Immigration detention: developments

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1. European Union nationals in detention.

In 2010, 78 EU citizens were detained under Immigration Act powers, thus forming 2.7% of all detainees. In 2015 3,699 EU citizens were detained under immigration powers, a 500% increase, to 11.4% of all detainees. By the third quarter of 2016, 1,227 EU Citizens were detained in that quarter alone, 17% of new detentions and EU citizens formed a quarter of all enforced removals (1,000 persons). More detail is provided in the table below, which disaggregates A2 and A2 (Romanian and Bulgarian) nationals, and other EU nationals. One in six persons in detention in 2016 (16%) was an EU national and in the first During the first quarter (January to March) of 2017, this increased to 29% (one in five people detained).

Year	Country of nationality	Total detainees	Total EU detainees	% those entering detention who are EU member state nationals
2009	*Total	28,001	768	3
2009	*Total EU 14	260		
2009	*Total EU 2	190		
2009	*Total EU 8	267		
2009	*Total EU Other	51		
2010	*Total	25,904	1,013	4
2010	*Total EU 14	273		
2010	*Total EU 2	247		
2010	*Total EU 8	453		
2010	*Total EU Other	40		
2011	*Total	27,089	1,244	5
2011	*Total EU 14	306		
2011	*Total EU 2	290		
2011	*Total EU 8	602		
2011	*Total EU Other	46		
2012	*Total	28,905	1,633	6
2012	*Total EU 14	344		

2012	*Total EU 2	468		
2012	*Total EU 8	766		
2012	*Total EU Other	55		
2013	*Total	30,418	1,969	6
2013	*Total EU 14	321		
2013	*Total EU 2	698		
2013	*Total EU 8	917		
2013	*Total EU Other	33		
2014	*Total	30,364	2,819	9
2014	*Total EU 14	441		
2014	*Total EU 2	841		
2014	*Total EU 8	1,519		
2014	*Total EU Other	18		
2015	*Total	32,447	3,699	11
2015	*Total EU 14	542		
2015	*Total EU 2	1,102		
2015	*Total EU 8	2,040		
2015	*Total EU Other	15		
2016	*Total	28,908	4,699	16
2016	*Total EU 14	568		
2016	*Total EU 2	1,669		
2016	*Total EU 8	2,451		
2016	*Total EU Other	11		
2017 Q1	*Total	7,358	1,515	21
2017 Q1	*Total EU 14	174		
2017 Q1	*Total EU 2	594		
2017 Q1	*Total EU 8	746		
2017 Q1	*Total EU Other	1		

For 2017 figures see UK Visas and Immigration, *Immigration Statistics, January to March 2017: Data Tables* at: https://www.gov.uk/government/statistics/immigration-statistics-january-to-march-2017-data-tables, Table dt_04_q: People entering detention by country of nationality, sex, place of initial detention and age.

EU citizens and their family members have a three months' right to reside in the UK and have a right to say longer if they are workers, self-employed, self-sufficient or students, or the family members of such persons. They can be expelled (the equivalent of deportation) from a member

State if they are a danger to public policy, public security or public security. In the Immigration (European Economic Area) Regulations 2016, (SI 2016/1052) which came into effect in February 2017, this test has been interpreted very broadly, in a way that appears to be incompatible with EU law, *inter alia* lowering the threshold at which removal/exclusion may be permitted by, for example, allowing this on preventative grounds, in the absence of a past criminal conviction; by restricting the factors relating to the individual's integration in the UK that may be taken into account and by detailing vague and controversial 'fundamental interests of society' weighing in favour of removal. The burden of proof is also placed on the applicant rather than the Home Office.

In addition, the regulations, as did their predecessor, make provision for the Home Office to remove a person who is not exercising Treaty rights, although they present no 'public policy' threat. This is the equivalent of administrative removal under the Immigration Rules. But under EU law, a person exercising rights of free movement who is removed as opposed to expelled, can come straight back and exercise his/her initial right to reside. The Home Office has therefore provided in the regulations that the return, with 12 months, of a person whom it has removed for having no right of residence is a 'misuse of rights' and that it may be proportionate to refuse to allow such a person back into the UK unless they can provide evidence of being a qualified person (worker, student etc.)

The broader the powers of removal, the greater the chance that person will be detained against removal. Of course, if detained they cannot exercise their rights to work and study, or to look for work and cannot live as a qualified person.

Those whom the Home Office has detained are often persons sleeping rough, often from the A8 and A2 but also others unable to prove that they are exercising Treaty rights, for example because they do not have documents, including records of self-employment.

