BAIL AND DETENTION IN THE IMMIGRATION ACT 2016

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ASSOCIATION OF VISITORS TO IMMIGRATION DETAINEES' CONFERENCE 2016

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ABOUT ILPA

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. ILPA worked with parliamentarians of all parties on the passage of the Bill which became the Immigration Act 2016, as well as working closely with the Home Office Bill team. ILPA coordinated the work of non-Governmental organizations on the Bill. ILPA's briefings on the Act can be found at http://www.ilpa.org.uk/pages/immigration-bill-2015.html. Further resources can be found in ILPA's *Information Service* at http://www.ilpa.org.uk/pages/info-service.html .

ABOUT THE IMMIGRATION ACT 2016

The UK Government stated in the Explanatory Notes to the Bill that its purpose in bringing forward this legislation was to tackle illegal immigration by making it harder to live and work in the United Kingdom without permission. The Immigration Act 2016 not only makes changes to immigration law and practice but also extends immigration control into other areas such as housing, social welfare and employment to create the 'hostile environment' envisaged.

PART 3 ENFORCEMENT

Powers of immigration officers etc

Sections 51 to 53 Search and seizure of nationality documents

Section 51 Search for nationality documents by detainee custody officers etc
Detainee custody officers, prison officers and prison custody officers can strip search a detained person or search their property for "nationality" documents as very broadly defined.

Section 52 Seizure of nationality documents by detainee custody officers etc
Permits the seizure and retention of nationality documents discovered in the course of other searches.

Section 53 Amendments relating to sections 51 and 52 Expands the existing offences of assaulting or obstructing a detainee custody officer, prison officers or prisoner custody officers, to include where acting under s 51 of this Act.

These came into force on 12 July 2016. Section 51 provides a power for detainee custody officers, prison officers and prison custody officers to strip search a detained person who has been recommended for or is facing deportation and is in a detention centre, short-term holding facility, prison or young offender institution, who is liable to removal or deportation, or to search their property, when directed to do so by the Secretary of State, if there are reasonable grounds to suspect that "relevant" "nationality documents" will be found if the search is carried out. "Nationality documents" are broadly defined: a nationality document is "a document which might establish a person's identity, nationality or citizenship or indicate the place from which the person has travelled to the UK or the place to which a person is proposing to go." A document is relevant if it relates to a person who is liable to removal from the UK under immigration law.

The "full" search may not be carried out in the presence of another detained person or a person of the opposite sex, including the persons conducting the search. An intimate search is not permitted. If documents are not retained by the Secretary of State, they must be returned to the person they were taken from or disposed of if return is not appropriate. Although the Secretary of State changed the name of the search from "strip" to "full" at Commons' Report stage of the Bill which became the Immigration Act 2016,[1] the extent of the powers was unchanged: the power is to conduct strip searches. A new criminal offence of obstructing a person exercising functions under section 51 is created by section 53.

Section 52 permits detainee custody officers, prison officers and prisoner custody officers to seize and retain "nationality documents" which they encounter during other searches in detention centres and prisons. They must obtain authorization from the Secretary of State before exercising the power to retain the document which is to be given only if the Secretary of State suspects that the document relates to a person liable to removal and that retention of the document may facilitate the removal. The document may be retained only for so long as she has such suspicions. Where the Secretary of State gives an authorization, the officers must pass the documents to her, or, if authorization is refused, return the documents to the person or location from where they were seized unless the Secretary of State "thinks that it would not be appropriate" to return the document, it which case it must be disposed of as she directs.

Section 56 Detention etc. by immigration officers in Scotland

Amends Scottish powers of detention prior to arrest, and of arrest without warrant so that they apply to all immigration offences contained in, or for which an immigration officer has a power of arrest under, the Immigration Acts.

Into force 12 July 2016. Means that Scottish powers of detention prior to arrest, and of arrest without warrant, apply to all immigration offences contained in, or for which an immigration officer

[1] Government amendments 3 and 4 at House of Commons' Report.

has a power of arrest under, the Immigration Acts. The Explanatory Notes to the Bill stated that this "allows immigration officers to work effectively within the Scottish criminal justice system and ensures consistency in the immigration-related criminal investigation powers of immigration officers across the UK".

