

Annex A

Evidence to Secondary Legislation Scrutiny Committee on SI 2021/184

The evidence hereby submitted relates to SI 2021/184 The Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2021.

The evidence has been jointly compiled by seven organisations with expertise on immigration detention and/or human trafficking - After Exploitation , Anti-Slavery International, Bail for Immigration Detainees, Focus on Labour Exploitation, Freedom from Torture, the Helen Bamber Foundation and Medical Justice.

1. Summary

a. SI 2021/184 will bring into force an amended version of the Statutory Guidance on Adults at Risk in Immigration Detention (AAR Guidance).¹ The amended version of the Guidance will take effect from 25 May 2021.

a. We are concerned that the changes brought into force by SI 2021/184 will weaken the protections against detention² afforded to potential victims of trafficking (PVoTs) – a group recognised by the government as being particularly vulnerable to suffering harm in detention.³

b. As such, we believe the changes will result in more PVoTs being detained and for longer periods of time. This outcome appears to directly contravene the government’s stated policy aim of bringing about “a reduction in the number of vulnerable people detained and a reduction in the duration of detention before removal”⁴ .

c. We therefore submit that, as per the Committee’s Terms of Reference paragraph 3(b)⁵, the SI imperfectly achieves its policy objectives.

d. In addition we submit that, as per the Committee’s Terms of Reference paragraph 3(e)⁶ , there have been inadequacies in the consultation process relating to the instrument.

2. What is the AAR Guidance?

a. In response to growing concerns about the detention of vulnerable people in the UK, the government introduced the AAR Guidance in 2016.⁷

b. As stated in the document, one of the key policy aims of the AAR Guidance is to bring about “a reduction in the number of vulnerable people detained and a reduction in the duration of detention before removal”.⁸

c. The Guidance recognises that people with certain conditions and past experiences are more vulnerable to suffering harm (e.g. to their mental health) in detention. Such people are known by the Home Office as “Adults at Risk”.

d. The government does not accept that such people should never be detained, however. Instead, the Guidance sets out the approach that Home Office caseworkers should take in deciding whether an Adult at Risk should be detained (or remain in detention, if already there).

e. The approach involves three stages:

i. Firstly, the Home Office considers whether the person has a condition or past experience that renders them more vulnerable to suffering harm in detention. These are known as “indicators of risk”. A list of the indicators is included in the Guidance.⁹ Examples include having a mental health condition, or being a victim of torture or trafficking. If a person is identified as having an indicator, they are deemed by the Home Office to be an Adult at Risk.

- ii. Next, the Home Office determines the ‘level of evidence’ the person has to support their indicator of risk. There are three levels of evidence: Level 1 – self-declaration by the person. Level 2 – professional evidence (usually from a doctor) stating that the person is at risk in detention. Level 3 – professional evidence (usually from a doctor) stating that the person is at risk in detention and that a period of detention would be likely to cause them harm.¹⁰
- iii. Finally, the Home Office ‘weighs’ the person’s perceived risk of suffering harm, based on the risk indicator(s) and level of evidence, against other immigration factors. These factors include whether the person has a history of offending, whether they have a negative immigration history (e.g. failed to comply with Home Office reporting requirements) and how quickly the person can be removed.

The more serious the Home Office believes the immigration considerations to be in a person’s case, the higher the level of evidence the person will need in order to avoid or secure release from detention. If the Home Office, after weighing up, finds the balance is not in the person’s favour, the person will be detained or remain in detention.

3. What change to the AAR Guidance is proposed?

- a. The current version of the AAR Guidance includes a paragraph (paragraph 18) stating that decisions relating to the detention of individuals who have received a positive Reasonable Grounds decision under the National Referral Mechanism¹¹ (also known as potential victims of trafficking or PVoTs) must be made with reference to the separate Modern Slavery Act 2015 Statutory Guidance¹² (MSA Guidance). Notably it is the Home Office, in its role as the Single Competent Authority, who makes decisions in relation to whether someone is a victim of modern slavery.
- b. PVoTs are the only group of people subject to the AAR process for whom such a provision exists ie. to consult specific guidance on the UK’s obligations to victims of modern slavery. The government describes this as a “policy anomaly” requiring correction.¹³
- c. Paragraph 18 has therefore been removed in the amended version of the AAR Guidance. This means that from 25 May 2021 decisions about the detention of PVoTs will be made without reference to the MSA Guidance.

