

Briefing note on Immigration Bail clause 32, sub-clauses (3) to (6), and paragraph 1(5) of Schedule 7 to the Immigration Bill 2015 for HOuse of Lords Committee Stage

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1. The law as it currently stands is that, if a person cannot lawfully be detained under immigration powers, for example because there is no prospect of removing them at all or within a reasonable period of time (the *Hardial Singh*¹ principles) or because it would be contrary to policy to detain them because they are victim of torture or trafficking or seriously mentally ill, then:
 - a. they must be released from immigration detention; and
 - b. they cannot be subjected to the bail powers of the Secretary of State and/or the immigration tribunals.² Powers to grant bail, and to subject the person to bail conditions, only exist if the person can lawfully be detained. The principle being that you can only impose conditions on a person's liberty and other fundamental freedoms if they can lawfully be detained;
 - c. This is a long standing principle of the common law dating back many centuries and enshrined in cases such as *Mitchell v Mitchinham* (1823) 2 D & R "When common bail is filed, still the party in the eye of the law is in custody"; *Foxall v Barnet* (1853) 2 E&B 928; see also Highmore, *Digest of the Doctrine of Bail* (1783), "He who is bailed shall not be said by the law to be at large, or at his liberty".
2. These principles were recently re-asserted by the Master of the Rolls, Lord Dyson, in the case of *The Queen (on the application of B) v Secretary of State for the Home Department* [2015] EWCA Civ 445, [2015] 3 WLR 1031 (6 May 2015). Lord Dyson referred to the long established common law position that "the power to grant bail presupposes the existence of (and the ability to exercise) the power to detain lawfully"³ (paragraph 33).
3. Lord Dyson went so far as to say, at paragraph 34, that:

¹ Governor of Durham Prison ex parte **Hardial Singh** [1984] 1 W.L.R. 704

² The First-tier Tribunal (Immigration and Asylum Chamber); and that the Special Immigration Appeals Commission.

³ Paragraph 33.

“It would be extraordinary if Parliament had intended to confer the power to grant bail where a person has been unlawfully detained or could not lawfully be detained...”⁴

4. However, Clause 32(3)-(6), and paragraph 1(5) of Schedule 7 to the Immigration Bill 2015, if enacted, would do just that, and would thereby reverse fundamental principles of the English common law governing personal liberty; and would do so retrospectively.
5. Clause 32, and paragraph 1(5) of Schedule 7 to the Immigration Bill 2015 state:

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- (1) Schedule 7 (immigration bail) has effect.
- (2) In that Schedule—
 - (a) Part 1 contains the main provisions about immigration bail, and
 - (b) Part 2 contains amendments to other Acts.
- (3) *A person may be released and remain on bail under paragraph 22 or 29 of Schedule 2 to the Immigration Act 1971 even if the person can no longer be detained under a provision of the Immigration Acts to which that paragraph applies, if the person is liable to detention under such a provision.*
- (4) The reference in subsection (3) to paragraph 22 or 29 of Schedule 2 to the Immigration Act 1971 includes that paragraph as applied by any other provision of the Immigration Acts.
- (5) The amendment made by subsection (3) is to be treated as always having had effect.
- (6) Subsections (3) to (5) are repealed on the coming into force of the repeal of paragraphs 22 and 29 of Schedule 2 to the Immigration Act 1971 by paragraph 16 of Schedule 7.

6. Paragraph 1(5) of Schedule 7 to the Immigration Bill 2015 says:

- (5) A person may be granted and remain on immigration bail *even if the person can no longer be detained*, if—
 - (a) the person is liable to detention under a provision mentioned in subparagraph (1), or
 - (b) the Secretary of State is considering whether to make a deportation order against the person under section 5(1) of the Immigration Act 1971.

7. These proposals are a retrograde step and amount to an unnecessary and unjustified encroachment on individual liberty and give the State with further powers to restrict the fundamental freedoms of individuals.
8. There are numerous reasons why a person may not be removable, including being stateless; where the person is at risk of torture or other ill-treatment; the inability of an individual to provide adequate information to support the issue of a travel document; practical problems in proving nationality; delays in the issuing of travel documents (e.g. for returns to Algeria); having pending judicial review, or family court or immigration appeals (including Home

⁴ Note that the Home Secretary has been granted permission to appeal to the Supreme Court in this case, and the appeal will be heard in December 2016.

