ILPA BRIEFING CONSIDERATION OF THE IMMIGRATION ACT 2016 (CONSEQUENTIAL AMENDMENTS) (BIOMETRICS AND LEGAL AID) REGULATIONS 2017 FOR THE DELEGATED LEGISLATION COMMITTEE ON TUESDAY18 APRIL 2017

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 organisations.

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Context

This briefing looks first at the context for this statutory instrument, then at the detail of the provisions in it.

Section 61 of, and Schedule 10 to, the Immigration Act 2016 replace temporary admission and bail under Immigration Act powers with a new single category under the unfortunate name of 'immigration bail'. It makes provision for the granting of such bail and conditions to be imposed on those released on immigration bail, including electronic tagging. The Schedule makes provision for support for those released from detention.

Automatic bail hearings

Immigration detention in the UK is currently by administrative fiat, without limit of time, and a person held in such detention is brought before a court only if they instigate this. As a result of debates in parliament Schedule 10 makes provision for some, but not all, of those detained under Immigration Powers to have an automatic bail hearing every four months, where an immigration judge will consider whether they should be released on bail.

This statutory instrument paves the way for the commencement of section 61 and Schedule 10. We understand that is intended to happen on 30 April 2017 but the instrument provides an opportunity to ask the Minister:

- **When is it the government's intention to bring section 61 and Schedule 10 into force?**

The debates and votes that prompted the government to make provision for automatic bail hearings during the passage of the 2016 Act focused on the question of a time limit for

detention and would have required the government to make the case for detention before a tribunal judge after 28 days' detention, at a stretch or in aggregate.[1] The amendment would have required the Secretary of State to persuade the Tribunal that the 'exceptional circumstances' of the case required detention beyond 28 days. The amendment was carried by 187 votes to 170[2]. The automatic bail hearing after four months is the government's compromise response. [3]

Paragraph 11 of Schedule 10 is not phrased in terms of the Secretary of State justifying detention and is identical to an elective bail hearing. Nonetheless, given the presumption of temporary admission set out in Chapter 55.1 of the Home Office Enforcement Instructions and Guidance, the Secretary of State will have to defend the decision to detain.

Automatic judicial oversight will not be for all. It does not apply to those detained pending deportation (paragraph 11(1)(a)). Nor does it apply to cases before the Special Immigration Appeals Commission, despite its being a specialist court of record presided over by a High Court judge and set up to hear national security cases (paragraph 11(6)(a)). Nor does the section apply where a person waives, in writing, their right to the hearing (paragraph 11(6)(a)).

Yet it is those detained on completion of their criminal sentence who are often detained for the longest periods and, given the political pressures to keep them locked up, stand most in need of a tribunal consider to review their detention.

- **The Committee should urge the Minister to bring forward legislation to extend automatic judicial oversight to all cases.**

Failings of the 'Adults at Risk' policy

Detention under Immigration Act powers was the subject of grave concern during the passage of the Act and parliament succeeded not only in inserting into the Act provision for automatic bail hearings, but placing a time limit on the detention of pregnant women and placing limits on the Secretary of State powers to impose electronic monitoring conditions. The damning report of Steven Shaw OBE as to the welfare of those in detention led the government to insert provision into the Act for statutory guidance on 'Adults at Risk' in immigration detention. [4] To date, the Adults at Risk policies have proven less protective than the provisions they replaced. In December 2016 the Royal College of Psychiatrists issued a positon statement saying "The Royal College of Psychiatrists is concerned that the new policy will significantly weaken the existing safeguards for vulnerable people with a history of torture, trafficking or other serious ill-treatment and that it will not, as is ostensibly intended, provide better protection for vulnerable groups against their detention and from the disproportionate adverse effects of such detention"[5] .