Section 59 Guidance on detention of vulnerable persons

Makes provision for statutory guidance to be taken into account in the decisions to detain or to continue to detain.

Into force 12 July 2016. This is the government's response to the Shaw review. Interestingly, given that his terms of reference explicitly excluded the decision to detain, it focuses on the decisions to detain and to continue to detain. The Ministerial Statement responding to Shaw on 14 January 2016 said that the government

> *"…will introduce a new "adult at risk" concept into decision-making on immigration detention with a clear presumption that people who are at risk should not be detained, building on the existing legal framework. This will strengthen the approach to those whose care and support needs make it particularly likely that they would suffer disproportionate detriment from being detained, and will therefore be considered generally unsuitable for immigration detention unless there is compelling evidence that other factors which relate to immigration abuse and the integrity of the immigration system, such as matters of criminality, compliance history and the imminence of removal, are of such significance as to outweigh the vulnerability factors."*

The guidance is to specify what is to be taken into account in determining whether a person is particularly vulnerable to harm if detained and if so whether the person should be detained or remain in detention.

During the passage of the Act, the government published a sketch of what the guidance has to cover in the form of a draft "adults at risk" policy. Guidance was published as *Adults at risk in immigration detention: draft policy* on 26 May 2016. A revised version of the same title was laid before parliament on 21 July 2016, see https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention. Regulations have been laid bringing it into effect on 12 September 2016. It is stated in the guidance that it is intended to achieve a reduction in the number of "vulnerable" people held in detention and in the time for which they can be held.

Ministerial statements made at the time of the publication of the Shaw review on 14 January 2016 indicated that the government intended to balance the indicators of 'vulnerability' with the risk of immigration offending etc. Cynics might say "but that is what paragraph 55.10 of the Enforcement Instructions and Guidance is trying to do." Paragraph 55.10 provides:

> *The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:*
>
> - *those suffering from serious mental illness which cannot be satisfactorily managed within detention (in C[riminal] C[asework] D[epartment] cases, please contact the specialist Mentally Disordered Offender Team). Enforcement Instructions and Guidance In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;*
> - *those where there is independent evidence that they have been tortured;*
> - *people with serious disabilities which cannot be satisfactorily managed within detention;*

- *persons identified by the Competent Authorities as victims of trafficking unaccompanied children and young persons under the age of 18 (but see 55.9.3 above);*
- *the elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention;*
- *pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 above for the detention of women in the early stages of pregnancy at Yarl's Wood);*
- *those suffering from serious medical conditions which cannot be satisfactorily managed within detention.*

The new guidance points to a much more schematised approach to the decision although there is little indication that the evidence informing it will be any better or that there are new tools with which to perform the desired balancing act. For the decision is very much thought of as a balancing act. We can detect a shift away from whether a person's account of torture or ill-treatment is believed to the question of whether, even if it is, the person should be released. The guidance states:

> *The clear presumption is that detention will not be appropriate if a person is considered to be "at risk". However, it will not mean that no one at risk will ever be detained. Instead, detention will only become appropriate at the point at which immigration control considerations outweigh this presumption. Within this context it will remain appropriate to detain individuals at risk if it is necessary in order to remove them. This builds on the existing policy and sits alongside the general presumption of liberty.*

This is arguably less protective in its approach than the Enforcement Guidance and Instructions Chapter 55.10 which refers to 'very exceptional' circumstances.

There will be three levels of evidence of risk. Pregnant women will automatically be classified at the highest level. Otherwise, a person's own testimony only gets them to the first level. Professional evidence that a person may be an adult at risk gets a person to the second level. Professional evidence that the person is at risk and that detention is likely to cause harm gets a person to the highest level. A rule 35 report would appear to fall at level 2. The indicators of risk are those identified by Shaw. Being female, gay or lesbian is not regarded as an indicator of risk although being transsexual or intersex is. A "more serious" learning difficulty, psychiatric illness or clinical depression "depending on the nature and seriousness of the condition is an indicator of risk, as is a "serious" physical disability or health condition. As to age, Shaw's recommendation of an upper age limit is not followed but being over 70 is an indicator of risk.

