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IMMIGRATION DETENTION

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Bail in the Tribunal

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- Tribunal may grant bail to a person who is detained under immigration powers listed in paragraph 1(1) to Schedule 10 to the Immigration Act 2016: see paragraph 1(3).
- In the case of those detained under para 16 to schedule 2 to the Immigration Act 1971 this is limited to a power from day 9 after a person arrived in the UK (see paragraph 3(3) to schedule 10)
- May not grant bail where there are removal directions set within 14 days without SS consent (para 3(4) Schedule 10)
- Must dismiss an application within 28 days of previous application absent a material change of circumstances (paragraph 12(2) to Schedule 10).

Bail in the Tribunal

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- Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014/2604, as amended, Rules 37-43
- Rule 39:
    - » bail application must be heard as soon as practicable;
    - » 28 day rule
- Rule 40- SS must serve bail summary by 2pm the day before
- Rule 41 and 42: provision as to what must be stated on grant of bail
- Rule 41A: The Tribunal may direct that the SS has the power to amend or remove bail conditions
- Rule 43: Requires the person having custody to release the bail party upon being provided with a notice of a decision to grant bail.

Guidance

- *Guidance on Immigration Bail for Judges of the First-tier Tribunal* (Immigration and Asylum Chamber) (Presidential Guidance Note No 1 of 2018) ('FTT Guidance')
- *Immigration Bail* (Version 4.0, 6 April 2019)
- *First-tier Tribunal Bail: Guidance for Home Office Staff 13 February 2019*

4 Groups of Detention Power

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- Paragraph 16(2) to schedule 2 to the Immigration Act 1971 provides for a power to detain a person for removal- relates to paragraphs 8-10)
  - (Paragraphs 8 and 9 to schedule 2 to the Immigration Act 1971 make (somewhat complicated) provision for the giving of directions to the captain of a ship or aircraft for removal of an illegal entrant where that person is not given leave to enter or remain. Paragraph 10(2) of schedule 2 to the Immigration Act 1971 read in combination with these provisions provides that the Secretary of State may make directions for the removal of an illegal entrant subject to the Secretary of State's own arrangements and defraying the cost himself.)
- Schedule 3, paragraph 2 provides powers to detain pending deportation.
- Section 62 of the Nationality, Immigration and Asylum Act 2002 provides for detention of persons liable to examination or removal,
- Section 36(1) of the UK Borders Act (detention pending 'automatic' deportation)

Secretary of State bail

- Secretary of State's bail powers are from 15 January 2018 in paragraph 1 to schedule 10 to the IA 2016 (see above as to how these apply across to Tribunal).
- Replaces all of the old powers to grant temporary admission; section 4, CIO bail etc.
- Para 1(1): Bail may be granted to anyone detained under the immigration powers above
- Para 1(2)

  "The Secretary of State may grant a person bail if the person is **liable to detention** under a provision mentioned in sub-paragraph (1)

- Paragraph 1(5)

  A person may be granted and remain on immigration bail **even if the person can no longer be detained**, if—

  (a) the person is **liable to detention** under a provision mentioned in sub-paragraph (1), or

  (b) the Secretary of State is considering whether to make a deportation order against the person under section 5(1) of the Immigration Act 1971.

Schedule 10 IA 2016, Paragraph 1

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(6) A grant of immigration bail to a person **does not prevent the person's subsequent detention** under a provision mentioned in sub-paragraph (1).

(7) For the purposes of this Schedule a person is on immigration bail from when a grant of immigration bail to the person commences to when it ends.

(8) A grant of immigration bail to a person ends when—

(a) in a case where sub-paragraph (5) applied to the person, that sub-paragraph no longer applies to the person,

(b) the person is granted leave to enter or remain in the United Kingdom,

(c) the person is detained under a provision mentioned in sub-paragraph (1), or

(d) the person is removed from or otherwise leaves the United Kingdom.

(9) This paragraph is subject to paragraph 3 (exercise of power to grant immigration bail)

Schedule 10 IA 2016, Paragraph 2

- (1) Subject to sub-paragraph (2), if immigration bail is granted to a person, it must be granted subject to one or more of the following conditions—
- (a) a condition requiring the person to appear before the Secretary of State or the First-tier Tribunal at a specified time and place;
- (b) a condition restricting the person's work, occupation or studies in the United Kingdom;
- **(c) a condition about the person's residence**;
- (d) a condition requiring the person to report to the Secretary of State or such other person as may be specified;
- **(e) an electronic monitoring condition** (see paragraph 4);
- (f) such other conditions as the person granting the immigration bail thinks fit
- Subsequent provision provide that electronic monitoring is usually to be imposed where a person is released from detention

Schedule 10 IA 2016, Paragraph 10

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(1) An immigration officer or a constable may arrest without warrant a person on immigration bail if the immigration officer or constable—

(a) has reasonable grounds for believing that the person is likely to fail to comply with a bail condition, or

(b) has reasonable grounds for suspecting that the person is failing, or has failed, to comply with a bail condition.

