] Contrast this with the current Home Office guidance on review, not by a court or tribunal, but by the officials detaining the person[13]:

There is a statutory requirement above, detention should also be reviewed during the initial stages, that is, the first 28 days. This does not apply in criminal casework cases where detainees come from prison, or remain there on completion of custodial sentence, and their personal circumstances have already been taken into account by the Home Office when the original decision to detain was made. However, criminal casework cases involving the detention of children must be reviewed at days 7, 10, 14 and every seven days thereafter…in practice, this will apply only to those exceptional cases where an FNO under 18 is being detained pending deportation or removal.

When the matter was debated in the Public Bill Committee the Minister said

"…*we do not consider that there is a need for mandatory judicial oversight of detention … There is already well-established judicial oversight available. Individuals detained under immigration powers have unrestricted opportunity to apply to the tribunal for bail at any time.*

[10] *HL Deb 17 July 2002 vol 637 cc1257-305*
[11] *HL Deb 19 July 1999 vol 604 cc693-724*
[12] Ibid. col 704
[13] Enforcement Instructions and Guidance 55.8.

They can also apply for a judicial review of their detention, or for a writ of habeas corpus to the High Court, again at any time.
… All detainees are made aware of the ability to apply for bail, but there is obviously a need to strike a balance. [14]

This is far too sanguine. Unless an immigration detainee applies for bail, s/he will never be brought before a court or tribunal to consider either release on bail or the lawfulness of detention. For those held in the prisons, there are no legal surgeries and the difficulties of obtaining any legal representation at all are increased. People with a mental illness are among the least likely to be able to take the necessary steps to instigate a bail hearing.

The lack of procedural protection and effect access to a court or tribunal in the UK renders detention under immigration act powers in particular cases arbitrary within the definitions used by the UN Human Rights Committee in resolution 1997/50 and by the UN Working Group on Arbitrary Detention: where it is clearly impossible to invoke any legal basis justifying the deprivation of liberty of a particular individual[15] and where an asylum seeker, immigrants or refugees are subjected to prolonged administrative custody without any possibility in practice of administrative or judicial review or remedy.[16]

PROPOSED AMENDMENT

Schedule 7, page 102, line 4, leave out lines 4-5

Purpose
To remove the power of the Secretary of State to detain a person granted bail by the Tribunal.

Briefing
Paragraph 1(6) of Schedule 5 provides that a grant of bail does not prevent a person's subsequent detention rather than this only being permitted when conditions of bail have been breached. It is another In *R(M) v SSHD* [2006] EWHC 228 (Admin) the Administrative court doubted that the Secretary of State can simply rely on reasseration of the underlying power under which a person had been detained to redetain a person released by the Tribunal on bail where the effect of the decision is to undermine the basis on which the Tribunal reached its decision. The provision suggests that an immigration officer will be able to overrule the Tribunal.

When this matter was raised in the Public Bill Committee the Minister was asked why it was needed.

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Keir Starmer: *… we are talking about a situation in which the tribunal is charged with faithfully going through a test of the individual circumstances of the case. In that situation, in what way and for what purpose does the Minister see the Secretary of State overriding the tribunal? Normally, if one side in a tribunal loses an argument on detentional conditions, there is*

[14] Public Bill Committee 3 November 2015 col 363
[15] Category One of the UN Working Group's criteria
[16] *Ibid*., Category Four.

an appeal route, but this appears to be something different in that the side that loses simply gets on with what it wanted in the first place.

James Brokenshire… *Sometimes, very close to a removal, when it is felt that the safest and most appropriate action would be to use detention, that mechanism may be adopted. Re-detention could be appropriate. It is also worth remembering that people granted bail might never have been detained. There will be people who are allowed into the UK on conditions while their claim is being considered. The amendment would mean that the Secretary of State could not detain such individuals if there were a change in their circumstances—for example, if their claim had been refused—without a suspicion that they were about to breach or had breached conditions.*

The power as drafted could not be used on an individual who had been granted bail by the tribunal where the facts in their case had not changed. Any attempt to re-detain would be unlawful. The power is not about marginalising the tribunal's ability to grant bail by allowing the Secretary of State to re-detain almost immediately after release. The power is about ensuring that detention is still available as an option when an individual is on bail and there is a change of circumstances in their case. The individual may never have been detained. The power is most likely to be used when removal becomes imminent, such as where someone was admitted at the border and their claim has subsequently been refused.

Keir Starmer: *I am grateful to the Minister for outlining the position on changes of circumstances. He has given a degree of reassurance, because what he said chimes with other not dissimilar regimes, but the matter is not clear in the Bill. Nothing in the Bill refers to changes of circumstances, so what level of assurance can he give that the provision is not intended to be used, nor will it be used, in a case where there is no change of circumstances?*

James Brokenshire: *If we are talking about detention, we are in many respects back to some of the basic principles as to why detention would be used, such as the immediacy of removal. Alternatively, we are talking about some other public policy objection on the basis of established legal principles around the matter. Those principles are what guide the potential use of the power, in addition to the obvious example of a change in circumstance.*

In short, the Minister has given no reason why the power should not be limited to cases in which there is a change of circumstances.

Schedule 7 Paragraph 2 Conditions of immigration bail

PROPOSED AMENDMENT

Page 102, line 24, delete ', occupation or studies' and replace with 'or occupation'

Purpose

To remove the restriction on a person's studies from the list of conditions to which a person may be subject when on immigration bail.

Briefing

The introduction of a restriction on studies as a condition either of temporary admission or bail for those subject to immigration control is new. No reason for the restriction is given in the Explanatory Notes to the Bill.

Breach of a condition of immigration bail is a criminal offence and therefore has serious consequences. Those lawfully present and in touch with the authorities should not be restricted from undertaking studies.

As all those subject to immigration control will be on immigration bail, not just persons released from detention, the condition could potentially be applied to children and young people, from accessing further education and even preventing them from attending their school.

Those previously on temporary admission will henceforth be on "immigration bail." This will include persons seeking asylum. The condition could be applied to them, preventing them from learning English or undertaking other studies whilst their asylum claim is pending. This would put those recognized as refugees at a disadvantage as they start to rebuild their lives in the UK. Those refused asylum are more likely to have an incentive to return if they know that return with skills or qualifications and such skills and qualifications may also help to rebuild countries recovering from war.

Persons seeking asylum currently face considerable delay in the determination of their asylum claim, during which time they are not permitted to work. The Home Office now has a target of six months for the initial decision on an asylum claim if the case is straightforward and a target of 12 months for deciding a case that it considers not to be straightforward[17]. Only if a person waits for more than 12 months for a decision will they be permitted to work and then only in an occupation on the shortage occupation list. A person who does not wait more than 12 months for their initial decision will not be permitted to work while waiting for a decision on their appeal, however long the appeal may take.

Should a person appeal against a wrongful refusal they will wait a long time for an appeal. At the moment the First-tier Tribunal is listing appeals for June and July 2016. That is the initial appeal; some cases will proceed to the Upper Tribunal and higher courts

By the time an individual is recognized as a refugee, they have large gaps in their employment history which make it more difficult to get a job and to begin to rebuild their lives in the UK. Placing an additional restriction on persons seeking asylum that would prevent them from learning English or other skills they may need to integrate into the UK will limit their prospects of integration on recognition as a refugee.