The draft policy states:

> *"The presumption will be that, once an individual is regarded as being at risk in the terms of this policy, they should not be detained. However, the risk factors for the individual, and the evidential weight that has been afforded to them, will then need to be balanced against any immigration control factors in deciding whether they should be detained."*

As to the immigration factors to be weighed against risk: length of time in detention, public protection and, ominously, "compliance issues" (rather than something more focused such as a risk of absconding) are identified as the factors.

Decisions on those with a positive "reasonable grounds" decision that they are a potential victim of trafficking, pending a conclusive decision, are dealt with on the basis of the Modern Slavery policy and not this guidance at all.

What the guidance does not do, although it purports to do it, is to provide any guidance as to how to weigh evidence of risk against immigration factors.

The guidance must be taken into account by those to whom it is issued.

60 Limitation on detention of pregnant women

Places a time limit, one week with the authorization of the Secretary of State, 72 hours in all other cases, on the detention of pregnant women and provides that the power can only be used where the woman will shortly be removed from the United Kingdom or there are exceptional circumstances which "justify" the detention. A woman can be detained more than once using this power.

Into force 12 July 2016. Stephen Shaw recommended a ban on the detention of pregnant women. It is unclear why the government did not accede to his request; but having a class of persons whom they could not detain did not sit well with the "balancing" approach being taken to the Shaw review.

Under section 60, a pregnant woman can only be detained if the Secretary of State is satisfied that she is shortly to be removed or that there are exceptional circumstances justifying the detention. During the debates on the amendments the conservative MP David Burrowes suggested that the "or" should be changed to "and" but this was not done. Time runs from the date on which the Secretary of State is satisfied that the woman is pregnant. A woman could be detained more than once under these provisions.

In the dying hours of the Bill, on 10 May 2016, Baroness Lister of Burtersett tabled an amendment that would have inserted the word "very" before "exceptional", mirroring the wording of the Enforcement Guidance and Instructions at Chapter 55.10. Resisting the amendment, the Minister, Lord Keen of Elie, said

> *The provision does refer to "exceptional circumstances". The guidance as it exists talks of only "very exceptional circumstances" applying for the detention of pregnant women, and that will continue to be the policy that is applied in the context of the provision. I reiterate what was said in the other place last night: it is only in very exceptional circumstances that it will be considered appropriate for this provision on detention to be employed.*[2]

There followed an exchange in which peers pressed him to put the word "very" on the face of the Act. The Minister's last word, although one which satisfied no one but him, was:

> *It is questionable whether there is any distinction to be drawn between exceptional, properly understood, and very exceptional or most exceptional. That is what lies behind the manner in which this provision has been drafted. Nevertheless, to dispel doubt in the minds of others, it has been said in the guidance that, as a matter of policy, the term "very exceptional" may be applied when approaching the application of this provision to the detention of pregnant women.*[3]

The subjective test that the Secretary of State is satisfied that the woman is shortly to be removed appeared to allow the Secretary of State considerable latitude. This cannot be simply about whether removal directions had been set as that is a matter of fact not of judgement.

[2] HL Deb 10 May 2015 col 1669.
[3] *Ibid*. Col 1770.

Since the Immigration Act 2014[4] it has been the case that a person gets notice of liability to removal and to detention when refused. If not removed within those three months, they get another such notice. And so on. A notice is a warning that you could be plucked into detention at any time. Pregnant women do get notice that they are to be removed, but only once they are detained.

The "time limit" approach taken is modelled on the provisions on the detention of families set out in Part 1 of the Immigration Act 2014. What is missing are the provisions of that Act as to no notice removal. Attempts were made to insert these during the passage of the Bill, but without success.

61 Immigration bail Power to cancel leave and Schedule 10 — Immigration bail Part 1 — Main provisions and Part 2 — Amendments to other Acts

Replace temporary admission and bail under Immigration Act powers with a new single category of "immigration bail". Makes provision for (some) judicial oversight of detention. Makes provision for support for those released from detention. Gives the Secretary of State power to dictate to a court when it should impose an electronic monitoring condition. Amends the provisions of the Immigration Act 2014 as to repeat bail hearings

Subsections 61(3) to (5) were whisked into force on 12 May 2016, the day on which the Immigration Bill became an act of parliament. The rest of these provisions are not yet in force.