B (Algeria) v SSHD [2018] 1 AC 418

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- Giving the judgment of the Supreme Court, Lord Lloyd Jones SCJ held that the power to grant bail is predicated on a person being capable of being lawfully detained under immigration powers, (§§30 and 31, specifically at 430H):

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

- Held that once the position is reached that detention would not be lawful:

  > "there is, in my view, no longer a power of detention under paragraph 16 [of schedule 2 to the Immigration Act 1971] and there is therefore no longer a power to grant bail under paragraphs 22 and 29"

B (Algeria) v SSHD [2018] 1 AC 418

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- *B (Algeria)* was concerned with the power to grant bail under paragraph 22 to schedule 2 to the IA 1971 as applied by paragraphs 1 and 4 to schedule 3 to IA 1971 to people subject to deportation (see §20 of the judgment). Paragraph 22 to schedule 2, prior to its repeal, afforded a power to grant bail to "a person detained under paragraph 16".
- Those powers now repealed and replaced by the powers in paragraph 1 to schedule 10 to the Immigration Act 2016 set out above but which still refer back to paragraph 16.
- condition to the exercise of the power to grant bail under the former provisions was held to be that a person was either "detained", or, the Supreme Court held, was not currently in detention but could lawfully be detained (see paragraph 46 of the judgment).

B (Algeria) v SSHD [2018] 1 AC 418

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- Paragraph 1(2) to schedule 10 provides (by contrast to the provisions at issue in *B (Algeria)*) that the condition to granting bail is not that the person is "detained", but that the person is "liable to detention"
- Pursuant to paragraph 1(5) a person may be granted bail if they remain "liable to detention" even if that person may no longer be detained.

What do the new provisions mean?

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- What do paragraphs 1(2) and 1(5) to schedule 10 to the IA 2016 mean?
- Does a person does remain “liable to detention” where they cannot be lawfully *removed* and consequently cannot be lawfully detained?
- Is a person only “liable to detention” within the meaning of paragraph 1 of schedule 10 where a breach of a bail condition would render them capable of being lawfully detained in the light of the breach of that condition?

Strict and Narrow Construction

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- *B (Algeria*) at §29 held that

  "it is a fundamental principle of the common law that in enacting legislation Parliament is presumed not to intend to interfere with the liberty of the subject without making such an intention clear: T*an Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, 111; *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 122 per Lord Bridge of Harwich."

- See also *In re Wasfi Suleman Mahmod* [1995] Imm AR 311, 314 Laws J

  "While, of course, Parliament is entitled to confer powers of administrative detention without trial, the courts will see to it that where such a power is conferred the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards.

B (Algeria) v SSHD [2018] 1 AC 418

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- At paragraph 53 of the judgment of the Court in *B (Algeria*), Lord Lloyd Jones SCJ held that

"The notion that the power to grant bail presupposes the existence and the ability to exercise a power to detain lawfully is not necessarily a principle of universal application. While the clearest possible words would be required to achieve a contrary result, Parliament could do so. It would be a question of construction in each case whether that result had been achieved".

- Lord Lloyd Jones SCJ specifically "drew attention to" section 61 of the Immigration Act 2016 in that regard. Section 61 to the Immigration Act 2016 is now repealed, but paragraph 1(5) to schedule 10 is in like terms.

Bail the Corollary of Detention?

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- Lord Dyson JSC in *Lumba* at §118 and by Collins J in *R (Konan) v SSHD* [2004] EWHC 22 (Admin). at §30 stating,

> "*The grant of bail presupposes the power to detain since a breach of bail conditions can lead to reintroduction of detention…*"

- *Ismail v United Kingdom* (2014) 58 EHRR 93 at §13 (art. 5(4) case) UK Government at §16, "*emphasised that, under domestic law as interpreted by the courts, a decision to release a person on bail, subject to conditions designed to ensure his future attendance, presupposed the legality to detain,*"

Bail the Corollary of Detention?

- *Stellato v Ministry of Justice* [2010] EWCA Civ 1435, [2011] QB 856, Stanley Burnton LJ:

> If the person granted bail does not comply with the conditions of his bail, he is liable to be returned to custody. If so, the legal authority for his detention is not the grant of bail, or his breach of the conditions of his bail, but the authority for his detention apart from the order for bail.

Bail the Corollary of Detention?

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- The power to grant bail to a person “detained” meant “lawfully detained” according to the judgment in *B (Algeria*),
- So does the power to grant bail to a person “liable to detention” mean a person “genuinely liable to lawful detention” not “notionally liable to detention which would in fact be unlawful even in the event of a breach of the grant of bail”?
- Does paragraph 1(5) save the new regime in respect of people who cannot be removed/cannot be detained?

Effect on *Khadir v SSHD* [2006] 1 A.C. 207.

