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Detention and Release of Vulnerable Adults: An update

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ADULTS AT RISK, DETENTION SAFEGUARDS, RECENT CASES

Graham Denholm

Adults at Risk Statutory & Policy Guidance (i)

- Immigration Act 2016, s.59: SSHD must issue guidance on detention of vulnerable adults. Section 59(3): guidance must be taken into account.

- Statutory Guidance: *Immigration Act 2016: Guidance on adults at risk in immigration detention* (May 2021; previously July 2018)

- Supplemented by detailed policy guidance: *Adults at risk in immigration detention*, Version 6.0, 25 May 2021.

- *Medical Justice v SSHD* [2017] EWHC 2461 at [141]: statutory guidance approved by parliament "*has to be read as controlling the scope*" of related policy guidance

Adults at Risk Statutory & Policy Guidance (ii)

Scheme of Statutory Guidance in outline:

- Presumption against detention of those "*at risk*"
- Can be outweighed by "*immigration factors*" (length of detention; public protection, compliance)
- Indicators of risk: mental illness or impairment, victim of torture, victim of sexual / gender based violence, victim of trafficking or modern slavery, PTSD, pregnancy, serious physical disability, other serious physical health conditions or illnesses, 70+, transsexual or intersex person
- Levels of evidence:
  - Level 1: Self declaration
  - Level 2: Professional evidence that in an "at risk" category
  - Level 3: As Level 2, but stating that a period of detention likely to cause harm

Adults at Risk Statutory & Policy Guidance (iii)

- Policy Guidance v6.0 – more detail on approach in practice.
  - Detailed guidance on:
    - Approach to identifying people at risk in each category
    - Assessing immigration factors
    - Balancing risk factors against immigration control factors in L1, L2 and L3 cases
    - Rule 35 reports

  - **May 2021 – two significant changes to the guidance**:
    - Approach to victims of trafficking (+ a separate policy document: *Adults at risk: Detention of potential or confirmed victims of modern slavery*)
    - **New detailed (and restrictive) guidance on "external medical reports"**

Adults at Risk Statutory & Policy Guidance (iv)

- New guidance on external medical reports. Applies:

  …to medical reports commissioned by an immigration advisor, or solicitor, resulting from a consultation between an external healthcare professional and their client whilst their client is detained under immigration powers.

- Does not apply to evidence arising from, e.g., ongoing treatment.

- The Policy Guidance sets out detailed "*standards*" against which reports commissioned by solicitors / advisors will be judged. **Critical that those advising vulnerable clients in detention have these standards in mind when instructing experts to report**.

- Summarised in following slides but see AAR Policy Guidance for full text.

Adults at Risk Statutory & Policy Guidance (v)

- Baseline requirement: Regulation

  *"Reports should be accepted only from a **qualified healthcare professional**, who is registered with the relevant healthcare professionals' regulator in the UK. For doctors/psychiatrists this is the General Medical Council (GMC) and for psychologists this is the Health and Care Professions Council (HCPC). The report must list the professional's registration number, qualifications and experience in the relevant field."*

- Failure to meet this requirement will lead to the rejection of the report

  "unless evidence of regulation is provided through the legal representative or immigration advisor within two working days of notification by the Home Office."

- Issues: unregulated therapists (BACP?), ISWs, reports other than "*medical reports*" per se?

Adults at Risk Statutory & Policy Guidance (vi)

- Further standards:
  - **Instructions**: report must include explanation of author's understanding of purpose and scope of the consultation. Goes to weight.
  - **Use of supporting documents**: medical records and other relevant documents (statements, determinations, etc) should be provided to expert, listed, and referenced where relied on. Goes to weight.
  - **Appropriate location**. Goes to weight

Adults at Risk Statutory & Policy Guidance (vii)

- Further standards (continued):
  - **Basic examination requirements**

    "*Unless prevented from doing so by circumstances beyond the healthcare professional's control, the consultation must have been conducted face-to-face with the detained individual, in person. Aside from exceptional circumstances, for example, the cancellation of visits on grounds of public health, or other sudden exceptional reasons, the report must be based on a face-to-face consultation. Any explanation as to why this could not be satisfied should be noted in the report. Failure to meet this standard may contribute to the report being given limited weight.*

    Whilst reports completed remotely may be accepted, in exceptional circumstances, those reports completed by telephone, or via video-link, must state the limitations (if any) attached to forming opinions through such methods of assessment. The evidential weight accorded to the report should be considered in light of this. […]"

Adults at Risk Statutory & Policy Guidance (viii)

- Further standards (continued):
  - "*Appropriate third party*" may be present (not rep / another detainee)
  - **Use of an interpreter** - Where there is no shared language an "*independent professional interpreter*" should be relied upon. This must not be a fellow detained person. The clinician "*must confirm that the consultation was carried out with a full level of understanding with the patient and must state whether an independent interpreter was used to achieve this*." Goes to weight.
  - **The report must be specific to the individual** – "*Purely generic statements about the impact of detention (or related matters), whether these are based on the healthcare professional's own opinion or on academic research, <u>will not be regarded as being pertinent</u>*." (Problematic?)