The High Court held, in the expulsion case of *R(Kondrak) v The Secretary of State for the Home Department* [2015] EWHC 639 (Admin), that while it may be proportionate to detain a person being expelled to effect removal, that should only be when removal was imminent. In that case a week was suggested, rather than the five months for which Mr Kondrak had been locked up. In that case, when Mr Kondrak was bailed, the Home Office had purported to make it a condition of release that he did not work. It conceded in his case that the imposition of this condition had been unlawful (see also the expulsion case of *Lauzikas v Secretary of State for the Home Department* [2016] EWHC 3215 (Admin)).

Legal aid is available for challenges to immigration detention. Both Bail for Immigration Detainees and the AIRE Centre may be able to provide assistance to EEA nationals and their family members who are detained and it may be possible to secure exceptional funding (for example for an immigration case where legal aid is not normally available) where a person's rights under EU law are being breached.

2. Bail under Schedule 10 of the Immigration Act 2016

The bail provisions of the Immigration Act 2016 were due to come into effect on 31 May but this process was interrupted by the announcement of a general election, before regulations had been laid. Some information was gleaned, however, because the Tribunal published draft

guidance and forms. We do not know whether the Tribunal had seen a draft of the Home Office regulations in drawing up these documents.

As discussed at this meeting in 2016 the provisions of the Act replace temporary admission and bail under Immigration Act powers with a new single category of "immigration bail". They make provision for (some) judicial oversight of detention and for support for those released from detention. They give the Secretary of State power to dictate to a court when it should impose an electronic monitoring condition and amend the provisions of the Immigration Act 2014 as to repeat bail hearings.

2.1 Management of immigration bail

The information from the Tribunal suggested that the Home Office will in future be responsible for the great majority of immigration bails. Insofar as this is because most persons on immigration bail will be persons who would previously have been on temporary admission, this is uncontroversial. Insofar as it suggests that, where previously the Tribunal would have managed bail, it will now pass this task to the Home Office, it is not. The documents from the Tribunal suggested that the Tribunal will expect 'in most cases' to transfer the continued administration of a bail case to the Home Office as it is empowered to do by the Act. ILPA and others have protested to the Tribunal, in commenting on the Tribunal's draft documents, that they do not consider this to be compatible with the overriding objective under the Tribunal Procedure Rules to deal with cases fairly and justly. The persons concerned are persons whom the Home Office has determined should be deprived of their liberty and have been released because the Tribunal did not agree, and overruled the Home Office.

Where administration of bail has been transferred to the Home Office then in the event of a breach there will be no forfeiture hearing before the Tribunal and this is a further reason for resisting the transfer of bail to the Home Office.

2.2 Automatic bail hearings

There is no indication that automatic bail hearings would have come into effect on 31 May 2017: the Act allows the Home Office to commence the whole schedule at once, or to so in dribs and drabs. Given the presumption of temporary admission (henceforth immigration bail) set out in Chapter 55.1 of the Home Office *Enforcement Instructions and Guidance*, the Secretary of State should be required to defend the decision to detain in a bail hearing, including an automatic bail hearing, rather than the person detained having to make the case for release.

2.3 Consent to bail

Where directions are set for a person's removal within 14 days of a bail hearing, it has been the case since the coming into effect of provisions of the Immigration Act 2014, that the Home Office must consent to release on bail. This power is re-enacted in the 2016 Act and the words used are different. The tribunal says that it understands that it was not intended to make any substantive change to the law. The new wording has, however, led to some question as to whether, as before, the Tribunal is required to list, hear, and decide the application, then ask the Secretary of State to consent or whether the new wording suggests that there be no hearing. The Tribunal proposed that in these cases the tribunal judge would give a note setting out the reasons why, in his/her opinion bail should be granted and then, if consent is withheld issuing a

refusal decision, stating both the reasons why the tribunal judge would have granted bail and the Secretary of State's lack of consent has led to refusal.

2.4 Electronic tagging

The 2016 Act sets out that in a case where 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. This appears to risk a conflict with the Tribunal's own duty not to act in a way that is incompatible with human rights.

The Tribunal note said that the bringing into force of the new provisions on electronic monitoring may be postponed until 2018 (and that was before all the other provisions got postponed).