Provisions in force

In *R (B) v Secretary of State for the Home Department (No 2)* (2015) EWCA Civ 445, currently pending before the Supreme Court, the Court of Appeal held that while it is accepted that the powers to impose bail conditions extend to someone who could be detained even if they are not actually detained immediately prior to the grant of bail, the powers extend only to people who are, or could be, lawfully subjected to immigration detention. The effect of the Court of Appeal's judgment was to make the imposition of bail conditions unlawful in circumstances in which the person concerned could not lawfully be subject to immigration detention.

This is addressed for the future by Schedule 10 to the 2016 Act which provides that bail conditions can be set in relation to individuals who are either "detained" or "liable to detention" under relevant immigration powers. It is provided that a person is "liable to detention" if s/he could be detained were it not for the fact that a "legal issue" or practical difficulty presently precludes or impedes his or her removal from the UK.

Section 61(3) is about current powers to impose bail conditions. It provides that these can be used "even if the person can no longer be detained" provided that s/he is "liable to detention". Section 61(5) provides that this is to be treated "as always having had effect." This means that the provisions will have retrospective effect, as acknowledged this in its Explanatory Notes to the Bill:

> *"This clause is retrospective in its effect because it is intended to clarify the law following a recent Court of Appeal judgment … on when immigration bail conditions can be imposed. The Court of Appeal judgment disturbed*

[4] See section 1.

previously settled case law in this area. If the Court of Appeal's judgment stands (it is under appeal) then it will have a significantly limiting impact on judges' and the Home Office's ability to impose bail conditions and manage individuals, including those who pose a risk to the public where deportation is being pursued" [Explanatory Notes to the Immigration Bill, para 168].

"Clarify" is here used in the sense of "change" as the House of Lords Select Committee on the Constitution pointed out.

34. The statement that these provisions "clarify" the law is questionable. The Court of Appeal has determined what the relevant provisions of the Immigration Act 1971 mean—and what, in law, they have always meant. The Government now wishes to revise what those provisions mean. The effect of clause 32(5) [now 63(5)] *will therefore be to change the law and to do so retrospectively. … the rule of law requires government to act according to law, and from that perspective the retrospective provision of a legal basis for executive action is constitutionally suspect and calls for a clear justification. To the extent that such a justification is provided by the Government, it appears to turn upon considerations of administrative convenience and to rely upon the fact that the Court of Appeal's judgment disturbed what the Government considered to be a settled understanding of the legal position. We recognise that the Government was acting in accordance with its understanding of the law, but once that action has been judged to be unlawful we would expect a greater justification for changing the law with retrospective effect than simple administrative convenience.*

35. As we have previously stated, there needs "to be a compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable." [Constitution Committee, Banking Bill (3rd Report, Session 2008-09, HL Paper 19), para 7] *The House may wish to assure itself that sufficient justification has been advanced for the use of retrospective legislation in this instance.*

In the event, parliamentarians took little interest in the point.

Provisions not yet in force

The provisions of the section and Schedule re-enact existing powers and give the Home Office new powers to manage those without leave, be they refused or persons waiting (as in an asylum case) for an initial decision. Henceforth there will be no concept of "temporary admission" to the UK while a decision is made on the case. Instead, anyone without leave who is waiting for a decision will be on "immigration bail". The language, with its connotations of criminality, has always been unfortunate, this is all the more the case now that it will be applied to persons who have claimed asylum at port of entry.

The notion of a single form of temporary permission has been a gleam in the Home Office's eye since the proposals for a simplification act back in 2008. The provisions go beyond renaming. A person granted temporary admission would never normally come before the Tribunal, so how to deal with the involvement of both the Tribunal and the Secretary of State in immigration bail? Under the Schedule, the Tribunal can direct that the power to amend or remove conditions, or impose new ones, may be exercised by the Secretary of State,

Under Schedule 10 a person liable to detention or detained under Immigration Act powers may be granted immigration bail by the Secretary of State or, if detained, by the First-tier Tribunal. Immigration bail must be granted subject to one or more of the following conditions :

- appearance before the Secretary of State or First-tier Tribunal at a date and place specified;
- restriction as to work, occupation or studies;
- restriction as to residence;
- reporting requirements (to Secretary of State or another person)

- electronic monitoring;
- such other conditions as the person granting bail thinks fit.