Adults at Risk Statutory & Policy Guidance (ix)

- Further standards (continued):
  - **Concerns should be raised immediately with the on-site healthcare team, and this should be confirmed in the report. Failure to do so without reasonable excuse goes to weight,** "*particularly if the report raises concerns which are not supported by, or conflict with the existing facts and history of the case*"
  - **Consideration of the existing standard of care [emphasis added]:**

    "*The report should consider that primary care is available in all IRCs and prisons and any specialist conditions needing attention will be referred by the healthcare team for secondary care according to need. Mental health teams work within IRCs and prisons and treatment will involve psychiatrist visits in appropriate cases.*

    A failure to engage with the fact that primary care medical facilities are available means that the report may not have accurately considered the impact of detention on the individual's health. A report which fails to evaluate how access to these facilities might affect the management of the individual's health in assessing the impact/harm of detention may lead to it being treated with limited weight."
  - Problematic? Does this (purport to) fetter discretion of clinician to address suitability / quality of care?

Adults at Risk Statutory & Policy Guidance (x)

- **Remit** – Opinions must be within the clinician's "*own scope of practice*"

- **Statement of assurance**:

  "***The report must be verified by a statement from both the healthcare professional and the immigration advisor or solicitor that commissioned the report, to confirm that the report has been prepared and completed in line with the aforementioned standards***. *A failure to meet this requirement will prompt an urgent request from the Home Office to obtain this confirmation, which should be satisfied within two working days*."

Adults at Risk Statutory & Policy Guidance (xi)

- Guidance then given on considering reports in light of the "*standards*":
  - Where the guidance refers to "*limited weight*" being given to a report due to a failing, "*this means considering whether the report should be placed at a lower evidence level than it would usually be set absent the standards*."
  - In such cases (and generally?) conclusions in report should be considered alongside other evidence such as medical records and judicial decisions.
  - Reasons must be given for conclusions reached, whether the report is being placed at a lower level than it otherwise would or accepted at face value.

Adults at Risk Statutory & Policy Guidance (xii)

- Issues:
  - Traps – multiple pretexts for diminishing weight to be attached to otherwise strong medical evidence.
  - Important to ensure experts are aware of and comply with the guidance.
  - Different to CPR Part 35 / PD 35, *Guidance for the instruction of experts in civil claims*, IAC PD.

Adults at Risk Statutory & Policy Guidance (xiii)

- Potential challenges:
  - To the terms of the policy guidance
    - Limits to type of expert evidence that may be considered
    - Mandatory approach to availability of healthcare?
    - Compatibility with terms of statutory guidance (which has approval of parliament)
    - Mandatory disregard of generic evidence.
  - To decisions taken by reference to the policy guidance

Applicability of AAR in Covid cases

- On 20 March 2020, SSHD promulgated operational instructions on the applicability of the AAR guidance / policy to those at particular risk of harm from Covid 19. Updated version here: https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention/detention-considerations-covid-19. In current form, states:

  "In assessing whether an individual is an adult at risk, particular account must now be taken of the latest PHE guidance and the risk factors contained, which are believed to increase the risk of severe illness from coronavirus.

  The AAR policy sets out a number of indicators of risk which cover the risk factors set out in PHE's guidance. Where these specific risk factors are identified (see further below), individuals should be considered and assessed as an Adult at Risk Level 3."

- Failures by SSHD to apply policy when first promulgated; potential damages claims.

CSM v SSHD [2021] EWHC 2175 (Admin) [2021] 4 W.L.R. 110

- **Important case (Admin Court) re detainees with HIV.**

- CSM was a detainee with HIV, in need of daily ARV medication. Missed for 4 days – per his consultant "*very serious indeed*"

- CSM alleged breaches of Article 3:
  - Systems duty – duty to put in place appropriate legal and administrative systems for protecting those vulnerable to treatment which would breach Article 3
  - Operational duty - duty to take appropriate steps if aware a person at a real and immediate risk of suffering such treatment

CSM v SSHD [2021] EWHC 2175 (Admin) [2021] 4 W.L.R. 110

Alleged systems duty breach:

- Failure to put in place effective framework for protection of detainees with HIV.
- Failure to implement BHIVA Guidance *Immigration Detention and HIV: Advice for healthcare and operational staff*

Alleged operational duty breach:

- Failure to take reasonable steps to provide CSM with necessary medication

CSM v SSHD [2021] EWHC 2175 (Admin) [2021] 4 W.L.R. 110

Breach of systems duty made out:

- Risks of interrupting ARV medication such that Article 3 engaged
- AAR does not contain specific guidance caring for detainees with HIV
- "*no sign of any relevant training*"
- BHIVA Guidance demonstrated serious problem affecting significant number of people
- Provision of appropriate training and information to relevant staff not disproportionate

Breach of operational duty also made out, but in absence of evidence of harm, no damages.