2.5 Financial conditions: Scotland

The Tribunal has spotted problems with the way in which the Act will work in Scotland. In Scotland at the moment a 'caution' (recognisance) is normally deposited when bail is granted. Bail in Scotland is normally granted for a specific period and the 'cautioner"s (surety's) obligations end when that period does, unless the cautioner consents to their continuing. The Tribunal can change or vary the amount of caution or the identity of the cautioner and deal with an application by the cautioner to be relieved of his/her obligation. Bail conditions are varied by the Tribunal by consent or following an oral hearing. The Act tries to deal with this special procedure and it gets in a mess.

We understand that the Home Office would need to instruct Sheriff Officers in Scotland to recover payment through 'diligence'. This would involve the service of a Charge for Payment which, if not complied with, can be followed up with further enforcement such as an obligation on an employer to transfer the debtor's wage to the creditor, or to a bank to transfer any money over a certain level in the debtor's account to the creditor, or an attachment on assets such as vehicles or at the debtor's business premises. The process is fairly expensive and dependent upon knowing the debtor's employer, bank and assets they hold. Unless this information is already held, it would be necessary to instruct investigations before even getting to enforcement. The Tribunal said 'it is questionable whether there is any significant purpose to be served by imposing a financial condition for a comparatively small sum when the cost and difficulty in enforcing payment is likely to be disproportionately high compared with the amount to be recovered."

3. Asylum cases in detention

The detained fast track was suspended following a series of cases brought by Detention Action and by others, including individual detainees, but the litigation has not stopped there.

3.1 The appeal procedure rules for the detained fast-track found to be unlawful

In *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 the Court of Appeal had held that the 2016 Tribunal Procedure Rules imposed time limits so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases and that the system for fast-

track appeals was structurally unfair and unjust. The rules were unlawful, *ultra vires* the power under which they were made, which are to make rules to ensure that justice is done and that the tribunal is accessible and fair (Tribunals, Courts and Enforcement Act 2007, s 22).

The Tribunal has powers to set aside a decision, which puts an end to a case, if it considers that it is in the interests of justice to do so, and if there has been some other procedural irregularity in the proceedings. It used these powers to set aside decisions made on cases in the fast-track in case AA/09953/2014 (anonymised). It regarded the rules being *ultra vires* as a procedural irregularity, one that meant that it had not had jurisdiction to decide the original appeal. It held that the 14-day time limit to apply for a decision to be set aside was not relevant because no one was applying; the Tribunal was acting on its own. It simply asked that a party wishing the Tribunal to set aside act write to the Tribunal asking it to set aside the decision of its own motion.

3.2 The 2005 procedure rules

There followed a dispute as to whether the decision that the 2015 rules were *ultra vires* mean that the predecessor rules, the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 (SI 2005/560) were *ultra vires* too. This looked like the Home Office clutching at straws as the previous regime at least as onerous as the 2015 one: it allowed for six working days between decision and appeal rather than seven. But the Tribunal did not simply set its decisions in these cases. It waited to see what the High Court would say.

The rules were found to be *ultra vires* in the case of *Hameed v SSHD* [2016] EWHC 1579 (Admin). This was an unlawful detention case. There was said to have been power to detain the appellants because they were to be removed from the UK within a reasonable timescale. It was held that any lawful consideration of their asylum applications would have taken far longer to resolve than the period for which they could lawfully have been detained because had it been appreciated that the fast-track was unlawful, the ordinary procedure applicable to asylum applications would have applied. It would have taken longer than the maximum lawfully permissible period of detention pending removal to resolve the cases.

The question of whether the rules were *ultra vires* was addressed directly in *TN (Vietnam)* [2017] EWHC 59 (Admin). To no one's great surprise the Court found that the 2005 Rules were *ultra vires* for same reasons that the 2014 Rules were *ultra vires.*

A different view than had been taken on the 2014 rules was however taken on the effect of the judgment. It was held that the ruling did not affect the jurisdiction of the Tribunal to hear appeals. The High Court said that anyone whose case had been heard under the unfair 2005 rules had to apply to the Tribunal to set aside the decision on the appeal, which otherwise remained valid. It was for the First-tier Tribunal to rule on whether the individual decision should be set aside termination should be set aside. Unfairness needed to be demonstrated. If the decision was set aside then the appeal remained pending before the Tribunal.

In *US, TN and AM* (AA/03180/2014), decided 30 May 2017, the Tribunal was asked to give effect to *TN (Vietnam*). Surprisingly, given its approach the 2015 cases and the decision of the High Court on the 2005 rules, it held that it had no jurisdiction to set aside appeals under the 2005 rules. The only way this can be the case is if it had wrongly decided the case AA/09953/2014.