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- The Supreme Court in *B (Algeria)* said of that decision (at §39(3)) that:

> "The House of Lords in *Khadir's* case held that the distinction between the existence and the exercise of the power to detain was material to the power to grant temporary admission to a person "liable to detention". There is no warrant for applying that distinction to the different question of whether there is a power to grant bail to a person who may not lawfully be detained at the time when it is proposed to grant bail".

Article 5 ECHR

- Article 5(1)(f) ECHR imposes a kindred restriction that an individual's detention may not be maintained if there is a *"lack of a realistic prospect of his expulsion"* (*Mikolenko v Estonia*, Application 10664/05, 8 October 2009 at §68)
- Does not admit of an asymmetric relationship between detention and bail: *Musuc v Moldova* Application no. 42440/06, judgment 6 November 2007
- Paragraphs 1(2) and 1(5) to schedule 10 incompatible?

R (Jollah) v SSHD [2019] 1 WLR 394

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- *R (Gedi) v Secretary of State for the Home Department* [2016] 4 WLR 93: Court of Appeal held that paragraph 2(5) to Schedule 3 to the IA 1971 did not empower imposition of a curfew since curfew was not a "restriction as to residence" within the meaning of that paragraph.
- Question in *Jollah* is whether the unlawfulness of the curfew amounted to a false imprisonment.
- Jollah was subject to a curfew restriction requiring him to reside at an address between 23.00 and 07.00 each day. Persisted for 2.5 years.
- Lewis J held there was no power to impose the curfew, and the restriction was a false imprisonment. Awarded damages of £4,000. Upheld on appeal.
- Court noted divergence of F.I. from article 5 here which traditionally did not protect against restrictions on movement: see *Guzzardi v Italy* (1980) 38 EHRR 333;
- Similar to notions of detention under F.I and deprivation liberty under art 5, where common law and article 5 also diverge.

Effect of Jollah on Schedule 10

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- Jollah applied to the previous bail scheme.
- Bail Guidance states at paragraph 20 that “Under current arrangements, EM can only be implemented in practice if accompanied by a curfew requirement.”
- New bail powers in schedule 10(4) encompass an express power to impose electronic monitoring requiring a person to be at a specified location during a specified time.
- HO Bail Guidance says at page 23 that a curfew condition must always be imposed on classes of serious foreign national offenders.
- But do they grant a power to *detain* - in the sense of impose a curfew?

The Brook House Inquiry

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- *R (MA and BB) v SSHD* (EHRC intervening)
- To be handed down this week
- Concerns claim by claimants that their treatment in detention violated article 3 ECHR.
- Panorama documentary showed MA being abused by guards on more than one occasion.
- Serious medical neglect of suicidal and mentally ill detainee also present.

Background: Stephen Shaw

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- Former Prisons and Probation Ombudsman
- Home Affairs Select Committee on 11 September 2018:

> *"As I say, I am tired of this in a way. I think it is now 15 years ago that I did the first review for the Government of abusiveness that had not been identified by the formal oversight mechanisms, had not been seen by management and had been revealed by an undercover reporter. The means by what was revealed at Brook House—leaving aside the appalling nature of it—came to public view was exactly the same as at Yarl's Wood two or three years ago and exactly the same as at Yarl's Wood and Oakington in the early 2000s. Therefore, we have not solved the problem."*

Stephen Shaw's 2016 Review of the Welfare of Vulnerable Detainees in immigration detention

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Jeremy Johnson QC's Appendix- reviews cases of article 3 violations:

- "The nature and pattern of the findings "**tend to suggest that these cases may be symptomatic of underlying systemic failings** (as opposed to being wholly attributable to individual failings on the part of the clinicians or public servants who were involved in the particular cases).
- None of the findings was attributed to a failing in the legislative framework or policy. Nor was there any finding of a deliberate intention to cause harm.
- The findings focus upon a lack of healthcare assessment and treatment: "The nature and pattern of findings are such that they are more likely to be a **reflection of a systemic problem** (i.e. insufficient medical – particularly psychiatric – provision) rather than individual failings."

Article 3 violations in detention of mentally ill

- ***R (BA) v SSHD*** [2011] EWHC 2748 (Admin)
- ***R (S) v SSHD*** [2011] EWHC 2120 (Admin)
- ***R (HA) v SSHD*** ([2012] EWHC 979 (Admin)
- ***R (D) v SSHD*** [2012] EWHC 2501 (Admin)
- ***R (MD) v SSHD*** ([2014] EWHC 2249 (Admin)

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Macpherson Report- February 1999

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- “Institutional racism” of the Metropolitan Police officially acknowledged for the first time;
- Found there to be a “collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin”.
- Concluded that every institution in the country had a duty to “examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of their communities”

PPO

Sue McAllister the Prison and Probation Ombudsman –

In a letter to the High Court in May stated that

> “all potential pressure, interest, or legal groups and anyone else involved in the immigration system”

would be invited to participate in a public forum as part of the inquiry.

- High Court judgment this week will determine whether that has to be a statutory public inquiry with powers to compel witnesses, to fund representation and hold hearings in public, or can remain an ad hoc inquiry as set up by the SSHD.

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