Office appeals); and the Home Office may not be implementing enforced removals to certain countries for safety, political or other reasons for example , e.g. Somalia, Zimbabwe. This can go on for many years.

9. If such persons cannot be removed at all or within any reasonable timescale, and cannot lawfully be detained, there is no basis on which their liberty should be curtailed by the State. The purpose of immigration detention powers is limited to putting into effect an immigration decision, in particular, to effect removal.
10. If there are particular issues of risk to the public, these will already have been taken into account by the Secretary of State, or the High Court, in deciding whether a person's detention is lawful. For example, a person with serious criminal convictions is likely to spend far longer in immigration detention before the courts find that the "reasonable period" of detention has been reached, rendering detention unlawful.⁵
11. Furthermore, in cases where it is said that a person presents a risk to national security, there is already a recent, specifically tailored regime for controlling such risks: Terrorism Investigation and Prevention Measures, under the Terrorism Investigation and Prevention Measures Act 2011.⁶
12. There are clear issues concerning the compatibility of the above clauses with Article 5 of the European Convention on Human Rights. Their effect is to subject a person to immigration bail indefinitely, with no periodic, or any, compulsory judicial oversight of the bail conditions imposed by the Secretary of State. Although these clauses state that bail can only be imposed for so long as the person remains "liable to detention", the legal test for this is set at such a high threshold, i.e. whether there is 'some prospect' of removal (the *Khadir* case),⁷ that the courts have never found it to have been met since *Khadir* was decided.⁸ It is a meaningless phrase because in all such cases there is no actual prospect of removal within a reasonable period of time, hence the illegality of the detention. Individuals risk being kept in an indeterminate limbo which does not aid rehabilitation and is damaging particularly to dependent family members such as wives and children who, likewise, live in a state of limbo and are also affected by the insecurity and intrusion of such conditions.
13. The prospect of indefinite immigration bail is therefore gravely concerning, particularly given that the Bill seeks to widen the menu of conditions of immigration bail as proposed in paragraph 2 to Schedule 7 of the Bill, which include requirements as to reporting, curfews (up to 24 hours), restrictions on work, occupation or studies in the UK, electronic monitoring, financial conditions and restrictions on communication. The previous Chairman of the Special Immigration Appeals Commission, Mr Justice Mitting, has described this situation of prolonged bail as "ATCSA lite,"⁹ referring to the use of indefinite detention which was declared unlawful by the House of Lords in *A (No 1) v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

⁵ *R (Lumba) v Home Secretary* [2011] UKSC 12 at paragraph 108.

⁶ Such measures include requirements/ constraints relating to overnight residence, travel, freedom of movement, communications devices, association with others, work and studies, reporting and other measures to monitor the individual concerned. These measures are subject to judicial oversight by a High Court Judge.

⁷ *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39 at paragraph 32.

⁸ As stated in Denholm & Dunlop, *Detention Under the Immigration Acts*, Oxford (2015) at paragraph 8.49.

⁹ *U and Others v Secretary of State for the Home Department*.

14. The above clauses are also incompatible with Article 5(4) of the European Convention on Human Rights because bail is not a remedy for an unlawful detention; and, if a court cannot order the release of the individual, no remedy compatible with Article 5(4) will be available to that individual.

Conclusion

15. On the current law, reflecting long standing common law principles, and compatibly with Article 5 of the European Convention on Human Rights set out in the *B* case (above), a person who cannot lawfully be detained and is released on temporary admission, can only be subject to conditions as to residence, employment/occupation and reporting.¹⁰

16. Parliamentarians are accordingly urged to propose the deletion of Clause 32(3)-(6) and paragraph 1(5) of Schedule 7 to the Bill.

29 January 2016

¹⁰ [Paragraph 2\(5\) of Schedule 3](#) to the Immigration Act 1971 and [paragraph 21 of Schedule 2](#) to the IA 1971).