When the matter was raised in the public bill committee[18] the Minister said

> *We have chosen to include a restriction on study as it is something that may be considered under the bail powers. Like the other conditions listed, a restriction on study is only an option that is available; it is not a mandatory requirement and can be imposed as appropriate.*
>
> *The power is not, as was suggested, about trying to deny education. If a child can lawfully access education services, we will not seek to disrupt that by using restrictions under the bail power to place a prohibition on them attending. We also do not intend to impose through the use of the power a blanket ban on asylum seekers accessing education. Where the power could have*

[17] UKVI, *Non-straightforward cases: exclusions from the asylum processing aspiration*, 10 June 2015
[18] 3 November 2015, pm Cols 365-366

utility, however, is on specifying the place at which someone can study, for example. That would mean knowing where they are and saying that they are permitted to study, but only at a particular institution. For example, the wrap-around for a particular family group may be most appropriately provided for by conditions that are allied to a child going to a particular school. I point to it in that way. We have other regimes where conditions can be attached to study that are more towards that stance and approach.

As this demonstrates, he gave no explanation as to why the condition might be relevant to a grant of bail, necessary or required.

PROPOSED AMENDMENT

Schedule 7, page 102, line 30, leave out lines 30-31

Purpose
To remove the power to impose such other conditions on immigration bail as the person granting bail thinks fit.

Briefing
The Bill makes explicit that conditions requiring a person to appear before the Secretary of State or tribunal at a specified time or place can be imposed on immigration bail. It makes explicit that conditions restricting work, occupation, studies (see amendment above) or as to residence, reporting and electronic monitoring may also be imposed. But this detailed list is otiose, for the power to impose bail conditions is at large.

- What conditions are envisaged?
- Why can these not be specified on the face of the Bill?

PROPOSED AMENDMENT

Schedule 7, page 102, line 34, omit lines 34 to 43 (sub-paragraphs (3)-(5)).

PROPOSED AMENDMENT

Schedule 7, page 104, line 41, omit sub-paragraph (5).

PROPOSED AMENDMENT

Schedule 7, page 105, line 44, omit sub-paragraphs (8)-(10).

Purpose of the three amendments
This set of proposed amendments would remove provision which would allow the Secretary of State to override a decision of the Tribunal with regard to electronic monitoring or residence conditions placed on immigration bail.

The first amendment removes the power of the Secretary of State to impose conditions on bail as to residence or electronic monitoring that the Tribunal granting bail has not seen fit to

impose or to vary the conditions as to residence or electronic monitoring that the Tribunal has seen fit to impose.

The second amendment ensures that all forfeitures or recognizances will be paid to the Tribunal unless the tribunal directs otherwise; the Secretary of State cannot impose financial conditions and then recoup monies paid under them without having to argue for this before the tribunal.

The third amendment deals with variation of conditions and functions in the same way as the first in situations where the Tribunal varies conditions of bail.

Briefing
The tribunal is mocked by provisions that allow the Home Office to impose bail conditions it has not seen fit to impose or change conditions it has imposed. As barrister Colin Yeo explained when giving oral evidence on 22 October 2014, it renders the hearing before the tribunal a charade. The tribunal hears argument and determines not to impose a particular condition. The very next day the Secretary of State imposes it. This is underlined by the debate on these amendments in the Public Bill Committee

Keir Starmer: *How is it proposed that this will work in practice? There is a hearing before the tribunal. The tribunal goes through the individual facts of the case and there is an argument before the tribunal on whether a condition of electronic tagging, for example, is appropriate. The tribunal looks through all the relevant material and says that in this case, it is not necessary according to the test. As I understand the Minister, the Secretary of State then comes along and says, "That's all very well, tribunal, we disagree and we are now imposing a condition that you have just decided it is not necessary to impose." If the individual does not like it, they go to the High Court on judicial review. Is that the regime?*

James Brokenshire: *I think the hon. and learned Gentleman has set out what I have just indicated to the Committee. It is that sense of requiring. We have looked at, for example, foreign national offender-type cases. Our judgment is that foreign national offenders who are in this country unlawfully should be subject to ongoing monitoring through electronic tagging. It is that clear policy intent that we judge, but, as I have indicated, there would be a right of challenge by way of judicial review.*

There is a precedent for such a power. The House passed a similar provision in the Immigration Act 2014; the Secretary of State is required to consent to the release of an individual on bail by the tribunal when removal is 14 days or fewer away. The Secretary of State already has that mechanism—in, I accept, a slightly different situation—and that sets a precedent on how the Secretary of State has a direct interest. [19]

Schedule 7

PROPOSED AMENDMENT

Schedule 7, page 103, line 16, omit "in that person' interests or"

[19] Public Bill Committee 3 November 2015 col 367.

Purpose
To remove a power to use immigration detention on the basis that it is in the person's best interests to be detained under immigration Act powers.

Briefing

The risks of using immigration detention rather than act to make appropriate provision have been illustrated by cases in the annex to this briefing, including the repeated cases in which the Home Office has been found to be in breach of Article 3 of the European Convention on Human Rights (the prohibition on torture and ill-treatment) for its treatment of the mentally ill held under immigration act powers and the case in which only when a judicial review was brought did it desist from using force on children despite not having any policies in place governing its use.

When this matter was raised in the Public Bill Committee the Minister said

> *I have given a clear indication of the most appropriate setting for someone with severe or significant mental health issues that cannot be addressed in a detention setting. I underline the Home Office policy on the detention of individuals suffering from mental illness: other than in very exceptional circumstances, those suffering from serious mental illness which cannot be satisfactorily managed in detention should not normally be detained. All cases are considered on the basis of particular circumstances, and all factors arguing both for and against detention must be considered when deciding whether to detain. Serious mental health problems are likely to be an argument against detention but do not automatically preclude it. There may be other factors, particularly the risks of absconding and of public harm, that argue in favour of detention, and equally I point to cases where detention may be appropriate. For example, it may be necessary and appropriate in exceptional circumstances to maintain a short period of immigration detention when an individual is to be transferred to local authority care where otherwise they would be released on to the streets with no support and care. It may also be necessary for safeguarding reasons; for example, if an unaccompanied child arrives at a port, especially late at night, and there is uncertainty over whether there are any complicating factors.*
>
> *I underline—and this is something that I continue to discuss with colleagues in the Department of Health—the transfer from detention to a health setting. Someone with a severe mental health episode is likely to require some form of stay in, for example, a secure mental health unit. It is not appropriate to hold someone with an acute mental health problem in an immigration removal centre. There is guidance in place and we have to analyse the issue carefully on a case-by-case basis. If detention is not appropriate, someone should be dealt with under the Mental Health Acts and be taken to a place of safety such as a secure mental health unit. Equally, where a mental health condition may arise in detention, consideration would be given, particularly if it is a severe episode, to their transfer from an immigration removal centre to a health setting in order to treat them properly and appropriately.* [20]

The Home Office has repeatedly been found to have breached mentally ill detainees' rights under Article 3 of the European Convention on Human Rights, the prohibition on torture,

[20] 3 November 2015, pm, Col 362.

inhuman and degrading treatment and punishment[21]. The Minister's aspirations are not reflected in the way the mentally ill are treated in detention. We draw particular attention to:

R (S) v Secretary of State of State for the Home Department [2011] EWHC 2120 (Admin) (5 August 2011)

The Court held that the circumstances in which S was detained at Harmondsworth constituted inhuman and degrading treatment in breach of article 3. Those circumstances included:

- Detaining him despite a clear (and documented) history of severe mental illness, and contrary to the clear expert advice of a number of mental health professionals;
- Serious deterioration in his mental state, with numerous acts of self-harm, psychotic symptoms, feelings of acute anguish and distress, and allowing him to reach such a deteriorated state that he lacked capacity to make decisions in his own best interests;
- The failure to respond assessments by the in-reach psychiatrist that he was unfit for detention and required urgent compulsory treatment in hospital under the Mental Health Act; and
- One incident in which officers encountered S, naked and bleeding, being pulled along a corridor by another detainee in view of a crowd of detainees after he had attempted suicide.