A recognisance may be required, or a surety required to put up a sum.

Whilst conditions of residence, reporting and restrictions on work are similar to current temporary admission requirements, the restriction on studies is new. During debates on the Immigration Bill, the Minister in the House of Lords stated: *"I emphasise that this is an existing power used only in the most exceptional circumstances pertaining to terrorism."*[5]

A person must be given notice by the Secretary of State or First-tier Tribunal of when bail begins and of the conditions of that bail. The notice is not required to specify when the bail ends.

Electronic monitoring conditions

The Schedule as presented to parliament contained a power of the Secretary of State to change an electronic monitoring or a residence condition of bail imposed by the First-tier tribunal. The Tribunal could decline to impose such a condition; the Home Office could turn around and impose it the next day. Following opposition from *inter alia* the House of Lords' Select Committee on the Constitution and the former Conservative Lord Chancellor Lord Mackay of Clashfern, the government amended the Schedule to replace the Secretary of State's proposed power to impose an electronic monitoring or residence condition where the Tribunal has not done so with a duty on the Secretary of State or Tribunal, when releasing a person on bail who has been the subject of deportation proceedings, to make such a person subject to an electronic monitoring condition unless it would be impractical or in breach of the European Convention on Human Rights so to do.

The Select Committee on the Constitution in its seventh report of session 2015-2016[6] reported that:

> *We are concerned that schedule 7, which would allow a Minister to override or alter independent judicial decisions about immigration bail conditions, is in tension with the principles of the rule of law. The usual process, should a Minister have concerns about a judicial decision, would be to appeal against it. The House may wish to ask the Government to clarify how their proposals comply with the rule of law. The House may also wish to ask the Government why, if the intention is to ensure the use of certain bail conditions for particular offenders (such as satellite monitoring for foreign nationals), they do not simply propose new criteria for the First-tier Tribunal to take into account when setting bail conditions.*

An apparently chastised Lord Bates wrote to Lord Lang of Monkton, chair of the Committee, on 1 March 2016 to say

> *"I acknowledge the Committee's concerns regarding the potential conflict of the original drafting of the bail powers with the rule of law. I have thought carefully about this issue and today I have tabled amendments to remodel the relevant clause and schedule in the Bill to address these concerns. The new approach will introduce a statutory requirement that an electronic monitoring condition must be imposed on individuals subject to deportation proceedings unless the Secretary of State decides that this is inappropriate"*

Immigration bail is granted to a person detained pending deportation, including "automatic deportation" under the UK Borders Act 2007 and it must be granted subject to an electronic monitoring condition unless the Secretary of State is granting bail and considers that an electronic

[5] Lord Keen of Elie, Immigration Bill, House of Lords Committee, Hansard, 01 Feb 2016, Column 1658
[6] HL Paper 75, see http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/75.pdf

monitoring condition would be impractical or contrary to a person's rights under the European Convention on Human Rights.

If bail is granted by the Tribunal then it must not be granted subject to an electronic monitoring condition if the *Secretary of State* informs the Tribunal that an electronic monitoring condition would be impractical or contrary to a person's rights under the European Convention on Human Rights.

In judging of impracticality or human rights breaches, the Secretary of State can have regard to obstacles in making arrangements for electronic monitoring, resources, the likelihood of the person failing to comply with a bail condition, whether the person has been convicted, the likelihood of the person committing an offence while on bail, whether the person is a danger to public health or threat to public order, whether detention is necessary in the person's interests or for the protection of any other person and such other matters as the Secretary of State or the Tribunal thinks relevant – although it is unclear when the Tribunal gets a chance to say what it thinks relevant.

The First-tier Tribunal may not exercise its power to amend or remove conditions of bail to amend an electronic monitoring conditions.