One change made in the *Adults at Risk* policies was to restrict the definition of torture, a history of which is a factor militating against, although not prohibiting, detention under the *Adults at Risk*

[1] See in particular Amendment 84 in the names of Lord Ramsbotham, Lord Rosser, Baroness Hamwee and Lord Roberts of Llandudno debated at HL deb, 15 March 2017, col 1787 (15 March 2016).
[2] Hansard, HL col 1804 (15 March 2016).
[3] Hansard, HC Vol 608 (25 April 2016) and (9 May 2016).
[4] See https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention
[5] Available at http://www.rcpsych.ac.uk/pdf/PS07_2016.pdf

Guidance. Whereas the Courts had held[6] that previous policies required an inclusive definition of torture, the Adults at Risk policy provided that only torture by a State agent, or agent of a State-like entity, should militate against detention. This was challenged by the charity Medical Justice and, pending the full hearing of the challenge, the Court issued an injunction against the Secretary of State requiring her to revert to the inclusive definition of torture.

Evidence that the new policy is failing in its stated aims is provided by deaths in detention., On 11 January 2017, a third person was found to have died at Morton Hall Immigration Detention Centre. He was a 27-year-old Polish man who was found hanging in his cell. His wife had given birth that day. While, unsurprisingly, there are suggestions of mental health problems, reports do not indicate whether there were any such problems prior to detention. On 9 April a 43 year old man died at The Verne immigration detention centre on Portland Island in Dorset.

- **The *Adults at Risk* guidance, far from implementing Stephen Shaw CBE's calls for greater protection of persons in immigration detention has been used to make it easier to lock persons up in immigration detention. The Committee should urge the Minister to lay new statutory guidance in draft before parliament.**

Legal Aid

The instrument addresses amends provisions on legal aid for challenges to immigration detention. It is vital that the government's review of legal aid, scheduled to commence this year, examines closely legal aid for those deprived of their liberty under Immigration Act powers. Those with immigration rather than asylum cases are not entitled to legal aid for their immigration case, although if they pass means and merits tests they will be entitled to legal aid to challenge their detention. Without dealing with the merits of the substantive case it may be very difficult to secure release. Paying or not, many struggle to secure legal representation, in particular those held in the prison estate following completion of their sentence.

For those detained in the prison estate, even legal aid for a challenge to detention may be out of reach in practice. As of September 2016, 558 persons were held under Immigration Act powers in prisons.[7] No figures are published showing how long immigration detainees are held in prisons, or on what happens when they leave detention, and whether they are removed or released.

In February 2017, the charity Bail for Immigration Detainees published *Mind the Gap: Immigration Advice for Detainees in Prisons.*[8] It finds that almost half the detainees surveyed were only told of their detention under Immigration Act powers on the day they expected to be released following completion of their prison sentence. It found that fewer than a quarter of the 18 immigration detainees in prison surveyed have access to an immigration solicitor. Fewer than 5% can access any independent immigration advice.

- **The Committee should urge the government to ensure that the review of legal aid pay special attention to those detained under Immigration Act powers.**

[6] *R (EO, RA, CE, OE & RAN) v SSHD* [2013] EWHC 1236 (Admin).
[7] Source: Ministry of Justice (JSAS/FOI 108670).
[8] Available at http://www.biduk.org/sites/default/files/media/docs/Mind%20the%20Gap_1.pdf

- **The Committee should urge the Minister to end detention under Immigration Act powers in the prison estate. Pending this, express provision must be made to ensure that such persons can access legal advice.**

Amendment to section 141 of the Immigration Act 1999

The first piece of primary legislation amended by this instrument is s 141(7)(b) of the Immigration and Asylum Act 1999. It currently reads

> 141 Fingerprinting.
> (1) Fingerprints may be taken by an authorised person from a person to whom this section applies.
> (2) Fingerprints may be taken under this section only during the relevant period.
> …
> (5) "Authorised person" means—
> (a) a constable;
> (b) an immigration officer;
> (c) a prison officer;
> (d) an officer of the Secretary of State authorised for the purpose; or
> (e) a person who is employed by a contractor in connection with the discharge of the contractor's duties under a removal centre contract.
> …
> (7) This section applies to—
> (a) any person ("A") who, on being required to do so by an immigration officer on his arrival in a control zone or a supplementary control zone, fails to produce a valid passport with photograph or some other document satisfactorily establishing his identity and nationality or citizenship;
> (b) any person ("B") who has been refused leave to enter the United Kingdom but has been temporarily admitted under paragraph 21 of Schedule 2 to the 1971 Act if an immigration officer reasonably suspects that B might break any condition imposed on him relating to residence or as to reporting to the police or an immigration officer;