R (BA) v Secretary of State of State for the Home Department [2011] EWHC 2748 (Admin) (26 October 2011)

The Court held that the circumstances of his detention, at Harmondsworth, constituted inhuman and degrading treatment in violation of article 3 and the prohibition on torture, inhuman or degrading treatment. Those circumstances included:

- Detaining him despite a clear and documented history of severe mental illness and contrary to expert advice that detention would be likely to cause deterioration. There was *"a deplorable failure, from the outset, by those responsible for BA's detention to recognise the nature and extent of BA's illness"*[22];
- The serious deterioration in his physical and mental health, including allowing him to reach a state where he was assessed as unfit for detention and, at one stage, on the verge of death;
- The failure, expeditiously, to make arrangements for his transfer to hospital once he had been assessed by medical staff as requiring urgent transfer; and
- The failure within the Home Office to ensure that clinical information about his deteriorating condition was accurately communicated to senior officials responsible for deciding whether he should be released. The judge referred to *"a combination of bureaucratic inertia, and lack of communication and co-ordination between those who were responsible for his welfare"* and described the Assistant Director's concern to manage press interest in the event of his death as *"callous indifference to BA's plight"*[23].

[21] For example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin) ;*R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (5 August 2011, *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012), *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012); R(MD) V SSHD [2014] EWHC 2249 (Admin).

[22] Judgment, paragraph 236.

[23] Judgment, paragraph 237.

The judge carefully enumerates the shortcomings in the reviews "In common with the other detention reviews, no detention review checklist appears to have been completed" "The reasoning in this decision does not refer to BA's mental illness at all. It …does not comply with…the policy." He says "A crescendo of professional voices expressed the view in the course of July that he was unfit to be detained."

The case shows how much deterioration can happen in a short time:

> *57… It is of concern that when BA had been seen on 31 March, his condition had been seen to be getting worse, but that a little more than a week later, he was obviously unwell to a layman, and was saying both that his medication had run out three days earlier, and that he had not been able to see the healthcare staff. This suggests that no-one was keeping an eye on his welfare, despite the warning signs seen on 31 March 2011. This is all the more worrying when it is recalled that incarceration, stress, and lack of medication were factors which had led to BA's becoming ill in the past. The GCID note for 8 April 2011 says "subject came to the centre from hospital and his psychiatric illness is acknowledged on IS91RA". On 11 April 2011, the healthcare unit at Harmondsworth IRC were asked for an assessment of BA's mental health. There was then to-ing and fro-ing about consent forms.*
>
> *58. BA was reviewed by the Harmondsworth IRC GP on 15 April 2011. …*
>
> *59. On 27 April 2011, Mr Agbeni … asked for an assessment of BA's current mental health, his medication, and "the regularity of his appointments with the psychiatric doctor by return." Manuscript medical notes for 10 May 2011 record that an appointment to see the doctor was booked for BA for 12 May 2011 "as requested by UKBA". He was reviewed by a GP on 12 May 2011. He reported that BA was "disoriented, lying on the floor, keeps repeating 'I see demons'. H/O schizophrenia/on Olanzapine...Already on the waiting list to see psychiatrist (20.5.11)."*

BA finally saw a psychiatrist on 20 May. But it was not until 6 August that he was transferred to a mental health ward. The judge records

> *75. On 6 July 2011, Dr Agulnik provided a preliminary psychiatric assessment. He formed the view that BA's food refusal was related to his delusional ideas. His physical condition was "not my area of expertise....gives rise to grave concern, and without more intensive and sustained treatment, could result in a lethal outcome." His physical and mental state made him unfit for continued detention, a "view supported by the Healthcare Manager". The stress and uncertainty about his status had a role in his current "decompensation into a psychotic state". Dr Agulnik considered it highly unlikely that BA could be successfully treated in an immigration detention centre, and "indeed that continuing to do so courts a real risk that he could die." He needed urgent psychiatric care which must be outside detention….*
>
> *…*
>
> *84. A file note on the same date indicates that UKBA knew that BA was considered unfit for detention, …*

Even when the hospital told the Home Office that a bed was available for BA, no transfer took place for a further three days, despite the hospital's chasing.

R (HA) v Secretary of State of State for the Home Department [2012] EWHC 979 (Admin) (17 April 2012)

The circumstances which led the Court to find that HA had been subjected to degrading treatment included:

- Acts which *"violated his own dignity"* (prolonged periods of time in isolation; sleeping on the floor, often naked, in a toilet area; drinking and washing from a toilet; self-neglecting, including not eating properly and not washing or changing clothes for prolonged periods; and suffering from insomnia);
- Not receiving appropriate medical treatment for a prolonged period of more than 5 months;
- The use of force on him on several occasions; and
- In the second period, detaining him when the Home Office had been explicitly warned by a psychiatrist that Harmondsworth did not have the medical facilities to treat him should he suffer a relapse and that an aspect of his mental illness was paranoia about detention centre staff.

The judge observes:

> *"…under the heading 'Changes in Circumstances' the same words that had been used in the previous two reviews were repeated without in fact any record being given of any changes since the last review…" "The Defendant had no real answer to these submissions. In substance her response was to accept that the Claimant was in need of a transfer at about that time for assessment and, if necessary, treatment in a psychiatric setting but to deny that it was her responsibility that this did not happen as quickly as it might have done, that responsibility lying with others such as the Primary Care Trust."*

R (D) v Secretary of State for the Home Department [2012] EWHC 2501 (Admin) (20 August 2012).
Another case involving a schizophrenic in which a violation of Article 3 was found. Each review contains the formula "and as there are no medical or compassionate issues highlighted to date" despite the increasing evidence of mental illness. The judge describes the Home Office approach as "irrational" and "laisser-faire". The Secretary of State maintained throughout that there had been no error and no breach of Article 3 or even of Article 8 even though the Official Solicitor was acting as D's litigation friend by the time of the hearing because D's mental state was such that he could not instruct his solicitors.

Women in detention have been subjected to abuse by the staff of centres.[24] It was suggested in those cases that an attempt was made to remove the victims from the jurisdiction before they could bring a case. Such allegations are not new. We recall for example the comments of Mr Justice Munby in *R (Karas and Miladinovic) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin):

> *I am driven to conclude that the claimants' detention was deliberately planned with a view to what in my judgment was a collateral and improper purpose – the spiriting away of the claimants from the jurisdiction before there was likely to be time for them to obtain and act upon legal advice or apply to the court. That purpose was improper. It was unlawful.*

[24] Yarls' Wood affair is a symptom, not the disease, Nick Cohen, The Observer, 14 September 2013.