Court would not direct SSHD to adopt BHIVA guidance but no obstacle to its adoption.

MR (Pakistan) v SSJ [2021] EWCA Civ 541, [2021] 4 W.L.R. 79

Significant decision (CA) on lack of Rule 34/35 protection in prison estate.

- DCR R34 – requirement for medical examination within 24 hours of admission to detention
- DCR R35 – obligation to report (1) where health likely to be injuriously affected by detention; (2) suicidal intentions; (3) potential victim of torture (majority of cases).
- Cf PR R21 – obligation to report to governor on prisoner likely to be injuriously affected by imprisonment. No provision re torture victims. No requirement to report to SSHD.

Alleged systemic unfairness from lack of provisions equivalent to R34/35 in prison estate.

MR (Pakistan) v SSJ [2021] EWCA Civ 541, [2021] 4 W.L.R. 79

Court found "*weakness in system*" but fell short of systemic unfairness:

- First, system does obtain relevant information
- Second, MR & AO would have been detained in any event, so no individual unfairness
- Third, detainees in HMPs likely to have been subject of custodial sentences or remand: "*That suggests that, even if higher levels of Adults at Risk are found to exist, detention is very likely to be continued even though the individual is an adult at risk…*" (!)

But…

MR (Pakistan) v SSJ [2021] EWCA Civ 541, [2021] 4 W.L.R. 79

It *was* irrational not to obtain medical concerns about Claimants' past torture on particular facts:

- "*…irrational, and … therefore unlawful, not to have ensured by means of a Rule 35 report or equivalent, that medical information showing concerns about past torture for both AO and MR was obtained at the commencement of or at any later time during their immigration detention.*"

- "*…not rational in the case of [each claimant] for the SSHD to have a policy which required information to be known about their vulnerability because of, among other matters, past torture, but not to obtain medical concerns about past torture.*"

Duncan Lewis have confirmed an appeal to the SC is to be pursued.

DETENTION AND RELEASE OF VULNERABLE ADULTS

Catherine Meredith

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What this presentation will/will not cover

- Detention and release of detainees with particular vulnerabilities by reason of mental capacity, or trafficking experiences.
- In practice multiple vulnerabilities may be manifest. For present purposes dealt with separately: part one capacity; part two trafficking:
- Mental capacity: statutory framework, capacity investigations and safeguards, detention and removal decision-making, transfer and release.
- Trafficking: normative/policy framework concerning detention and release of victims of trafficking, correct and prompt status investigations and descriptors ('absconding'/'retrafficking'); and support needs
- No promise of any comprehensive overview in the short time available.

PART ONE: Mental capacity

- Statutory framework concerning vulnerable adults who may lack capacity to make decisions about their own personal affairs, including health, treatment, support, or to instruct a lawyer.
- Mental Capacity Act 2005 (MCA) and Statutory Code of Practice.
- S1 Mental Capacity Act 2005: fundamental principles include:
  - best interests;
  - presumption of capacity unless it is established that the person lacks capacity;
  - all practicable steps must be taken to help the person make a decision before concluding a lack of capacity.

Mental capacity: statutory definition and guidance

- S2(1) MCA defines a person who lacks capacity "...if at the material time he is **unable to make a decision for himself in relation to the matter** because of **an impairment of, or a disturbance in the functioning of, the mind or brain**." Requires two elements: diagnostic **and** functional
- S3(1) MCA. Functional test - a person is unable to make a decision for themselves if unable to:
  - understand "the information relevant to the decision": (includes the consequences of decision or of not deciding)
  - "retain that information"
  - "use or weigh that information as part of the process of making the decision"
  - "communicate [their] decision (whether by talking, using sign language or any other means) "
- S.3(2) if a person is able to understand an explanation (in simple language/ visual aids) of relevant information then they are not to be regarded as being unable to understand.
- Diagnostic: wide range of conditions, including mental illness, learning disability, brain damage, dementia, loss of consciousness. Can also cover drug/alcohol use, pain, shock or exhaustion, or extreme fear.
- Decision - and issue - specific .
- Capacity may fluctuate or be borderline.

Litigation capacity: distinct from matter capacity

- Separate issue to whether the person has subject matter capacity: clients may be unable to make decisions about matters such as their own healthcare or treatment; and also lack litigation capacity.
- Test in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889 (approved by UKSC in *Dunhill v Bergin* [2014] UKSC 18): whether capable of (i) understanding the issues in the proceedings, (ii) giving instructions to enable advice/representation, and (iii) understanding advice and making decisions based on it.
- Type and complexity of proceedings are relevant.