Where a person is on immigration bail pursuant to a grant of bail by the Secretary of State or a grant of by bail by the First-tier Tribunal in a case where the Tribunal has directed that the power to amend or remove conditions, or impose new ones, may be exercised by the Secretary of State, the Secretary of State may only remove an electronic monitoring condition if she considers that it would be impractical for the person to continue to be subject to the condition or that it would be contrary to the person's rights under the European Convention on Human Rights for the person to be so subject.

If a person is not subject to an electronic monitoring condition then upon coming to the conclusion that it would not be impractical or a breach of a person's convention rights to impose one, the Secretary of State must impose one.

Where a person formerly detained pending deportation is on bail and that bail is being managed by the Tribunal rather than the Secretary of State then the Tribunal must not remove an electronic monitoring condition unless the Secretary of State notifies the Tribunal that she considers that it would be impractical or a breach of a person's convention rights for them to continue to be subject to the condition. If she notifies the Tribunal to the contrary, it must impose the conditions. Thus although the Secretary of State is no longer seen to turn around and undermine what the Tribunal is doing, she calls all the shots and the Tribunal is not acting independently.

Regulations may make provision about the circumstances in which powers to impose an electronic monitoring condition may or must be exercised.

The same regime applies to the Special Immigration Appeals Commission. That specialist tribunal can be overruled by the Secretary of State.

The provisions do not describe any scope for the Tribunal, or the Commission to disagree. What if the Tribunal or the Commission consider that to impose such a condition will breach a person's human rights, despite the protestations of the Secretary of State's representative to the contrary?

ILPA's understanding is that the Tribunal or Commission will continue to be bound by section 6 of the Human Rights Act 1998 which, insofar as material, provides

> **6 Acts of public authorities.**
> (1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
> (2)Subsection (1) does not apply to an act if—
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
> (3)In this section "public authority" includes—
> (a) a court or tribunal, and
> (b) any person certain of whose functions are functions of a public nature,
> …

The structure could also operate to allow the Secretary of State to declare a tag "impractical" in circumstances where the Tribunal or Commission considered that it should be imposed, or to advance human rights arguments against its imposition that the Tribunal or Commission considered to be without merit. Then the Judge or immigration judge will be unable to impose the condition s/he wished to impose. If this meant that s/he did not grant bail to a person who would otherwise have been bailed, then this could constitute an unwarranted and unlawful interference with a person's right to liberty.

Duty to arrange consideration of bail

A surprise win was the first provisions since 1999 for automatic judicial oversight of detention, although bear in mind that the provisions of the 1999 Act were never brought into effect and were repealed in 2002. In the House of Lords, amendments were tabled which combined the notion of a time limit on detention with the principle of judicial oversight. It was proposed that the Secretary of State be required to justify detention beyond a fixed period (28 days was suggested in the amendment) before a Tribunal.

At Lords' Report on 15 March 2016 Amendment 84, proposing a new clause *Immigration detention: time limit and judicial oversight,* was tabled in the names of Lord Ramsbotham, Lord Rosser and Baroness Hamwee.[7] This required that the Secretary of State make an application to the Tribunal where she wished to detain a person, other than a person who had been sentenced to a term of imprisonment for 12 months or longer or whom she had determined shall be deported, for more than 28 days, at a stretch or in aggregate. On such an application the Secretary of State would have to persuade the Tribunal that the "exceptional circumstances" of the case required detention beyond 28 days. The Tribunal could then extend detention for a further period, not limited to 28 days and could do so more than once, with no maximum.

Those sentenced to more than 12 months or whom the Secretary of State had determined should be deported would have had to bring an application for bail themselves. There would be no automatic review of their detention. It is understood that this restriction, which was not a feature of the amendment tabled at Commons' Committee, was introduced so that the Labour front bench

[7] HL Report, col 1787.

would support the amendment were it pressed to a vote. The detainee as offender was not to escape detention by administrative fiat, without limit of time. The amendment was carried by 187 votes to 170.