HM Chief Inspector of Prisons has reported on an 84 years' old frail Canadian man suffering from dementia who died in detention in handcuffs having been kept handcuffed for five hours.[25]

Deaths, including suicides, and incidents of what is called "self-harm" but includes suicide attempts, are recorded. Home Office figures for the period July to September 2013 show 624 people on "self-harm watch" (what would elsewhere be called suicide watch) in immigration detention and 94 incidents of "self-harm" (which includes attempted suicide). In 2012 there were 208 incidents of what statistics call "self-harm" requiring medical attention and 1804 detainees formally recognised as being at risk of such harm[26] . There no figures for self-harm not requiring medical attention. Persons are detained for administrative convenience, although not for correct and sustainable decisions on applications for international protection, in the detained fast-track. In the last two years, the courts have made unprecedented findings that mentally ill men have been subjected to inhuman and degrading treatment in contravention of Article 3 of the European Convention on Human Rights[27].

PROPOSED AMENDMENT

Schedule 7, page 106, line 9, omit lines 9 to 20 and replace with-

"The Secretary of State must provide, or arrange for the provision of, facilities for the accommodation of persons released on immigration bail."

Purpose

To maintain existing powers of the Secretary of State to provide accommodation for those released on bail and to ensure that these powers are not limited

(a) to persons already granted bail

(b) to exceptional circumstances

Briefing

In part five of this Act the Home Office is making changes to the arrangements for it to provide to support to persons under immigration control. One set of circumstances in which it provides such support is to persons released on bail who would otherwise be destitute. This support is provided under section 4(1)(c) of the Immigration and Asylum Act 1999 which is worded in identical terms to the words it is proposed to substitute in this amendment.

The reason why we do not consider that the new powers are satisfactory is that the wording in subparagraph 7(1) "when a person is on immigration bail" may not be wide enough to

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[25] *Report of unannounced inspection of Harmondsworth Immigration Removal Centre*, 2014, section 1, paragraph 1.3 available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf

[26] Response to Freedom of Information of information requests, see http://www.ctbi.org.uk/96 . See also the evidence of the Association of Visitors to Immigration Detainees to the Home Affairs Select Committee for its report on Asylum, Seventh report of session 2012-2013, HC 71, 8 October 2013 http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008_HC71_01_VIRT_HomeAffairs_ASY-73.htm . See also HL Deb, 27 June 2012, c71W.

[27] *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin) (5 August 2011), *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (26 October 2011), *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012), *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012).

encompass the circumstances in which a person applies to the Home Office for an address so that they can make an application for bail in the first place. The new powers are also stated to be used only in "exceptional circumstances," a restriction to which we object for the reasons set out in the briefing to the separate amendment below.

When the Home Office consulted on restrictions to asylum support in preparation for this Bill, it proposed to leave out s 4(1)(c) and did not propose any replacement. ILPA argued that a replacement was required. Paragraph 7 appears to be response to those arguments but it is insufficient.

Section 4(1)(c) is used in cases where the Home Office needs urgently to release a person detained under Immigration Act powers because their detention is unlawful so that there is accommodation to which the person can be released. It also acts as an essential precursor for a proportion of detainees to being able to lodge and have heard an application for release on bail. Bail hearings are a means by which immigration detention is scrutinized. A failure to release a person for want of an address may lead to additional periods of unlawful detention in violation of Article 5 of the European Convention on Human Rights and the common law.

Immigration detainees seeking release on bail from the First-tier Tribunal (Immigration & Asylum Chamber) must propose a bail address. This may be private accommodation offered by family or friends, but where this is not available a detainee can apply to the Home Office for Section 4 (1)(c) bail support, and once this is granted the detainee can lodge their application for release on bail to the specified address.

Any grant of immigration bail by the First-tier Tribunal (Immigration and Asylum Chamber) is a grant to a stated address. Bail cannot, therefore, be granted pending the provision of a bail address.

The Minister suggested in Commons Committee that because conditional bail" ("bail in principle") could be granted, the problems would not arise:

> *… The new bail powers contain the concept of conditional bail, at paragraph 3(8). That will allow the tribunal to grant bail conditional on arrangements specified in the notice being in place to ensure that a person is able to comply with the conditions. Where a residence condition has been applied, it will be for the individual to find a suitable address during the period of conditional bail and, if a suitable address cannot be found, for them to go back to the tribunal for a further hearing. If the person is unable to find an address, consideration will be given to using the powers in paragraph 7 to provide one.* [28]

In the experience of ILPA member Bail for Immigration Detainees, which provides representation in a substantial number of bail hearings, it is normal practice for Her Majesty's Courts and Tribunals Service to refuse to list applications for hearing without a bail address, save in special circumstances and a grant of bail in principle, where the absent (but shortly to be supplied) missing element of the process is the bail address, is not a possibility in Bail for Immigration Detainee's experience, given that consideration of the bail address is a primary and essential part of any bail decision. **The Minister should be pressed on whether the matter has been raised with the Tribunal judiciary and provide their reply, as ILPA**

[28] Public Bill Committee 3 November 2015 col 368.

suggested be done in its response to the Home Office consultation on asylum support.

If it were possible for detainees to seek release on bail first, and subsequently seek financial support and accommodation via s 95 support, then detainees would already be doing so. They would not need to wait in detention, for periods of up to 24 months in extreme cases, for a bail address to be granted by the Home Office, as Bail for Immigration Detainees' research and Home Office data indicates that they are doing.

On November 4 2014, there were 198 outstanding applications for Home Office Section 4(1)(c) bail support where the applicant was deemed unsuitable for Initial Accommodation. 28% of these detainees had been waiting six months or more, to date, of these 5% for over one year, and one detainee had already waited for two years[29].

Data obtained by Bail for Immigration Detainees from the Home Office via Freedom of Information requests indicates that between three and four thousand applications are made to the Home Office each year for Section 4(1)(c) bail accommodation. In 2014 the Home Office made 2860 grants of Section 4(1)(c) bail accommodation for the purpose of lodging a bail application, although not all of these grants will have resulted in a bail application being lodged, and, if lodged, far from all will have resulted in release.

Home Office Section 4 (1)(c) bail accommodation: applications, grants by accommodation type, and refusals of support since January 2010

	Number of APPLICATIONS RECEIVED for s4 (1) (c) bail accomm[30]	Number of grants for **Initial Accomm**	Number of grants for **Standard Dispersal Accomm**	Number of grants for **Complex Bail Accomm**	Total number of grants for the year
2010[31]	3,367	1,916	66	19	2001
2011	3,138	1,568	218	55	1841

[29] Home Office response to BID FOI request dated December 2 2014.

[30] Some individuals made more than one application during this period.

[31] Note: June 2009: introduction of new practice of granting all Section 4(1)((c) applicants shared initial accommodation (IA). January 2010: publication of new HO policy on Section 4(1)(c) support arranging bail accommodation for applicants convicted of serious offences, including new process that sought to determine whether IA or dispersal accommodation was suitable, the latter almost immediately being found to be in short supply under existing contractual arrangements.