When and who should assess mental capacity?

- There should be an investigation of capacity whenever there is any reason to suspect that it may be absent: *Masterman-Lister v Jewell* [2003] 1 W.L.R. 1511; *Saulle v Nouvet* [2007] EWHC 2902 (QB) ; *Dunhill v Burgin* [2014] 1 W.L.R. 933
- MCA Code and guidance on when a 'capacity enquiry' should be triggered including if capacity is "in doubt" [4.34]
- MCA must be adhered to by those "*acting in a professional capacity for, or in relation to, a person who lacks capacity*" & those "*involved in the care of people who lack capacity to make the decision in question …*"
- Lawyers: take a view and obtain clinical assessment on both functional and diagnostic elements.
- Duties on HO and contractors/healthcare.

Practical and Procedural considerations

- Lack of capacity may mean client unable to understand being served (including removal/detention); and doubts should trigger duties of investigation, assessment, notice, transfer and support and release.
- CPR requirements for court proceedings: e.g. MCA certificate; procedure in CPR 21.5, PD17; request appointment of Official Solicitor (litigation friend of 'last resort').
- Participation and rules governing public law/civil and immigration proceedings differ.

Procedural safeguards: notice /service requirements

- Public law errors include procedural breaches and unfairness which may render detention unlawful.
- Deportation decisions and notices, s.120 notices, must be lawfully served including in a procedurally fair manner so as to enable access to court, which is an absolute and inviolable right, *FB(Afghanistan) & Medical Justice v SSHD (and the EHRC intervening)* [2020] EWCA Civ 1338 at §§81, 108, 117.
- CPR r 6.25 and 21.1 MCA and guidance: rules re service and protected parties.
- Disclosure and Part 18 requests: Proof of certificate of conveyance and of process by which decisions/notices conveyed/explained.

Duties of investigation, assessment, release, transfer

- Ch 55 EIG, AAR, DCR Guidance on the duties of the SSHD in cases of detainees suffering serious mental illness which cannot be satisfactorily managed in detention
- Category of "*those suffering serious mental illness*" has wider applicability to those suffering both serious mental and physical illness (which may be relevant to capacity eg in stroke cases).
- *Das v SSHD* [2014] EWCA Civ 45 at §68.
- *ASK v SSHD* [2018] EWCA Civ 1987 (24 July 2018) at §220.
- *VC v SSHD* (Rev 1) [2018] EWCA Civ 57.
- *Gasztony v SSHD & Anor* [2019] EWHC 2879 (Admin) at §§ 68-69, 70-73. If hospital treatment or care in the community required, SSHD "*is under a duty expeditiously to take reasonable steps to obtain appropriate medical advice*" §68 and §69.
- Establish needs: hospital transfer, care package, supported living in a care home/ arrangements for healthcare and caring services, including through NHS England.

HRA claims: specific issues in this context

- Art 5(1) conditions *(Idira v SSHD* [2015] EWCA Civ 1187)*;* Art 5(2) prompt reasons (and understanding).
- Art 3 ECHR.
- Requirement to take necessary preventative measures to preserve the physical and psychological integrity and well-being of persons deprived of their liberty, *Premininy v Russia* (44973/04) (2016) 62 E.H.R.R. 18, *Mouisel v France* (67263/01) (2004) 38 E.H.R.R. 34.
- Treatment of a seriously mentally ill immigration detainee may breach Art 3 ECHR: *HA (Nigeria) v SSHD* [2012] EWHC 979 (Admin); *R (S) v SSHD* [2011] EWHC 2120 (Admin); *R (ota BA) v SSHD* [2011] EWHC 2748 (Admin); or conditions Ga*stony* §74; *ASK* §§ 67-74.
- Article 8 ECHR: mental and physical health is a "crucial part of an individual's integrity and thus private life, so that acts which have a detrimental impact on an individuals mental [or physical] health may interfere with the individual's Article 8 right" – though weighing the public interest in FNP cases: *Gastony* §75; Lang J in *R (EH) v SSHD* [2012] EWHC 2569.

Equality Act 2010 claims

- Section 149(1) EA 2010 the 'public sector equality duty' imposes a duty on public authorities to have regard in the exercise of their functions to the need to eliminate inter alia discrimination (including disability discrimination) prohibited under the Act.
- S149 EA 2010 duty must be integrated into the formulation of policy *before* and *at the time* the particular policy is being considered and is not met by a rear-guard retrospective application. *R (BAPIO) v Secretary of State for the Home Department and Anr* [2007] EWCA Civ 1139 at [2]-[3]; *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at §26.
- S.13 (direct) and s.19 indirect discrimination – differential adverse impact on detainee with protected characteristic and deprivation of equal protection from real or actual risk of harm. Breach of s.29(6) EA 2010.
- Put to proof of what if any reasonable adjustments made (s.136) including anticipatory adjustments (s.20) to ensure incapacitous /mentally ill detainees not treated 'less favourably' in detention. *Finnegan v Chief Constable of Northumbria Police* [2014] 1 WLR 445 at §31 per Lord Dyson MR ; *ZH v Commr of Police of the Metropolis* [2013] 1 WLR 3012 at §67.