4. Why does the amended AAR Guidance imperfectly achieve its policy aims?

- a. Removing a single paragraph from the AAR Guidance may appear a minor change. In fact, it represents a significant downgrading of the protections against detention currently afforded to PVoTs.
- b. Upon receiving a positive Reasonable Grounds decision, a PVoT is granted a 45 day “Recovery Period”. During this period, the PVoT cannot be removed from the country and this creates a presumption that they also cannot be detained.
- c. As the government observes in its Explanatory Memorandum on the SI, the MSA Guidance only states that PVoTs do not need to be released from detention where there are reasons of public order not to do so.¹⁴ ‘Public order reasons’ usually relate to a history of offending.
- d. In practice the provision means that, unless a PVoT has a history of offending,¹⁵ they will not be detained, or, if already detained, will be released.

e. Removing the application of the MSA Guidance will mean that decisions relating to the detention of PVoTs will now be made in accordance with the AAR Guidance instead. This is concerning for two reasons:

- i. Firstly, the decision will now involve the balancing exercise of weighing up an individual’s vulnerabilities against a variety of “immigration factors” (see paragraph 2(e)). Immigration factors

are far wider than public order reasons: they can include a history of offending, but also whether the person has a negative immigration history (e.g. having entered the country unlawfully, not having claimed asylum at the earliest opportunity or having failed to comply with Home Office reporting requirements) amongst other things. The very fact that a PVoT has been trafficked often leads to them having a negative immigration history. For example, being under the control of a trafficker may result in the person entering the country unlawfully, being unable to claim asylum as soon as they arrive, or being unable to travel in order to report.

ii. Secondly, in order to benefit from a stronger protection against detention (ie that afforded at Level 3), once brought under the AAR Guidance, PVoTs with a positive Reasonable Grounds decision will now need to provide additional professional evidence demonstrating not only that they are an adult at risk, but that detention is likely to cause them harm.

f. Therefore, compared to the current arrangements, the amended AAR Guidance will make it significantly more difficult for PVoTs to avoid or secure release from detention. We believe it will result in more PVoTs being detained and spending longer periods in detention. In some cases it will result in PVoTs suffering actual harm to their mental health whilst they obtain professional evidence.

g. Such an outcome appears to directly contravene the government's stated policy aim, contained in the AAR guidance itself, of bringing about "a reduction in the number of vulnerable people detained and a reduction in the duration of detention before removal".

h. The outcome is also concerning in light of the state's duties to victims of trafficking, including (but not limited to) obligations to assist victims in their physical, psychological and social recovery.¹⁶

i. As such, we submit that the amended Guidance must be considered to imperfectly achieve its policy aims.

5. Inadequacies in the consultation process relating to the instrument

a. We are concerned that the change to the AAR Guidance is being brought in without adequate consultation. There have been serious flaws in the consultation undertaken by the Home Office on this change:

i. The Home Office shared the proposed change with a small group of stakeholders in August 2020. The group of stakeholders consulted did not include many relevant and / or specialist organisations whose expertise would have been extremely valuable. This included an external engagement forum set up by the Home Office itself (the Modern Slavery Strategy Implementation Group), various anti-trafficking charities, and a network of people with lived experience of the asylum/detention system.

ii. The consultation period was short (two weeks); moreover, it was carried out at a point in the year (August) when representatives of stakeholder organisations were likely to be on leave.