When Schedule 10 to the Immigration Act 2016 comes into effect subsection 141(7(b) will read

> 141 (7)(b) any person ("B") who has been refused leave to enter the United Kingdom but has been granted immigration bail under Schedule 10 to the Immigration Act 2016 if an immigration officer reasonably suspects that B might break any condition imposed on him relating to residence or as to reporting to the police or an immigration officer;

The amendment effected by paragraph 2 of this statutory instrument means that the final part of the section will read:

> 141 (7)(b) any person ("B") who has been refused leave to enter the United Kingdom but has been granted immigration bail under Schedule 10 to the Immigration Act 2016 subject to a condition mentioned in paragraph 2(1)(c) or (d) of that Schedule if an immigration officer reasonably suspects that B might break that condition."

The conditions mentioned in paragraphs 2(1)(c) and (d) are conditions about a person's residence or requiring the person to report to the Secretary of State or such other person as may be specified. It will thus be seen both that the changes are consequential on the changes made by Schedule 10 to the Immigration Act 2016 and that they could have been made in that Act; evidence of a matter oft commented on during the passage of that Act, that it was drafted in haste. As predicted, this has necessitated further amendment and increased complexity.

Changes to the Legal Aid, Sentencing and Punishment of Offenders Act 2012

In England and Wales, Legal Aid for challenges to immigration detention is provided under paragraph 25 to 27 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Legal Aid in Scotland is provided under a different, simpler, less bureaucratic and more inclusive regime.

Paragraph 25 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which is unchanged by this instrument, reads:

> ***Immigration: detention***
> 25(1)Civil legal services provided in relation to—
> (a)detention under the authority of an immigration officer;
> (b)detention under Schedule 3 to the Immigration Act 1971;
> (c)detention under section 62 of the Nationality, Immigration and Asylum Act 2002;
> (d)detention under section 36 of the UK Borders Act 2007.
> Exclusions
> (2)Sub-paragraph (1) is subject to the exclusions in Parts 2 and 3 of this Schedule.

This covers legal aid for challenges to immigration detention. This instrument is concerned not with challenges to detention, but with legal aid to challenges to the conditions of immigration bail.

Subsections 61(3) – (5) of the Immigration Act 2016 deal with conditions of immigration bail and were whisked into force the day the Act received Royal Assent. The House of Lords Committee on the Constitution drew attention to these provisions under the heading 'retrospective legislation'.

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 where, as in the case it was considering, there was no realistic prospect of the person's deportation taking place, subjecting them to immigration detention pending deportation would not be lawful and that once the legal basis for detention falls away, so does the legal basis for imposing bail conditions. 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.

The Immigration Act 2016 reverses this decision and makes it lawful to impose bail conditions in these circumtances. It provides that the change is to be treated 'as always having had effect'.

The House of Lords Select Committee on the Constitution said:

> '34. *The statement* [by the government*] that these provisions 'clarify' the law is questionable. …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.*

The conditions that can be imposed as conditions of immigration bail are set out in paragraph 1(3) of Schedule 10 to the Immigration Act 2016. They are:

- 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;
- electronic tagging;
- reporting requirements (to Secretary of State or another person); and/or
- such other conditions as the person granting bail thinks fit.

The most controversial of these is electronic tagging. When immigration bail is granted to a person detained pending deportation, the Immigration Act 2016 provides that it must be granted subject to an electronic monitoring condition. There is an exception to this where the Secretary of State is granting bail and considers that an electronic monitoring condition would be impractical or contrary to a person's rights under the European Convention on Human rights. Where bail is granted by the tribunal, bail 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.

The same regime applies to the Special Immigration Appeals Commission.