The Tribunal indicated that had it found that it had jurisdiction it would have adopted a case by case approach: criticism of the procedure did not necessarily mean that the decision in each individual case was unfair.

This decision may be challenged. The First-tier Tribunal thought that it has to be challenged through a judicial review, not an appeal to the Upper Tribunal. If a challenge succeeds, that could mean the Rule 32 approach adopted in the AA/09953/2014 case being adopted for cases under the 2005 rules, albeit most likely on a case by case basis. If a challenge fails, the remedy will be a judicial review of each individual decision, by reference to *vires* of Rules, but almost certainly with a requirement to show case-specific unfairness.

In summary:

If it can be shown that a "vulnerable or potentially vulnerable" individual should have been identified as such, but instead went through the fast track, refusal of asylum should be quashed, and the determination process re-started. There is helpful guidance on this in *Zafar v SSHD* [2016] EWHC 1217 (Admin), a judicial review, Mr Zafar's case was heard in the fast track. It was refused, and certified as clearly unfounded, which meant that he had no appeal. The judge held that it was "obvious" that Mr Zafar's case was not suitable for the detained fast track. As a result the asylum process had to be restarted and the Secretary of State could not look at what Mr Zafar said in his first interview.

The principle, acknowledged since the *Refugee Legal Centre* challenge to the Oakington fast-track that an appeal will not always cure the unfairness in an initial decision is recognised in *Zafar.*

The principle is also recognised in *LMC v SSHD* [2016] EWHC 2016. Mr Justice Blake held that an asylum claim's being based on sexual identity did not, in itself, mean it was unsuitable for the fast track. But when (post-decision) medical evidence was submitted supporting LMC's claim to be a survivor of torture and recording that he was suffering from post-traumatic stress disorder, the Home Office should have realised that the case could not be determined in the fast track. The judge set aside the original decision on the basis that a fresh decision was required to remedy the unfairness. The court also held that LMC had been detained unlawfully from the point at which removal was not imminent.

In the cases the Home Office should have realised could not be determined in the fast-track, detention will have been unlawful and compensatory damages will be payable unless could / would have been detained in any event for unrelated reasons.

3.3 Persons removed following a fast-track case

In the case of *AB v SSHD* [2017] EWCA Civ 59, AB had lost his appeal in the fast-track and had been removed. The decision in the appeal was set aside as a result of the *Detention Actio*n challenge to the 2015 rules. AB asked Secretary of State to bring him back to UK. She refused and AB challenged that decision. He lost. The Court of Appeal held that the Secretary of State had been entitled to rely on the unchallenged Tribunal decision at time of removal. It was held against AB that, despite knowledge of matters of law and fact to raise, there had been no attempt at an out of time appeal on the merits of the case earlier on. At [82] CA attached significance to fact there was no attempt at an out of time appeal or judicial review earlier on, while he was still in the country

3.4 Detained Asylum Casework

Following the suspension of the detained fast track, the Home Office began to operate a slow track for those who were in detention when they claimed asylum and for those who were held to meet the general criteria for detention at the time when they made their claim.

It issued the *Detention: interim Instruction for cases in detention who have claimed asylum, and for entering cases who have claimed asylum into detention Version 3.0* (1 August 2016). This was the subject of a legal challenge, in Hos*sain v SSHD* [2016] EWHC 1331 (Admin), but the challenge failed, the procedure was not found to be unfair systemically. Permission to appeal was refused.

3.5 The Future

On 12 October 2016, the Ministry of Justice launched a consultation on policy proposals to introduce an expedited appeals process, regulated by specific new rules, for detained appellants. The Government responded to the results of the consultation in April 2017 and concluded:

> *The Government is firmly of the view that there is a need for new rules in order to provide an expedited appeals process for detained immigration appellants. The operational requirements of a new expedited appeals process for detained immigration appellants are currently being explored. The Government will now invite the TPC to consider the conclusions set out in this document and decide how they wish to proceed.*

It will now be for the independent Tribunal Procedure Committee (TPC) to decide whether to introduce an expedited appeals process; something it has previously declined to do. The government made clear in the consultation paper that if the Tribunal Procedure Committee is unwilling to do as it asks, it could set a maximum time for the determination of appeals by detainees and the Committee would then have to make rules within that constraint. Further details can be found here: https://www.gov.uk/government/consultations/expedited-immigration-and-asylum-appeals-for-detained-appellants

4. Adults at risk in immigration detention

The statutory guidance on adults at risk in immigration detention, made under s 59 of the Immigration Act 2016, came into effect on 12 September 2016. On 12 September 2016 the Home Office withdrew paragraph 55.10 of the Enforcement Instructions and Guidance, the Detention Services Order on Rule 35, and the Rule 35 Process policy, which contained detailed guidance on when Rule 35 reports should be accepted as independent evidence of torture.