2012	3,465	1,961	382	35	2378
2013	3,841	2,081	529	14	2624
2014	3635	2233	613	14	2860

(Source: Data obtained from the Home Office by Bail for Immigration Detainees through a series of freedom of information requests since 2011)

Bail for Immigration Detainees' research in 2014 found that the average (mean) time to grant a Standard Dispersal bail address with no National Offender Management Service involvement in the case was 59.28 days (8.46 weeks), with a range from five to 175 days (one – 25 weeks).[32] See: Bail for Immigration Detainees, (2014),' *No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation'*. [33]

A core part of bail decision-making by First-tier tribunal judges is the consideration of the suitability of the proposed bail address. In the words of current *Bail Guidance* to tribunal judges, the Home Office, as a party to the bail application, is also asked "to take a view as to whether they can maintain reasonable control of the person at that address." The guidance to tribunal judges states at 38i, that:

> *"The proposed place of residence must be set out clearly in the application for bail so that the immigration authorities can consider its suitability and make representations if they believe it is not suitable."*[34]

Bail decision-making takes into account the nature of the accommodation, other residents at that accommodation, and the distance between the accommodation and any sureties. Immigration detainees who are on a National Offender Management Service release licence as a result of criminal convictions must seek the approval of their probation officer for any proposed immigration bail address. Tribunal judges of the First-tier Tribunal (Immigration and Asylum Chamber) must satisfy themselves that probation approval for a proposed bail address has been given. Without a bail address, under the current system, an immigration detainee, whether an asylum seeker or not, will not reach the point of release from detention on bail.

Detainees with severe and enduring mental illness may become estranged from family or friends who could otherwise stand surety at bail or offer bail accommodation on release; their illness or

[32] See: Bail for Immigration Detainees, (2014),' *No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation'*. Available at http://bit.ly/1DqTEQL (accessed 4 September 2015)

[33] On November 4 2014, there were 198 outstanding applications for Home Office Section 4(1)(c) bail support where the applicant was deemed unsuitable for Initial Accommodation. 28% of these detainees had been waiting 6 months or more, to date, of these 5% for over one year, and one detainee had already waited for 2 years. Source: Home Office response to BID FOI request dated December 2 2014. BID research in 2014 found that the average (mean) time to grant a Standard Dispersal bail address with no NOMS involvement in the case was 59.28 days (8.46 weeks), range from 5 to 175 days (1 – 25 weeks). See: Bail for Immigration Detainees, (2014),' *No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation'*. Available at http://bit.ly/1DqTEQL

[34] Tribunals Judiciary, (2012), 'Bail guidance for judges presiding over immigration and asylum hearings'

behaviour arising from their illness may have alienated those who were closest to them. Detainees in this position will often be reliant on Home Office bail accommodation.

One reason that longer term detainees are disproportionately reliant on Section 4(1)(c) is that their ties with family and friends who could offer accommodation and support are weakened by years spent in detention.

An unknown but presumed to be small number of former detainees, granted release on bail by the First-tier Tribunal Immigration and Asylum Chamber, are on a National Offender Management Service licence at the time of their release and are required by the terms of their licence to reside in premises approved by the National Offender Management Service. National Probation Service Approved Premises local managers nowadays may refuse to provide these individuals with an Approved Premises bed unless 'move-on' accommodation is in place.[35] For a proportion of immigration detainees their only option for 'move-on' accommodation is Home Office accommodation. They may have a home in the UK but precluded by some form of restriction order (e.g. non-molestation order, non-contact order] from occupying those premises on release.]) Immigration detainees required to reside in Approved Premises on release are entitled to apply for release on immigration bail but will be unable to do so in a number of cases if Home Office bail accommodation is not available.

Among Bail for Immigration Detainees' caseload, which consists mainly of long term detainees and those with additional needs, clients were reliant on a Home Office bail address in 53% of the bail applications prepared by Bail for Immigration Detainees in 2013, and in 36% of cases during 2014.

There is currently no limitation to "exceptional circumstances" in the Home Office guidance on bail accommodation under s 4(1)(c) of the Immigration Act 1999.[36]

There is such a limitation in guidance on the provision of support to persons who have never made a claim for asylum under sections 4(1)(a) and (b) of that Act, as follows:

> ***1.1.3 Applications from other immigration categories***
> *Support under Section 4(1) (a) and (b) of the 1999 Act will only be provided to other immigration categories in truly exceptional circumstances. In considering whether such circumstances exist, Caseworkers should take account of the following:*
> *Support should only be provided to other persons on temporary admission if:*
> - *They are destitute; and*
> - *They have no avenue to any other form of support; and*
> - *The provision of support is necessary in order to avoid a breach of their human rights.*
>
> *The consideration of whether support is necessary to avoid a breach of the person's human rights will usually require an assessment of whether they are likely to suffer inhuman or degrading treatment if they are not provided with accommodation and the means to meet their*

[35] This requirement is intended by NOMS to ensure that approved premises beds are not blocked by individuals (UK citizens and foreign nationals) without access to housing and a known address to transfer to at the end of their supervision in Approved Premises.

[36] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438472/asylum_support_section_4_policy_and_process_public_v5.pdf

essential living needs whilst in the UK. However, Caseworkers should only provide support for these reasons if it is clear that the person cannot reasonably be expected to leave the United Kingdom.

In considering all support cases on their individual merits caseworkers must take particular account of the following:

- *Support should not be provided in cases where there are children in the household because an alternative avenue of support is available through the duties local authorities have to safeguard and promote the welfare of children under Section 17 of the Children Act 1989;*

- *Support should not be provided to persons who claim that the reason they cannot leave the United Kingdom is because they are at risk of persecution or serious harm in their own country. Individuals in this position should submit a protection claim. Support may be available for such individuals under the asylum support arrangements. :(Sections 95 and 98 of the Act, and Section 4(2) for certain failed asylum seekers);*

Support should not be provided solely because the person has an outstanding non-protection based application for leave to remain in the United Kingdom (for example based on Article 8 of the European Convention on Human Rights or on long residence). A person in these circumstances can reasonably be expected to leave the United Kingdom to avoid the consequences of destitution.

The word "exceptional" is apt to be read as implying that a grant should only be made in exceptional cases. We recall the words of Lord justice Dyson, giving the judgment of the Court of Appeal in the Legal Aid exceptional funding cases of *Gudanaviciene* et ors v Director of Legal Aid Casework and the Lord Chancellor [2014] EWCA 1622

> *"… that section 10 is headed "exceptional cases" and that it provides for an "exceptional case determination" says nothing about whether there are likely to be few or many such determinations. Exceptionality is not a test. … there is nothing in the language of section 10(3) to suggest that exceptional case determinations will only rarely be made "*

In that case the guidance was found to be unlawful in that it was leading to refusals of legal aid in meritorious cases.

ILPA's response to the consultation on asylum support, from which this is adapted, can be read at http://www.ilpa.org.uk/resource/31352/ilpa-response-to-home-office-consultation-on-asylum-support-8-september-2015

PROPOSED AMENDMENT

Schedule 7, page 106, line 26, at end insert –

> "( ) If the Secretary of State decides that the applicant does not qualify for support under paragraph 7(2) of this Part, the applicant may appeal to the First-Tier Tribunal (Asylum Support)."

Purpose

To provide a right of appeal to the First-tier Tribunal (Asylum Support) where the Secretary of State decides not to provide support or to discontinue support under this Part to enable a person to meet bail conditions.

Briefing

This section of the Bill provides the Secretary of State with the power to provide support and accommodation to individuals to enable them to comply with conditions of immigration bail. This is a necessary power to facilitate the right to liberty and release from detention.

This amendment provides for a right of appeal where the Secretary of State decides a person does not qualify for support under this provision. Without a right of appeal, there will be no scrutiny of Home Office decision-making in an area where decisions are frequently not sustainable.