Part two: Detention and release of victims of trafficking

- Breach of *Hardial Singh* principles/ public law errors = illegality.
- A policy heavy area: failure to correctly apply policy (including in line with international obligations)/ application of an unlawful policy or gaps/ absence.
- Public law errors arising from:

- Failure to follow policy absent good reason /put in place clear transparent policy as a requirement of the rule of law. *Lumba v SSHD* [2011] UKSC 12, *Kambadzi v SSHD* [2011] UKSC 23, Hossain v SSHD [2016] EWHC 1331 (Admin) §§20,140-143.
- Failure to apply trafficking duties consistently with ECAT in policy: *PK Ghana* [2018] EWCA Civ 98

Key trafficking duties in detention claims

- ECAT. Arts 4 (definition), 10 (identification), 12 (support), 13 (reflection and recovery and prohibition on removal), 14 (residence permit/DLR), 16 (removal), 26 (non penalisation) and 35 (and 5) cooperation with civil society.
- Art 4 ECHR duty to put in place clear transparent comprehensive policies as regards ID, protection of victims, and support.
- *LE v Greece* App 71545/12. Delayed/ flawed ID/investigation prolonged detention and impacted on her personal situation.
- *AN & VCL v UK* App Nos 77587/12 and 74603/12.
  - Duty to ID when indicators presented whether at outset or later
  - Duty to provide a fully reasoned ID decision, and express reasons in writing for departing from an NRM decision.

Policy framework/ patchwork

Detention of Victims of Trafficking

- AAR: Detention of potential or confirmed victims of modern slavery v.1.0, 25.5.21

Detention

- Detention: General instructions v.1.0, 9.6.2021
- Detention Centre Rules 2001 Rules 34 and 35.
- Adults at Risk in Immigration Detention, v.6.0, 25.5.2021.

Trafficking

- Modern Slavery: Statutory Guidance for England and Wales (under s.49 MSA 2015) and Non-Statutory Guidance for Scotland and Northern Ireland, v.2.3, June 2021.
- Discretionary Leave considerations for victims of modern slavery, v.4.0, 8.12.20

AAR: potential or confirmed victims of trafficking

- HO instructions to staff. NOT Statutory Guidance ('SG').
- Previously the AAR referred to the CAG SG under s.49 MSA 2015 when making detention decisions, but from 25.5.21 detention decisions in this cohort are brought within the scope of the AAR policy and decision-makers should follow this guidance instead (p.4).
- AAR/PCVOT 'supplements' the AARSG and decision makers should refer to it to ID if an individual is an AAR according to indicators in the policy (p.4).
- Key differences and potential gaps.

Status issues which may render detention unlawful

- Failure to promptly and correctly identify status relevant to exercise of power to detain for the purpose of removal; and timescales (if any)
- SSHD not entitled to proceed on the basis of unlawful decisions or where material in her possession indicates that the person is a victim of trafficking.
- Failure to correctly and properly ID and investigate including failure to apply the trafficking definition and use of indicators
- Failure to make NRM referral;
- NRM decision-making and timescales. RG threshold, delays, CG decision and information-gathering;
- Reconsideration of a negative NRM decision and treatment of PVOT
- Failure to correctly record status on GCID/ flawed reviews
- Failure to properly implement trafficking status in reliance on illegal entry , failure to regularise status, absconding, risk of reoffending (and relevance of non-penalization/ statutory offences)

Further barriers to removal

- Recovery and reflection periods– prohibition of removal;
- DLR/interim DLR and outstanding asylum claim and failure to acknowledge such barriers to removal;
- Cross cutting issues with Rules 34, 35, health, welfare and support at all stages of NRM, which may impact both on legality of removal and/or detention.

Release: Safe and secure accommodation and support

- Pre-release considerations and steps. No release to the street or traffickers. *TDT v SSHD* [2018] EWCA Civ 1395
- Cross-cutting accommodation issues depending on stage of the NRM/ asylum claim.
- E.g. Referral/pre-RG SA address, Post-RG safehouse, NASS, s.95, s.4. Probation checked addresses.
- Act quickly to foreclose future drift and delay and prolonged detention even when release recommended/agreed.
- Financial and outreach support.