iii. The consultation also took place very late in the policy development process, raising questions about the ability of stakeholders to influence Home Office thinking on the issue. It is important to note that the proposed change had been under consideration by the Home Office for at least two years. It is unclear why the department did not begin the consultation at an earlier stage.

iv. Involvement in the consultation group was subject to an agreement not to disseminate the proposals beyond the group.

b. During the consultation process stakeholders raised the same concerns as expressed in this evidence. These efforts appear to have had little effect – the change brought in by SI 2021/184 is identical to that proposed originally.

c. We are therefore extremely concerned that this policy change has been introduced without input and insights from relevant stakeholders. The Home Office stated to stakeholders that, in its view, wider consultation was not required as the proposed change to AAR Guidance did not affect ‘people’s rights’ and purely served to provide greater clarity in decision-making. However, for the reasons outlined above, we consider that the proposed changes will significantly downgrade the protection afforded to PVOTs leading to more PVOTs being detained and for longer periods of time.

1 The amended version of the AAR Guidance is available at:

<https://www.gov.uk/government/publications/draft-revisedguidance-on-adults-at-risk-in-immigration-detention-february-2021>

2 Please note that throughout this document, the term “detention” refers specifically to immigration detention ie the detention of people under immigration powers, either in Immigration Removal Centres or prisons.

3 See “Guidance on adults at risk in immigration detention”, paragraph 11. Available at <https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention> . For example, victims of trafficking may experience re-traumatisation whilst in detention because the conditions in many ways replicate those under which they were held by their traffickers.

4 Available at <https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention> .

5 <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/content/120278/terms-ofreference/>

6 Ibid.

7 See “Guidance on adults at risk in immigration detention”. Available at <https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention> .

8 Ibid, at paragraph 1.

9 Ibid, at paragraph 11.

10 The likelihood of future harm is subject to myriad and unpredictable factors. It is therefore extremely difficult for doctors to provide an accurate prediction about it. As such, Level 3 evidence can typically only be obtained in cases where the person has already suffered harm and, as such, has clear evidence of it.

11 The National Referral Mechanism (NRM) is the UK’s framework for identifying victims of human trafficking and ensuring they receive the protection and support. For an overview of how the framework operates in practice, please see: <https://www.freemovement.org.uk/briefing-the-support-system-for-migrant-victims-of-human-trafficking/>

12 The MSA Guidance sets out how the UK will comply with its obligations pursuant to the Council of Europe Convention on Action Against Trafficking in Human Beings. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950690/January_2021_-_Modern_Slavery_Statutory_Guidance_E_W_Non-Statutory_Guidance_S_NI_v2.pdf

13 See Explanatory Memorandum to The Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2021. Available at <https://www.legislation.gov.uk/uksi/2021/184/memorandum/contents>

14 See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950690/January_2021_-_Modern_Slavery_Statutory_Guidance_E_W_Non-Statutory_Guidance_S_NI_v2.pdf

15 It is important to note that victims of trafficking may have histories of offending that result directly from having being trafficked e.g. convictions for cannabis cultivation.

16 Article 12, Council of Europe Convention on Action Against Trafficking in Human Beings Warsaw, 16.V.2005. Available at: <https://rm.coe.int/168008371d5>

Annex B

Home Office Response to House of Lords Secondary Legislation Scrutiny Committee re SI 184 The Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2021

Concern raised: The changes weaken protections against detention afforded to potential victims of trafficking (PVoTs)

Modern slavery is an abhorrent crime. The Government remains committed to identifying and protecting victims of modern slavery and trafficking, and bringing the perpetrators to justice. The Adults at Risk in Immigration Detention (AAR) policy enables officials to identify whether a person would be particularly vulnerable to harm if that person were to be detained in immigration detention and, if so, whether that person should be detained or remain in immigration detention. The AAR policy has always recognised that the experience of having been a victim of trafficking or modern slavery may make a person particularly vulnerable to harm in detention. It is necessary for the Home Office to make this change to the AAR Guidance in order to rectify an anomaly in the current policy, in which detention decisions for those considered to be potential victims of trafficking or modern slavery are made with reference to the separate Modern Slavery Act 2015 Statutory Guidance¹. The Modern Slavery Act 2015 Statutory Guidance, in turn, states only that such individuals do not need to be released from detention where there are public order reasons not to do so. We believe that the AAR policy itself provides the appropriate framework for all detention considerations of potential victims of modern slavery, to enable consistent consideration of all vulnerable individuals within a single policy and to remove the policy anomaly.