The Asylum Support Appeals Project provides advice to those appealing Home Office decisions to refuse or withdraw their housing or financial subsistence in the absence of legal aid for this work. It is the experience of the project that it is rare for support to be granted to those eligible for support under similar provisions under section 4(1) of the Immigration and Asylum Act 1999. The project reports that in the 12 months from August 2012 to July 2013, it provided representation in 18 appeals involving section 4(1) of the Immigration and Asylum Act 1999, of which 11 were allowed, five dismissed, one withdrawn and one remitted.

Individuals in need of support under this provision, who would be affected by the absence of a right of appeal, include those who have never claimed asylum but who are attempting to return to their country of origin or former habitual residence and either their country will not admit them, they cannot be documented or there are delays in documenting them[37]. They may also be people who have never claimed asylum but have a claim pending before the Home Office to regularise their status such as people brought to the UK as children who are found to be have no lawful status.

Examples of destitute individuals represented by the Asylum Support Appeals Project whose cases were allowed only following appeal to the Asylum Support Tribunal include:

> 30 September 2011 A 21 year old man who arrived in the UK aged 15 and asserted that he was a British citizen. He had been waiting for seven years for the Home Office to decide his case (AS/11/09/27448, 30 September 2011).
>
> 22 November 2011 An appellant with severe mental health problems who had been certified by his doctor as unable to travel and had made a claim for leave to remain outside the immigration rules (AS/11/11/76787, 22 November 2011)
>
> 12 January 2012 A 43 year old homeless man who was waiting for a travel document so that he could return to India (AS/11/12/27777, 12 January 2012).

The consequences of a wrong decision are that a person may be left homeless and destitute and at risk of harm. Such cases may give rise to breaches of human rights under Articles 2 and 3 of the European Convention on Human Rights, as well as under Article 8. This means that the Home Office will be in breach of its international obligations and is likely to face challenges by way of judicial review (the cases may also sound in damages).

[37] The charity Refugee Action reports that its clients from India, Pakistan, and Bangladesh wait on average for 32 days to receive travel documents but, in some cases, up to 133 days, Refugee Action Jan – June 2013

Schedule 5 Paragraph 8 Arrest for Breach of Bail

PROPOSED AMENDMENT

Schedule 7, page 107, line 23, leave out from "- (a) to "otherwise" in line 38

Purpose

To provide that a person arrested without a warrant and detained because it is considered that they are likely to breach any of their bail conditions or that there are reasonable grounds for suspecting that they have done so must be brought before the First-tier Tribunal. To bring the person before the "Secretary of State, " a Home Office official, will not suffice for this stage of the proceedings.

Briefing

Under this paragraph, an individual may be arrested without a warrant where an immigration officer or police constable has reasonable grounds for believing that they are likely to fail to comply with a bail condition or they have reasonable grounds for suspecting that the person is failing or has failed to comply with a bail condition. In these circumstances, the arrested person must be brought before the "relevant authority as soon as reasonably practicable and the "relevant authority" must decide whether the arrested person has broken or is likely to break any of the bail conditions.

Where breach of bail is considered by a court or tribunal, this is uncontroversial. The individual, who will have been arrested without a warrant by an immigration officer and will be in detention,, will be brought before a tribunal judge in an open and transparent process and questioned about the circumstances leading to the suspicion that the conditions of bail may be or may have been breached. The tribunal will make a decision as to whether maintain or revoke bail after hearing evidence from both the Secretary of State and the individual.

Under paragraph 9(a) the Secretary of State may act as the "relevant authority" where she has been authorised to exercise the power of bail by the First-tier Tribunal. The Secretary of State is not a judicial body and is not in a position to examine the individual in an open and transparent process. Nor one that has the appearance of fairness, given that an immigration officer has already deprived the person of their liberty for breach of conditions, and yet the Home Office is now asked to adjudicate on whether that was lawful and/or correct.

Section 24 of the Immigration act 1971 currently provides for the arrest without warrant in similar conditions to this paragraph. It provides that unless it was a condition of a person's release that s/he was in any event to have reported before an immigration officer within 24 hours of the time of the arrest then s/he should be brought before the First-tier Tribunal or failing that, a Justice of the Peace or Sheriff. Why has a different approach been taken in the Bill?

The question as to whether a person has breached the conditions of his/her bail should be determined by an independent tribunal. This is all the more so given that the Bill permits the Secretary of State to impose such conditions as she thinks fit and to alter the conditions imposed by the Tribunal. The process envisaged would allow for the imposition of arbitrary and oppressive conditions.

Immigration Act 1971, s 24

…
(2) A person arrested under this paragraph—

(a) if not required by a condition on which he was released to appear before an immigration officer within twenty-four hours after the time of his arrest, shall as soon as practicable be brought before the First-tier Tribunal 1 or, if that is not practicable within those twenty-four hours, before in England and Wales, a justice of the peace, in Northern Ireland,] 2 a justice of the peace acting for the petty sessions area in which he is arrested or, in Scotland, the sheriff; and

(b) if required by such a condition to appear within those twenty-four hours before an immigration officer, shall be brought before that officer.

(3) Where a person is brought before the First-tier Tribunal, a justice of the peace or the sheriff by virtue of sub-paragraph (2)(a), the Tribunal, justice of the peace or sheriff —

(a) if of the opinion that that person has broken or is likely to break any condition on which he was released, may either—

(i) direct that he be detained under the authority of the person by whom he was arrested; or

(ii) release him, on his original recognizance or on a new recognizance, with or without sureties, or, in Scotland, on his original bail or on new bail; and

(b) if not of that opinion, shall release him on his original recognizance or bail.

PROPOSED AMENDMENT

Paragraph 10 Transitional provision

Page 108, line 25, leave out from line 25 to line 44 (paragraph 10)

Purpose To probe the transitional provisions

Briefing

Paragraph 10 was added at Commons Committee where it was stated that its purpose was to clarify that transitional arrangements will be detailed in regulations. But the paragraph does not "clarify" anything. It delegates to secondary legislation the definition if the purposes for which a person subject to transitional provision is to be treated as having been granted immigration bail Concerns go beyond omissions in the drafting of a paragraph. The concern is that the whole question of transitional provision has not adequately been thought through and that it is intended to change the status of many thousands of people in ways which may have unforeseen consequences, including for recognition of their documents and status.

PROPOSED AMENDMENT

PROPOSED AMENDMENT

Schedule 7, page 111, line 28 leave out lines 28-32 and replace with

(*) subparagraphs 3-5 were omitted

Purpose
To provide that the Secretary of State cannot impose conditions of bail that the Special immigration Appeals Commission does not see fit to impose.

PROPOSED AMENDMENT

Schedule 5 page 111 line 35 leave out (4)

Purpose
Consequential on the amendment below

PROPOSED AMENDMENT

Schedule 5 page 111 line 37, after "Commission" insert
(*) subparagraph 4 were omitted

Purpose
Removes the restriction on the Special Immigration Appeals Commission's granting bail is directions are in place for removal within 14 days which was imposed in 2014 at the same time as such restrictions were imposed on the Tribunal

PROPOSED AMENDMENT

Schedule 7 page 111, line 40, omit lines 40-43

Purpose Removes the application of the provision whereby, where arrangements are made for electronic monitoring they may involve the exercise of functions by persons other than the Secretary of State, for cases before the Commission.

PROPOSED AMENDMENT

Schedule 7 page 112, omit lines 1-3

Purpose
Removes the provision whereby, when the Commission has directed that the Secretary of State should have the power to vary bail conditions, any financial condition is to be exercised by the Secretary of State.