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RELEASE OF VULNERABLE ADULTS FROM DETENTION

Anthony Vaughan

AC (Algeria), 'grace periods' & what is a permissible delay in effecting release

- How long does the SSHD have to effect release once the *Hardial Singh* principles are breached, and/or when detention is inappropriate, but there are practical or logistical challenges to immediate release?
- A: "a reasonable period": *AC (Algeria) v SSHD* [2020] EWCA Civ 36 at [38]-[39];
- How long is a reasonable period?
- A: it depends on the facts. In *AC* it was 2 weeks: [40]-[43]. Numerous cases post-*AC* suggest this is usually a maximum, once release is considered appropriate (see table below).

AC (Algeria), 'grace periods' & what is a permissible delay in effecting release

- In *AC (Algeria)* having reviewed the authorities in Graham's book at [8.11]-[8.13], Irwin LJ said at [33]:

> "It is clear from that review [1] that the "grace periods" are granted for practical purposes, reflecting the facts of each case and applying a test of reasonableness; [2] that this court has declined to set any overall or absolute limit to such a period as a "long-stop" for all purposes; [3] that the periods have more usually been short, often a few days, but running up to a month, and [4] that there has been some tendency for the periods to increase."

- Also see [38]-[39]:

> 38. Once any of the second, third or fourth [Hardial Singh] principles are breached, then the question arises whether any further detention is lawful. Such further detention can be lawful, in my judgment, only for a reasonable period to put in place appropriate conditions for release.
>
> 39. The duration of such a "period of grace" must be judged on the facts of the case. The relevant facts include the history, as well as the risks to the public. I fully accept that the risk to the public is a highly important factor, but it cannot justify indefinite further immigration detention. No risk can justify preventive detention: that is clearly out-with the statutory power of the Respondent.

Case	Circumstances
AC (Algeria) v SSHD [2020] EWCA Civ 36	Substantive JR appeal. Following 8 months of detention, granted 'bail in principle'. A further six months elapsed and no accommodation was found. SSHD not entitled to unspecified grace period to find accommodation
SB (Ghana) v SSHD [2020] EWHC 668 (Admin) (John Kimbell QC)	Substantive JR challenging detention. Serious rape conviction, positive reasonable grounds decision and pending FTT appeal. Grace period of 14 days allowed following HS3 endpoint before detention unlawful, despite "not straightforward" accommodation needs (a 'high harm' case) [103]-[109].
SML v SSHD [2020] EWHC 3267 (Admin) (Kerr J)	Interim relief. Vietnamese national, cannabis cultivation conviction, potential victim of torture, s 95 accommodation sought and initially refused as still in detention; 'bail in principle' granted on 27/4/20 expiring 4/5/20. IR granted on 11/5/20 for release to occur at 11am on 13/5/21, where an address had been identified by the time of the IR hearing and no dispute as to its suitability.
R (Merca) v SSHD [2020] EWHC 1479 (Admin) (Fordham J)	Interim relief. 'Bail in principle' granted in early April 2020, s 95 application refused on 26 May, accepted on 29 May; SSHD given until 4pm on 12 June to provide accommodation – two weeks after reversal of s 95 decision, even considering difficulties caused by the Covid-19 pandemic. Merca not 'high risk'. [12]-[13]
R (Humnyntski & others) v SSHD [2020] EWHC 1912 (Admin) (Johnson J)	Substantive JR. "Orders for interim relief typically require the provision of accommodation within 7 days or less… Sometimes… within a matter of hours…" [179]. In that case, 7 days was the 'reasonable' period within which accommodation should have been provided; and at which the public law error of unreasonable delay vitiated the detention decision [175]-[179]. Not high harm cases.
R (Diriye) v SSHD [2020] EWHC 3033 (Admin)	Interim relief granting release on 16/10/20 following a hearing on 7/10/20 involving an FNO posing high risks of harm.
R (Habeb) v SSHD [2021] EWHC 177 (Admin)	An interim order for release was sought. Court ordered C to be released 'with a grace period of 48 hours'.
AO v Home Office [2021] EWHC 1043 (QB) (Morris J)	Substantive QBD ruling. "The reasonable period for removal expired on 7 August 2017 by which time he had been transferred to HMP Hull for his own safety, but away from his family. Taking account of a grace period of 14 days, the detention became unlawful as at 21 August 2017." [155]

AC (Algeria), 'grace periods' & what is a permissible delay in effecting release

- However, longer delays have been accepted in cases of particular complexity, or where transfer to hospital under the Mental Health Act 1983 is required, e.g.
  - *R (ASK) v SSHD* [2019] EWCA Civ 1239 [231] - Just over 2 months' delay in arranging a transfer to hospital under s 48 MHA 1983 after it was identified as necessary, was upheld as reasonable and lawful where the case was described as "marginal or unclear", and there was "divergent medical opinion," which did not specify the need for immediate admission to hospital).
  - See also *R (Gastony) v SSHD* [2019] EWHC 2879 (Admin): "where a medical need for release to suitable accommodation has been identified, and the provision of suitable accommodation is in principle within the Secretary of State's power, there must, in my judgment, be a special duty on the Secretary of State to ensure that there is no unnecessary delay in locating and securing appropriate accommodation: and the longer the detention continues, the more stringent must be the duty" [88] & [90].

