The Immigration Bill and detention: Schedules 5 and 6

DETENTION ACTION

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Briefing – Committee Stage

Summary

The Immigration Bill would risk seriously restricting judicial oversight of the Home Office's powers of immigration detention. The Bill would abolish the current system of 'bail addresses' that enables destitute migrants to challenge their detention through bail applications to the First-Tier Tribunal. As a result, in a significant proportion of cases the Home Office could face no judicial scrutiny of detention until the point at which an expensive and time-consuming unlawful detention challenge can be brought in the High Court.

The current system of 'Section 4' bail addresses

The UK already has the least constrained powers of detention in the EU. As well as being unique in having no time limit, it is unusual in lacking automatic judicial oversight of detention, despite the interference with the fundamental right to liberty. A decision to detain is only reviewed by the courts on the application of the person detained. By contrast, in France cases of detention are automatically brought before a court after five days.

In the UK, every detainee has the right to apply for bail to the First-Tier Tribunal, which must consider whether their detention is reasonable. However, bail applicants must provide an address at which they would live if released, in order to show the court that they would be able to remain in contact with the Home Office. Some migrants can provide an address of a friend or relative who can house and support them, but many are destitute and unable to provide such an address.

In this context, the Home Office currently provides addresses for most detainees on application, in order to enable their access to the First-Tier Tribunal. Migrants in detention have been able to apply for bail addresses under Section 4 of the Immigration Act 1999, which are almost invariably granted (with the exception of EEA nationals). This bail address can only be used in a bail application before the First-Tier Tribunal; if bail is granted, the person is released to live at that address and receive Section 4 support.

Schedule 6

Part 5 and Schedule 6 of the Bill abolish Section 4 of the Immigration Act 1999, and replace it with a new Section 95A. The intended operation of Section 95A is unclear and would be set out in secondary legislation, but it appears that the Government is not proposing to recreate a system whereby detainees can automatically access addresses for bail applications to the Tribunal. It appears that accommodation may only be provided where the Home Office chooses to release and recognises the need for an address.

The Bill will provide a power, not a duty, to support refused asylum-seekers who have a 'genuine obstacle to removal' and those with pending further submissions or judicial review challenges. It restricts support to asylum-seekers or, in limited circumstances, refused

asylum-seekers. There is no power under Schedule 6 to support people who have never claimed asylum, even if they cannot be returned.

Destitute migrants in detention, who cannot provide a private address, would not be able to be released on bail by the Tribunal unless the Home Office accepts their entitlement to an address under Schedule 6. The Tribunal will not normally consider granting bail in the absence of an address. As a result, this could allow the Home Office to prevent migrants from challenging their detention. It is unclear whether it will even be possible for migrants in detention to make applications for a bail address. In any case, there is no right of appeal if the Secretary of State decides that the person does not face a genuine obstacle to removal, so the Home Office would be able to prevent destitute migrants from challenging their detention in the Tribunal. This reliance on Home Office decision-making is unjustifiable: 61% of asylum support appeals made between September 2014 and February 2015 were successful, being either allowed or remitted by the Asylum Support Tribunal, or the refusal of support withdrawn by the Home Office.

The Minister could be asked to clarify whether there will be a process for migrants in detention to apply for an address on the grounds of an obstacle to removal, judicial review or fresh submissions pending.

An amendment could be introduced to create a right of appeal against refusal to grant support under Section 95A.

According to the Home Office Memorandum on ECHR implications at point 115:

> *'it is envisaged that applications for the new form of section 95A support will need to be made within the grace period [following refusal of asylum], there will be provision for an application to be made out of time where certain criteria are met.'*

This would mean that migrants in detention who have previously been refused asylum would be unable to apply for Section 95A support, unless they are considered to meet the unspecified 'certain criteria'.

The Minister could be asked whether being in detention would be a criterion that would allow out of time applications for Section 95A.

Schedule 5

In addition, Clause 29 and Schedule 5 make 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'. It also only applies:

> '*where a person is on immigration bail subject to a condition imposed by the Secretary of State requiring the person to reside at an address specified in the condition*'.