PROPOSED AMENDMENT

Schedule 5 page 112 line 5, leave out line 5 to line 7 and replace with"

(*) The words "subject to sub-paragraphs (3) and (4)" in subparagraph (2) were omitted and subparagraphs (3) to (5)) were omitted

Schedule 5 page 112 line 8 leave out "(3), (4).(6) and (10) and replace with "(6)"

Purpose

The first amendment provides that provisions allowing the Secretary of State to override the decisions of the Tribunal and impose conditions that the Tribunal did not impose will not apply Special Immigration Appeals Commission cases. The second amendment is consequential on the first.

Briefing

The Special Immigration Appeals Commission is presided over by a High Court judge and Should not be constrained in its powers to release on bail by statute.

Where arrangements are made for electronic monitoring they may involve the exercise of functions by persons other than the Secretary of State. Given the many problems there have been with subcontractors administering electronic tagging, including in the criminal justice service, as set out in the report of the National Audit Office,[38] there are arguments for insisting that the Home Office manage this directly.

It is to be hoped that the Commission would never use the powers the Bill gives it to devolve to the Secretary of State power to vary bail conditions. Should it do so it is suggested that it should still be the Commission that takes the monies and retains oversight and therefore the amendment is opposed.

The effect of amendments made at Commons' Committee is that if the Commission gives a direction that the Secretary of State may exercise the power to amend or remove conditions then the Commission may not exercise such powers. ILPA opposes this. The Commission is presided over by a High Court judge and is specialist in matters of national security. It should retain control of those released, overall control of conditions and control of the Secretary of State.

The application of paragraph 6(10) to the Commission, inserted at Commons Committee, has the effect that the Secretary of State can impose a different condition in place of the condition imposed or amended by the Commission. It mocks a specialist tribunal presided over by a High Court judge if the Secretary of State, having failed to convince it by argument, can simply turn around and substitute her view of the appropriate bail conditions for this view. It is also potentially dangerous as the "Secretary of State" in this context is a member of her staff who, we suggest, is more likely to make mistakes in the handling of matters of national security than this specialist expert tribunal.

Clause 30 Power to cancel leave extended under section 3C of the Immigration Act 1971

PROPOSED AMENDMENT

Clause 33, page 38, line 25, leave out from "Power" to the end of line 26 and replace with

"Section 3C of the Immigration Act 1971

[38] https://www.nao.org.uk/report/the-electronic-monitoring-of-adult-offenders/

30. Section 3C of the Immigration Act 1971

Purpose
This amendment paves the way for the proposed amendment below. It allows this part of the Bill to be used to correct existing problems with 3C leave.

We have presented both the problems below as separate amendments, so that the problems can be identified clearly and addressed. If they find favour, however, it will be necessary to produce a composite amendment dealing with both at once.

PROPOSED AMENDMENT

Clause 33, page 38, line 28, after "decision)" insert

(a) leave out "and" at the end of subsection 1(b)
(b) leave out subsection 1(c)
(a) (c) In subsection 2
(c) In subsection (2) replace "The leave is extended by virtue of this section" with "The leave is extended from the day on which it would otherwise have expired"

Purpose
To correct a consequence of the Immigration Act 2014 amendments whereby a person whose application is refused before their original leave expires can benefit from 3C leave is they appeal or bring an administrative review. Ensures that a person whose application is refused before their original leave expires and is still in time to bring an appeal or has brought an appeal by the time their original leave expires, benefits from the protection of 3C leave in the same way as they would had they been refused by the Secretary of State only after their original leave had expired.

Briefing
Although this amendment was debated in Commons Committee the response was garbled and we consider that it should be revisited. Section 3C of the Immigration Act 1971 provides that when a person makes an "in time" application (i.e. makes an application while they still have leave to be in the UK), their leave continues on the same terms and conditions until such time as the Secretary of State has made her decision on the application and then for the period during which an appeal or administrative review could be brought and while it is pending. People are asked not to apply until c. one month before their existing leave expires and it is very often the case that the application is not decided before, without the protection of 3C leave, their leave would have expired.

Without the protection of 3C leave, a person would become an overstayer, unable to work, rent property, open a bank account, drive etc., their employers and landlords/landladies liable to prosecution, even though the application was straightforward and indeed was approved without hassle as soon as the Secretary of State was able to deal with it. The only way of avoiding this situation without 3C leave would be for the Secretary of State to have to deal with all applications before the original period of leave expired, which would make enormous and unpredictable demands upon her.

Amendments were made to section 3C in 2014, as a consequence of the changes to the appeals and removals regime. In particular, provision was made for 3C leave while an administrative review could be brought or was pending.

But one effect of the redraft was to require that the original leave had already expired when the Secretary of State made her decision for the protection of section 3C to kick in for the period while an appeal could be brought or was pending. The consequence of the redraft is that if Secretary of State does manage to decide the application before their original leave expires, and refuses it, they do not benefit from section 3C while the appeal or administrative review could be brought or is pending. The problem is with s 1(c) below.

> 3C Continuation of leave pending variation decision
> (1) This section applies if—
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
> (b) the application for variation is made before the leave expires, and
> (c) the leave expires without the application for variation having been decided.
> (2) The leave is extended by virtue of this section …

Paragraph 152 of the Explanatory Notes to the Bill implies that section 3C already covers such applicants, which may well be the intention. It says

> "A person who currently has leave and applies to extend their leave to enter or remain may well find that their leave expires while their application remains undecided, or while an appeal or administrative review against a refusal decision remains pending. To prevent people being left without leave, section 3C…provides.." [emphasis added]

Persons refused before their original leave expires may have the right to appeal or apply for administrative review, but they are effectively prevented from doing so because they run the risk of overstaying if their leave expires before the conclusion of proceedings

What we are trying to ensure by this amendment is that a person who is refused an extension of leave before their original leave expires, continues to benefit from their original leave until it runs out, and then benefits from 3C leave for rest of any period during which an appeal could be brought and while that appeal is pending. We would thus ensure that those who make a variation application before their leave expires and whose application is refused before their leave expires are not prevented from bringing an appeal or applying for administrative review of the decision because they would become overstayers during that process, and at that point become subject to the measures in this Bill.

It may be that it will suffice to leave out subsection 3C(1)(c). The reason we have gone for a more complicated amendment is to make clear that the original leave continues until it expires and 3C leave only kicks in when the person has no leave and we are not wholly confident that the word "extended" in 3C(2) is sufficient to cover this.

When the matter was debated in the Public Bill Committee the Solicitor General appeared to misunderstand the point.

> ***The Solicitor General:*** *Amendment 216 seeks to change the way the leave that is extended by section 3C of the Immigration Act 1971 operates. With respect, there has been a misunderstanding of the current position. The effect of the amendment would be that where a*

person applies for leave to remain and their application is refused while they still have immigration leave, their leave would be extended by section 3C while they bring an appeal or administrative review. Where an appeal or administrative review is lodged, leave will continue to be extended until any appeal or administrative review is no longer pending.