The provisions do not describe any scope for the tribunal, or the Special Immigration Appeals Commission to disagree with the Secretary of State. If the tribunal or the Commission considers that to impose such a condition will breach a person's human rights, despite the decision of the Secretary of State's representative to the contrary, the Tribunal or Commission will continue to be bound by s 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 decision-making structure could also operate to allow the Secretary of State to declare a tag 'impractical' in circumstances in which the tribunal or commission considered that it should be imposed, or to advance human rights arguments against its imposition that the tribunal or commission considers to be without merit.

In judging of impracticality or human rights breaches, the Secretary of State may 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 she or the tribunal deems relevant .

The First-tier Tribunal may not exercise its power to amend or remove conditions of bail to amend an electronic monitoring condition. Where a person is on immigration bail the Secretary of State may only remove an electronic monitoring condition if she concludes 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 do so.

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. The Secretary of State makes the decisions and the tribunal is not acting independently.

It will be seen from this framework that challenges to immigration bail are likely, and likely to be complex, making the provision of legal aid important.

Paragraph 26 of Schedule 1 to the 2012 Act currently reads:

> ***Immigration: temporary admission***
> 26(1) Civil legal services provided in relation to temporary admission to the United Kingdom under—
> (a) paragraph 21 of Schedule 2 to the Immigration Act 1971;
> (b) section 62 of the Nationality, Immigration and Asylum Act 2002.
> Exclusions
> (2)Sub-paragraph (1) is subject to the exclusions in Parts 2 and 3 of this Schedule.

Paragraph 21 of Schedule 2 to the Immigration Act 1971 is deleted by the Immigration Act 2016, hence reference to it is removed.

The amended paragraph will provide for legal aid in relation to conditions of immigration bail for those liable to detention under paragraphs 16(1)(1A) or (2) to Schedule 2 to the Immigration Act 1971 and, as before, under s 62 of the 2002 Act. No mention is made of paragraph 16(1B) of Schedule 2 to the Immigration Act 1971 which reads:

> (1B) A person who has been required to submit to further examination under paragraph 3(1A) may be detained under the authority of an immigration officer, for a period not exceeding 12 hours, pending the completion of the examination.

- **The Minister should be invited to explain this omission.**

Paragraph 27 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act currently reads

> ***Immigration: residence etc restrictions***
> 27(1)Civil legal services provided in relation to restrictions imposed under—
> (a) paragraph 2(5) or 4 of Schedule 3 to the Immigration Act 1971 (residence etc restrictions pending deportation);
> (b) section 71 of the Nationality, Immigration and Asylum Act 2002 (residence etc restrictions on asylum-seekers).
> Exclusions

(2)Sub-paragraph (1) is subject to the exclusions in Parts 2 and 3 of this Schedule.

Schedule 2 paragraph 4 is deleted by the Immigration Act 2016 and paragraph 2(5) of that Schedule is substituted. Section 71 of the 2002 Act remains unchanged.

The statutory instrument splits this paragraph 27 and paragraph 27A. The amended paragraph 27 makes reference to a person who is liable to detention under paragraphs 2(1), (2) or (3) of Schedule 3 to the immigration Act 1971. Paragraph 2(1A) of that Schedule is dealt with in the new paragraph 27A.

Subparagraph 3(5) of this statutory instrument removes paragraph 8 of Part 3 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act which provides

> Advocacy in the following proceedings in a magistrates' court—
> (b) proceedings in relation to—
> (i) bail under Schedule 2 to the Immigration Act 1971, or

- **The Minister should be asked to explain why this provision is removed, rather than substituted, so that no provision is made to any proceedings in the Magistrates Court in relation to bail from immigration detention.**

The complexity of the drafting is a result to an approach to legal aid in Schedule 1 to the 2012 Act that ensures that a matter is outside the scope of legal aid unless it is expressly included. This approach leads to complexity and confusion in practice, and heightens the risk of persons falling through the gaps. Because of this:

- **The Minister should be asked to place on the parliamentary record the Statement in the Explanatory Memorandum to the instrument states that**

> ***"There is no change in policy…The Policy intention is that legal aid availability will be maintained as before, ensuring there is no effective change to availability of legal aid when the Schedule 10 provisions are commenced and the existing powers repealed."***