More detailed guidance for Home Office caseworkers was published: Home Office Enforcement Guidance and instructions *Adults at risk in immigration detention* was published on that date as part of the 'offender management' collection of policies. (see https://www.gov.uk/government/publications/offender-management) along with a new Detention Services Order 9/2016 on Rule 35.

While the guidance is said to be designed to afford adults at risk a greater level of protection, it has been questioned whether this is what it does in practice.

One example is that it adopts the definition of torture in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires that the treatment be inflicted by a State or State-like entity, rather

than the wider definition, looking simply at the degree of suffering inflicted found to apply in detention cases in *R (on the application of EO, RA, CE, OE and RAN)* v Secretary of State for the Home Department [2013] EWHC 1236 (Admin). Detention Services Order 9/2016 also used the narrower definition and instructed doctors not to make a Rule 35(3) report unless this definition is met. Medical Justice and individuals challenged the change, including on the basis that it is contrary to the statutory purpose of s 59 *Adults at Risk* of the 2016 Act and is discriminatory, which is intended to provide greater, not lesser, protection to survivors of torture.

The court directed a full judicial review hearing in March 2017 and judgment is awaited (the Medical Justice case is CO/5386/2016). But, in the meantime, the Court held that the Home Office must revert to using the broader definition. The Home Office updated its guidance on Detention Centre Rule 35 and on Adults at Risk in Immigration Detention on 21 November 2016 to give effect to the order of the court.

5. The Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017 (SI 2017/405) (10 April 2017)

The Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017 (SI 2017/405) came into force at noon on 15 March 2017.

Under the Dublin III Regulation, a person who has made an application for international protection may only be detained where they present a significant risk of absconding. Article 2(n) provides that "risk of absconding" means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that the individual who is subject to a transfer procedure may abscond.

These regulations set out the criteria which will be considered to determine whether a person who has claimed asylum in the UK, but whose application is subject to the Dublin III Regulation presents a significant risk of absconding for the purpose of considering whether they should be detained. The reason for making the regulations was the ruling by the Court of Justice of the European Union in the case of *Al Chodor* C-528/15. In its 15 March 2017 judgment on that case, the Court of Justice considered the case of an Iraqi father and his two children who were detained by the Czech police in May 2015 pending their transfer to Hungary pursuant to the Dublin Regulation and the Czech Aliens Act. The detention was challenged before a Regional Court, which ruled it to be unlawful since the Czech legislation contained no objective criteria defining "risk of absconding". The Supreme Administrative Court referred a question for a preliminary ruling on the need for objective criteria in legislation to define a 'risk of absconding'.

The Court held that the Dublin III Regulation requires the criteria to establish a 'risk of absconding' to be 'defined by law', in a binding provision of general application. Absent that, detention is unlawful. It is not enough that there is settled case law on what a 'risk of absconding' means. The Home Office moved quickly to lay its regulations to avoid claims for unlawful detention.

6. Legal Aid Tenders

Current legal aid contracts run out in April 2018, from which date new contracts will be let. The good news is that there will no longer be exclusive contracting of work in immigration detention centres. See the Legal Aid Agency's Headline intentions document at https://www.gov.uk/government/publications/civil-2018-contracts-tender :

> *Work at Immigration Removal Centres…will no longer be procured separately and competed to secure a fixed maximum number of contractors.*
>
> *All organisations bidding in the higher lot will be able to bid for IRC work although organisations will need to employ an IAAS Advanced Accredited Caseworker based at the relevant office to be eligible to apply for Detained Fast Track…work*
>
> *Organisations that bid for IRC work will be additionally committing to deliver IRC work at any site across the whole procurement area if necessary (e.g. where a new detention location is established) during the contract period.*

We wait, however, to see how many firms will be able to fulfil these conditions. This may depend upon the size of the 'procurement area' (the Legal Aid Agency divides the country up into areas and tenders for work in each area. In immigration, the areas have historically been very large.

Invitations to tender in, *inter alia*, immigration are supposed to be published in August 2017. The timetable seems to be slipping. General suitability to hold a legal aid contract was supposed to have been assessed in June 2017 and this has not happened. The outcome of the process is supposed to be announced in December 2017 with contracts issued in March 2018.