It was said that the reason for the tabling of the amendment is that people in that situation do not have their leave extended by section 3C, and that is an unintended consequence of the Immigration Act 2014. That is not the case. In fact, if anything, the 2014 Act actually improved the position with regard to section 3C. It has always been the case that, where an application is refused while the applicant still has immigration leave, leave is not extended by section 3C while a challenge to the refusal can be brought. In other words, section 3C applies only to undetermined applications. Where somebody is still waiting for an application to be dealt with, section 3C kicks in to allow the delay to be remedied. [39]

The 2014 Act resulted in leave being extended during the currency of an administrative review. That was an extension of 3C leave. But it is not on the point this amendment addresses which is that if a decision is made before the original leave expires and then the person's appeal against any refusal is dealt with after the original leave expires, the drafting of the 2014 Act means leave will not be extended. It is no answer to say that you could bring a fresh application: the reasons for your refusal may be wrong, in a way that would only be repeated on a fresh application.

Clause 33 Power to cancel leave extended under section 3C of the Immigration Act 1971

PROPOSED AMENDMENT / STAND PART DEBATE

Page 38, line 25, leave out heading "power to cancel leave" and leave out clause 33

Purpose

To remove from the Bill the power to cancel leave extended under section 3C of the Immigration Act 1971.

Briefing

Section 3C of the Immigration Act 1971 automatically extends a person's leave to enter or remain in the UK where they have limited leave to enter or remain, for example as a Tier 2 worker or as a student, and they make an application to extend or vary that leave before it expires. Their leave is extended on the same terms and conditions as their existing leave to cover the period until the Home Office decides their application, the period during which an appeal against, or administrative review of, the Home Office decision can be brought and the period during which that appeal or administrative review is pending until it is finally determined.

Clause 30 gives the Home Office the power to cancel leave extended under section 3C of the Immigration Act 1971 where it considers that the applicant has failed to comply with a condition of that to the leave or has used deception in seeking leave to remain.

The Home Office does not need a power to cancel leave extended by section 3C of the Immigration Act 1971. The Home Office bring leave under section 3C to an end, including in

[39] Public Bill Committee 3 November 2015 pm col 371-372.

circumstances where it considers there has been a breach of conditions or the use of deception, by making a decision on the outstanding application and dealing with any appeal or administrative review.

This can be illustrated using the hypothetical example provided by the Government in the Explanatory Notes to the Bill (p.22, example 1). In this example, a student applies to extend his leave to remain as a student in the UK and his leave is automatically extended under section 3C of the Immigration Act 1971 whilst that application is considered. Meanwhile, the student is found to have breached his conditions because of the employment he has had and is discovered to have used deception in his application.

The Government is concerned that the student would continue to benefit from leave under 3C of the Immigration Act 1871 until the outstanding application is determined and any administrative review is concluded. However, in this scenario, the Home Office could immediately refuse the outstanding application as a breach of conditions and the use of deception are both material to the application. Leave under 3C of the Immigration Act 1971 would only continue if an administrative review were brought. Administrative review was introduced at the time of the coming into force of the Immigration Act 2014, for the Home Office to correct own casework errors in cases where, subsequent to the coming into force of that Act, there is no right of appeal. The Home Office aims to decide an administrative review within 28 days.

If the Home Office cancelled leave under section 3C of the Immigration Act 1971 instead, without making a decision on the outstanding application, the applicant would have no right of appeal or administrative review to challenge the cancellation of leave. There is currently no provision for administrative review of a cancellation of leave. The person would have no lawful status and no means of challenging any mistaken decision: the cancellation, because there is no administrative review of this and the original decision because to pursue their appeal they would have to remain unlawfully.

Even where the Home Office made a decision on the original application at the time of cancellation of 3C leave, if that decision were a refusal the applicant would have no lawful status and would be unable to work or study until any administrative review of this had been determined, despite having no control over the length of time the Home Office takes to determine their case.

Applicants unable to work would potentially lose their job whilst casework errors made by the Home Office were addressed and their case reconsidered. They would also be subject to all the proposed measures designed to create a hostile environment for those living unlawfully in the UK, including losing their home through being unable to rent and losing access to their bank account. Even where the applicant was ultimately successful the damage would have already been done through the loss of their work or home in the interim.

The quality of Home Office decision-making was highlighted as a concern during debates on the Immigration Act 2014 when appeal rights were removed. Whilst the use of deception or breach of a condition would be a valid reason to refuse an immigration application, mistakes are made, for example if the Home Office does not have sufficient evidence to support an assertion of deception; if a decision that a condition has been breached is made under the wrong rules and policy; or if a notification by an employer that an individual no longer works for them is linked to the wrong employee.

ILPA is aware of cases where applicants in a variety of categories have found themselves accused of deception where fraud was identified in the test centre that they used to take the English

language tests for their visa, even though they were unaware of cheating having occurred and there was no evidence to suggest that they had cheated in the tests.

The Government argues in the Explanatory Notes that this clause addresses an anomaly with how it deals with cases where there has been a breach of conditions or the use of deception by an individual who has leave to enter or remain that is not "3C" leave. The second example in the Explanatory Notes, is of a student with valid leave to remain due to expire in two years' time. This student may have his leave immediately curtailed and be given notice of removal on discovery of any use of deception.

The different outcome for the student with leave that is not 3C leave is should, however, be a matter of concern, because it was not what parliament was led to expect during the passage of the Immigration Act 2014.

The Immigration Act 2014 removed a number of rights of appeal against immigration decisions, including the right of appeal against a decision to curtail leave.

During the passage of the Bill that became the Immigration Act 2014, the Government stated that administrative review would provide a remedy in those cases where a right of appeal had been removed.

The Government's I*mmigration Bill – Statement of Intent on Administrative Review in lieu of Appeals*[40] said of administrative review:

> *1. Who will be able to apply for administrative review?*
> - *Individuals who will no longer have a right of appeal as a result of changes to the appeals system.*
>
> […]
>
> *14. Will existing leave continue while an administrative review is conducted?*
> - *Yes where an individual with leave applies for further leave before their current leave expires and, following a refusal, applies for administrative review; their current leave will be extended until their administrative review has been concluded.*

The Explanatory Notes accompanying the Bills, published on both 10 October 2013[41] and 03 February 2014[42] stated:

> *Where an application is refused and there is not a right of appeal, the applicant may be able to apply for an administrative review. Similarly, an administrative review may be sought when a person's leave is curtailed or is revoked. The Immigration Rules will set out when an applicant may seek an administrative review. In Schedule 8, Part 4 extends the effect of section 3C and 3D where an administrative review can be sought or is pending. The question of whether an administrative review is pending will be determined in accordance with the Immigration Rules.*

Despite this however, when the Home Office subsequently published the immigration Rules on administrative review[43], decisions to curtail leave were excluded from the scope of

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40 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254851/SoI_Administrative_review.pdf,

41 http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0110/en/14110en.pdf, para 73

42 http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0084/en/14084en.htm, para 77

43 C 395, Appendix AR.

administrative review. ILPA raised this in its comments on a draft version of the rules, but no action was taken. The rules received limited scrutiny from parliament. Adding insult to injury, the Government now seeks, by clause 32 in this current Immigration Bill, to remove section 3D of the Immigration Act 1971 on the basis it is no longer necessary. Section 3D of the Immigration Act 1971 is the provision under which a person may have their leave automatically extended whilst they bring an administrative review against a decision to curtail their leave. The Government could achieve parity of outcomes by providing an administrative review of a decision to curtail leave, as parliament had been led to understand, during the passage of the Bill that became the Immigration Act 2014, that it would do and by ensuring that section 3D of the Immigration Act 1971 is left intact so that right may be exercised.