Releasing at risk detainees 1/2

DSO 6/2019 *Management of Adults at Risk in Immigration Detention* (July 2019) - duties at the point of release:

1. Onward care plan "should, where possible" be arranged "before release" where there are outstanding safeguarding concerns [32];
2. Where IRC or healthcare staff have "significant concerns" about releasing a detainee considered to be at risk, "a multi-disciplinary meeting… must be arranged by the local DET team to agree a plan to safely release the individual" [33]. Examples given include detainees who "require a mental health follow up".
3. Where the detainee "requires support and/ or accommodation from the Local Authority" the case owner and where allocated the non-detained casework team "must" arrange a LA needs assessment "prior to release" [34].
4. IRC healthcare provider should inform "the relevant healthcare provider in the community" in the case of release to the community where possible.

Releasing at risk detainees 2/2

Where SSHD/ IRC/ healthcare are not yet aware of post-release needs:

- Query whether SSHD is/ can be satisfied as to post-release needs & conditions. Are reasonable adjustments needed to enable detainees to make representations about this? See by analogy *R (VC) v SSHD* [2018] EWCA Civ 57.
- Immigration Bail policy suggests that setting of conditions is unilateral. Representations may be needed re ability to comply, to remove inappropriate conditions.

Accessing accommodation

- The *Interim Guidance* provides further detail on eligibility for Schedule 10 accommodation, following *R (Humnyntskyi) v SSHD* [2020] EWHC 1912 (Admin).
- Exceptional circumstances include:
  - SIAC cases
  - High harm cases
  - Article 3 ECHR cases
    - they do not have adequate accommodation or the means of obtaining it
    - the provision of accommodation is necessary in order to avoid a breach of their human rights (usually Article 3 ECHR)

Accessing accommodation

- Residence condition and accommodation – application process for the various types of accommodation post-release is now set out in *Immigration Bail – interim guidance* (9 July 2021), pp 12-13.

Accommodation provisions: quick guide on usage

This must not be used at a stand-alone guide and use must be in conjunction with the detailed guidance on the accommodation condition and provisions above.

Status	Provision for accommodation	Application process
Asylum Seeker	Accommodation provided under section 95 Immigration and Asylum Act 1999.	Contact migrant help on 0808 8000 631 for advice and assistance on how to make an application.
Failed Asylum Seeker	Accommodation provided under section 4(2) Immigration and Asylum Act 1999.	Contact migrant help on 0808 8000 631 for advice and assistance on how to make an application.
Non-detained foreign national offender	Accommodation can be provided under paragraph 9 of Schedule 10 where there are exceptional circumstances including: SIAC cases; Harm cases; ECHR: Article 3 cases; but are not limited to these types of cases.	Any exceptional circumstances should be set out in bail variation form B2 or Bail 409.
Detained foreign national offender	Accomodation can be provided under paragraph 9 of Schedule 10 where there are exceptional circumstances including: SIAC cases; Harm cases; ECHR: Article 3 cases; but are not limited to these types of cases.	Any exceptional circumstances should be set out in bail application form or Bail 409. Where consideration of accommodation is in process, notification should be provided by the caseworker using Bail 411.
Detained non foreign national offender/ non asylum seeker.	Accommodation can be provided under paragraph 9 of Schedule 10 where there are exceptional circumstances including: SIAC cases; Harm cases; ECHR: Article 3 cases; but are not limited to these types of cases.	Any exceptional circumstances should be set out in bail application form or Bail 409.
Special Immigration Appeals Commission (SIAC) cases	Accommodation can be provided under paragraph 9 of Schedule 10 where there are exceptional circumstances including: SIAC cases; Harm cases; ECHR: Article 3 cases; but are not limited to these types of cases.	Any exceptional circumstances should be set out in bail application form or Bail 409. Where consideration of accommodation is in process, notification should be provided by the caseworker using Bail 411.
All other individuals	Accommodation can be provided under paragraph 9 of Schedule 10 where there are exceptional circumstances including: SIAC cases; Harm cases; ECHR: Article 3 cases; but are not limited to these types of cases.	Any exceptional circumstances should be set out in bail variation form B2 or Bail 409.