We recognise that there are specific protections afforded to those who have received a positive Reasonable Grounds decision under the National Referral Mechanism (NRM). Existing protections, including those provided under Articles 12 and 13 of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) such as the 45-day Recovery and Reflection period, will continue. We will work closely with caseworkers and ensure that they are aware, through the supplementary AAR caseworker guidance and training, of the particular considerations and protections which apply to trafficking victims.

Concern raised: The changes will result in more PVoTs being detained and for longer periods of time

There is a presumption in immigration policy that a person will not be detained. The AAR policy strengthens this presumption against the detention of those who are particularly vulnerable to harm in detention. This has not changed. Some individuals may, as a result of the changes, be more likely to be detained, or have their detention continued, than would currently be the case. However, detention decisions are always

made on a case-by-case basis and vulnerable people will be detained only when the evidence of vulnerability in their particular case is outweighed by the immigration considerations – including timescales for potential removal, public protection concerns and risk of compliance issues.

Concern raised: The 45-day Recovery and Reflection Period during which the PVoT cannot be removed creates a presumption that they also cannot be detained

There is no exemption from immigration detention for any particular group, and this includes potential victims of trafficking or modern slavery. We accept that the Recovery and Reflection period means that, in some cases, detention will not be appropriate. However, that will not always be the case. We therefore believe that consideration of cases under the AAR policy is the rational and sensible approach. Where detention is considered for those who have received a positive Reasonable Grounds decision, the decision-making process will include additional safeguards including an assessment of the recovery needs of the individual. This will ensure that detention is only maintained where Article 12 ECAT assistance can be provided from within detention.

Concern raised: When balancing vulnerabilities against ‘immigration factors’, the fact that a PVoT has been trafficked often leads to them having a negative immigration history

We fully accept that there are a number of considerations that apply specifically to potential victims of trafficking or modern slavery and which need to be taken into account when making detention decisions. Home Office staff working in the detention system are provided with training and support to identify and act upon indicators of vulnerability. Decisions relating to detention or continued detention are made on a case-by-case basis. Caseworker guidance will address the specific situation of potential victims of modern slavery or trafficking.

Concern raised: In order to benefit from the highest protection under AAR, the PVoT will now need to provide additional professional evidence that detention is likely to cause harm

This policy change does not alter the presumption in immigration policy that a person will not be detained. Indeed, the AAR policy strengthens the presumption against the detention of those who are particularly vulnerable to harm in detention. Potential victims of trafficking or modern slavery will not need to provide any additional professional evidence compared to other vulnerable individuals identified under the AAR policy. Where detention is considered for those who have received a positive Reasonable Grounds decision, the decision-making process will include additional safeguards including an assessment of the recovery needs of the individual. This will ensure that detention is only maintained where it is consistent with the obligations under Article 12 of ECAT.

Concern raised: Consultation did not invite input and insights from relevant stakeholders

There is no statutory requirement for consultation when making a change to the AAR Statutory Guidance. However, the Home Office has undertaken targeted engagement on this proposal with key stakeholders which has been used to inform our approach. We recognise that this targeted engagement does not constitute a formal consultation and was therefore not referred to in the Explanatory Memorandum. Through our engagement similar concerns were raised to those set out above. We have considered these concerns and are satisfied that there is sufficient rationale for introducing this change to ensure fairness and the consistent consideration of detention decisions for potential victims of modern slavery as well as to correct the policy anomaly. We continue to value the input and insights from those with an interest in this policy.

Home Office

11 March 2021