According to the Explanatory Notes at 318, the rationale is that:

> *'The Secretary of State's ability to require a person to live at a particular address could be undone by that person's inability (for example, in having insufficient finances) to live at that address… it is not intended that the power is available where, for example, a person proposes a bail address which the Secretary of State accepts (even if the Secretary of State accepts the bail address and imposes/mandates a residence condition for that address). '*

Schedule 5 and Explanatory Note 318 are poorly drafted and altogether unclear, since they appear to presuppose that the person is already on bail and subject to a requirement to live at a given address, for the Secretary of State to then have the power to provide that same

address. **The Minister could be asked to clarify the circumstances in which the power would be used, in particular where the person is in detention.**

However, it appears that the intention is not to use the power to provide bail addresses to enable detainees to make bail applications to the Tribunal. 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. **The Minister could be asked how it is intended that the First-Tier Tribunal would be able to exercise judicial oversight of detention of migrants who cannot provide private addresses.**

Impact of the Bill on migrants in detention and after release

It appears that many destitute migrants in detention will be unable to access bail addresses, because the Home Office does not consider them to face a 'genuine obstacle to removal' under Schedule 6, or because they are not asylum-seekers and the Home Office does not consider that there are 'exceptional circumstances' under Schedule 5. Without bail addresses, destitute migrants may be unable to access meaningful oversight of their detention in the Tribunal.

This would lead to an **increase in long-term detention**, causing great harm to individuals' mental health. It would also be wasteful of taxpayers' money, as detention costs over £36,000 per person per year. The inaccessibility of bail would force challenges to detention into the High Court, as unlawful detention challenges would be the only available option for many in detention to seek their release. The High Court is already under significant pressure from the numbers of asylum and detention-related judicial reviews, which are far more expensive than bail applications. The Home Office has paid out almost £10 million in 2011-13 in compensation following claims for unlawful detention.

Increasing long-term detention is likely to result in **protests and disturbances** in an already tense detention estate. Frustration and stress is likely to increase amongst migrants in detention, as many will have no lawful steps available to seek their release. The HM Inspectorate of Prisons has repeatedly noted that long-term detention causes frustration and a tense environment. The safe management of the detention estate would be seriously undermined by depriving a substantial proportion of migrants of any opportunity legally to challenge their detention.

The Bill would generate **unnecessary asylum claims**. A significant proportion of migrants in detention have never claimed asylum, yet Section 95A support will only be available to people who have claimed asylum. Depending on the process adopted, this may create an incentive for non-asylum-seekers in detention to claim asylum, in order to create an entitlement to Section 95A support under Schedule 6, which would allow them to apply for bail. As a result, migrants in detention who are not granted exceptional support under Schedule 5 may feel obliged to make a groundless asylum claim to avoid indefinite detention or street homelessness. This would undermine efforts to reduce misuse of the asylum system, generating substantial unnecessary costs for the Home Office.

To the extent that migrants are released to homelessness, the Bill will be likely to lead to an **increase in absconding**, which will reduce the ability of the Home Office to resolve cases and increase the backlog of outstanding cases. Restricting the availability of bail addresses will lead migrants to provide an address at which they cannot live in the long-term, in order to avoid indefinite detention. They are likely to then become street homeless. Without

support, it will be difficult for many to comply with reporting restrictions, and they will have little incentive to remain in contact with the Home Office.

The Bill would be likely to lead to **increased offending** by ex-detainees. Significant numbers of ex-offenders who have never claimed asylum are released from immigration detention because they face barriers to removal. Some have lived in the UK since they were small children, and are refused travel documentation by their countries of origin. As non-asylum-seekers, they will only in exceptional circumstances be granted an address under Schedule 5. Making ex-offenders street-homeless with no right to work would make significantly increase the likelihood of re-offending, as they seek to support themselves.

Case study: T was detained for almost five years under immigration powers. He was granted Section 4 support, as he had no usable address with friends or family. He was eventually released on bail by the Tribunal after 13 failed applications. The First Tier Tribunal accepted that he was not returnable. Without access to a bail address, T would have remained in detention indefinitely.

Detention Action

Detention Action provides emotional and practical support to people in immigration detention, primarily in Harmondsworth and Colnbrook Immigration Removal Centres, near Heathrow Airport, London, and the Verne IRC in Dorset, and campaigns for detention reform.

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