The Lords amendment on judicial oversight was rejected and what became the *Duty to arrange consideration of bail* part of the Schedule was as substituted in lieu. This provided for the Secretary of State to arrange a bail hearing before the Tribunal when a person has been detained for four months from their first entry into detention, or since their last bail hearing, whether automatic or a bail hearing they had instigated, save if the latter were a bail hearing within 14 days of a proposed removal as in such cases the Secretary of State has, since the passage of the Immigration Act 2014, power to refuse to consent to bail. Mirroring the amendment carried in the Lords, it does not apply to those detained pending deportation. It applies to cases before the Special Immigration Appeals Commission, perhaps a surprise given that that it is a specialist court of record presided over by a High Court judge and set up to hear national security cases. The section applies where a person waives, in writing, their right to the hearing.

The section is not phrased in terms of the Secretary of State justifying detention, but of the person making their case for release, despite presumption of liberty to which Home Office guidance makes reference.

Powers of Secretary of State to enable person to meet bail conditions

With the repeal of powers to support persons who have never claimed asylum under section 4 of the Immigration and Asylum Act 1999, including s 4(1)(c) which is used for bail cases on bail, Schedule 10 makes new provision for the Secretary of State to provide support to a person bailed to an address of her choosing. It is provided, however, that the power would only be used in exceptional circumstances and the wording "where a person is (a) on immigration bail" creates doubt about whether an impecunious detainee could apply for an address to facilitate making a bail application. Without such an address they are unlikely to be granted bail and their rights to liberty under Article 5 of the European Convention on Human Rights risk being infringed[8]. The matter was discussed in the Public Bill Committee and the Minister, the Rt Hon James Brokenshire MP, said

> *Schedule 5, paragraph 7* [now Schedule 10, paragraph 9] *provides a power to allow the Secretary of State to meet accommodation costs and travel expenses for those granted immigration bail. That arrangement is designed to replace section 4(1)(c) of the Immigration and Asylum Act 1999*, which…to date has been used to provide accommodation for persons released on bail in the limited circumstances where we judge that that is appropriate. …
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> *… in general, individuals seeking bail are expected to accommodate themselves or arrange accommodation through friends or relatives. This is no different from the way the section 4 power is currently used. It is clearly inappropriate to spend public money providing accommodation for people who do not need it. It should therefore only be in exceptional circumstances that the Secretary of State should pay for the accommodation of people seeking release from detention on bail. If the person is truly unable to arrange their own accommodation, the powers can be used to provide it on a case-by-case basis … the concern expressed about the provision appears to be based on the assumption that there will be increased use of detention for a longer period, because bail can only be granted when an address is available. 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*

[8] See amendment 28 at Commons' Report.

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.
Keir Starmer… *As I understand the Minister, it is envisaged that the tribunal will use conditional bail to bail someone on the condition of a residence, or an address, unspecified. There will then be a period during which the individual either finds an address or consideration will be given to supporting the individual to have an address so that they can be released. Is that how it is envisaged that this will work, when looked at in the round?*
James Brokenshire: *That is how conditional bail can be used in these circumstances, as I think I described in my response to the hon. and learned Gentleman's points.* (Public Bill Committee, 10th sitting, 3 November 2015, pm, col 368)

Other provisions

Sections of the Immigration Act 2014 require rules to be made for the Tribunal and for the Special Immigration Appeals Commission to prohibit repeat bail hearings within 28 days, unless there is a material change and the provisions of that Act which required the Home Office to consent to bail with 14 days of removal and to consent to new matters being raised before the tribunal or commission. These provisions are re-enacted in the Schedule, but with a difference. While section 7 of the 2014 Act implicitly allows a bail application to be heard since all that is prevented is 'release' on bail within 14 days from the date on which bail has been granted, the Schedule *Immigration Bail* to the Bill provides instead[9] that person must not be 'granted' immigration bail by the First-tier Tribunal without the consent of the Secretary of State. This raises the spectre of the case not being listed for hearing at all.

Provision is made for bail granted by a criminal court or court of criminal appeal following a recommendation for deportation to be treated in the same way as any other Schedule 10 bail.

Resources

Powers of immigration officials etc
Factsheet 6: Enforcement officer powers 09 December 2015
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483800/Immigration_Bill_Factsheet_07_-_enforcement__report_.doc

Detention and bail
Factsheet 7: immigration Bail 09 December 2015
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