Accessing accommodation

- NB SSHD's recent successful challenge to the grant of s 4 support by FTT(AS) on Article 3 grounds where person had not participated in the Voluntary Returns Service which 'would have avoided' their exposure to Covid-19:
  - *R (SSHD) v FTT(AS)* [2021] EWHC 1690 (Admin) (principles set out from [133]-[141]).
  - Principles also apply when making Schedule 10 applications in reliance on Article 3 ECHR where no asylum claim has been made
  - Extensive guidance on this issue in the *Interim Guidance* pp6-10

Immigration bail: amendments to Schedule 10

Immigration Act 2016 (Commencement and Transitional Provisions No. 1) (England and Wales) Regulations 2021 (SI 2021/939), in force from 31 August 2021

- Brings into force the remaining parts of Schedule 10 in E & W;
- Para 2(2) & (3) - mandatory electronic monitoring (EM) to be imposed where bail is being granted in deportation cases (Sch 3, para 2(1)-(3) IA 1971; s 36(1) UKBA 2007).
- Para 2(5) exceptions – "impracticability" and breach of ECHR
  - But only if SSHD thinks exception applies
  - In FTT bail cases, SSHD must have "informed" FTT of her view that either exception applies
  - Query what happens if FTT thinks ECHR would be breached but SSHD doesn't?
- Para 2(9) – non-exhaustive list of relevant factors for SSHD on impracticability (obstacles to person wearing, using etc the tag; insufficient resources to impose tag; prioritisation – see Immigration Bail policy (31/8/21) on this; the para 3(2) factors).

Immigration bail: amendments to Schedule 10

- Not an amendment, but note *Immigration Bail* policy:

  "EM must not be used where the person is under 18 or where the person is being released onto immigration bail following detention under Sections 37 or 41 of the Mental Health Act 1983."

- Section 37 – 'Powers of courts to order hospital admission or guardianship' – following conviction for a criminal offence;
- Section 41 – 'Powers of higher courts to restrict discharge from hospital' by way of a 'restriction order' where necessary for the protection of the public from serious harm, as an additional order when sentencing under s. 37.

Immigration bail: amendments to Schedule 10

Where bail has already been granted with no EM condition:

- Upon SSHD review, the authority seized of bail must impose EM in a deportation case unless the SSHD thinks either exception applies;
- Requests to remove EM based on the two exceptions can be made at any time;
- Powers are in para 7 for SSHD bail; para 8 for FTT bail;
- SSHD will review all deportation bail cases for suitability for EM by January 2022 – *Immigration Bail* policy;
- Note the discretion to impose EM in all cases. "Due regard should be given to the need to seek representations, decision levels and the need to conduct regular reviews" – *Immigration Bail* policy p21.

NB proposed amendments by Nationality and Border Bill 2021-2022, ss 45 (failure to co-operate in any immigration process relevant to bail) and 43(9) (SSHD consent to bail required where RDs are set to be executed within the next 21 (rather than 14) days.

GPS tags and harm to mental health

- Home Office use GPS tags (24 hour location monitoring) as of early 2021, rather than the old 'RF' tags (in/out monitoring).
- Larger, more cumbersome, cannot conceal from others, compulsory charging time requiring presence in the place of residence, greater risk of inadvertent breach.
- Frequently exacerbates pre-existing mental health problems → importance of expert evidence to support requests to remove.

> *"My feet were swelling and bleeding. It was too tight and it got infected," he said. "I have no idea when it's going to be taken off. I feel bad, I feel down, I feel anxious; I don't know how to describe it in words. I'm not having my freedom like other people do."*
>
> *One woman who participated in the study said the ankle monitor physically prevented her from kneeling down to pray, while another said she had stopped taking her son to the playground because it made other parents uncomfortable."*

"Home Office condemned for forcing migrants on bail to wear GPS tags", *Guardian.com,* 14 June 2021

GPS tags and harm to mental health

- Home Office intends to use data from GPS tags in immigration decisions. Query compatibility of doing so with, e.g. Articles 5 & 6 UK GDPR in general and in the individual case.
- *R (Open Rights Group) v SSHD* [2021] EWCA Civ 800 the "immigration exemption" to the Data Protection Act 2018 was held to be unlawful
- GPS location data has been used to prosecute for breach of a TPIM reporting condition: *LM & LF v SSHD* [2021] EWHC 266 (Admin) at [205].
- Do GPS tags render curfews unnecessary?
- The power to impose a curfew, under para 2(1)(e) of Schedule 10 to the 2016 Act, is in any event subject to challenge.

Urgent work

1. Ongoing risk of *Hamid* hearings, and not just because of candour issues
   - *DVP v SSHD* [2021] EWHC 606 (Admin)
   - *Re an application for JR* [2021] EWHC 1985 (Admin)
2. *Administrative Court Judicial Review Guide* – less of a 'guide'; treated as akin to the CPR
3. How urgent and how to apply? N463 (24hrs, 72hrs, 5 days), N244, N463 or just a cover letter?

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Q&A

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