



Law Society  
of Scotland

# Written Submission

## Immigration Detention Inquiry

November 2018



## Introduction

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The Law Society of Scotland is the professional body for nearly 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Immigration and Asylum Law sub-committee welcomes the opportunity to consider and respond to the Joint Select Committee on Human Rights' immigration detention inquiry. The sub-committee has the following comments to put forward for consideration.

## Whether detention should be time limited

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In its response to the United Nation's Universal Periodic Review recommendation that the UK stop the practice of arresting migrants for unspecified periods, the UK Government gave two main justifications for resisting a time limit. Their first justification was that an individual's detention remains under regular review by the government, and their second was that individuals can apply for release on immigration bail and can challenge the lawfulness of their detention in the courts.<sup>1</sup>

In relation to the second justification – that detainees can apply for release on bail – we think that the government's approach over-emphasises the role of individual detainees in applying for release and does not take sufficient account of the barriers to release. We think that the government should take more responsibility for facilitating release, including by time-limiting detention. International comparators demonstrate that alternatives are available.

<sup>1</sup> Ministry of Justice, *United Nations Universal Periodic Review – UK, British Overseas Territories and Crown Dependencies – Response to the recommendations received on 4 May 2017 (29 August 2017)*

## How a time-limit might be applied in practice

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The introduction of regular review in Schedule 10 of the Immigration Act 2016 is a step in the right direction but we think the four monthly review of detention is too infrequent and there are too many limitations on its scope (for example, the review not taking place when removal is contemplated within the next 14 days).

In addition, it is important to note that the automatic review provisions in the Immigration Act 2016 do not apply to those subject to deportation or who have national security cases. There is likely to be a significant number of detainees who will probably continue to be detained longer than is necessary.

In relation to the processes which could be used to apply a time limit in practice, there are international comparators to draw on. The Netherlands, for example, reduced its reliance on immigration detention significantly between 2011 and 2015.<sup>2</sup>

## The operation of arrangements for bail

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We agree that it is very important that detainees have the opportunity to apply for immigration bail. We also recognise the findings of research into immigration bail hearings at the First Tier Tribunal (Immigration and Asylum Chamber) which has demonstrated that, in practice, bail hearings have considerable limitations as a route to release.<sup>3</sup> In the case of a detainee with pre-existing mental health problems on entering detention, the Court of Appeal recently identified that there was no mechanism which would enable him to effectively challenge his detention, and they found that the Home Office had discriminated against him on by failing to make reasonable adjustments under the Equality Act 2010.<sup>4</sup> It was the Secretary of State's critical failure to make anticipatory adjustments to ensure that procedures were in place to avoid a mentally ill detainee being unjustifiably disadvantaged.

In that case, Beatson LJ referred to a "lacuna" in the system. While in other detention contexts there were regular reviews on the lawfulness of detention, in immigration detention only a bail application could initiate an independent review of the detention. Mentally ill detainees lacked the ability to initiate that process and are therefore unjustifiably discriminated against pursuant to the Equality Act 2010. Importantly, the Court held that the Secretary of State's duties under section 153(2) of the Immigration and Asylum Act 1999 to make provision with respect to the safety, control, activities, discipline and control of detainees were sufficiently wide to incorporate a system to assist mentally ill detainees in making representations against their detention.

<sup>2</sup> Global Detention Project, *Netherlands Immigration Detention Profile*, (November 2016)

<sup>3</sup> See, for example, *Bail for Immigration Detainees, A Nice Judge on a Good Day: immigration bail and the right to liberty* (2010) and *Bail for Immigration Detainees, The Liberty Deficit: long-term detention & bail decision making* (2012)

<sup>4</sup> *VC v SSHD* [2018] EWCA Civ 57

In that case, the Appellant proposed three main adjustments to cure this problem:

1. The appointment of specific “mental health advocates” to make representations on behalf of the detainee;
2. That a detainee’s capacity should be assessed at the beginning of their detention; and
3. That regular and independent reviews should be carried out without a detainee’s prompting.

The Secretary of State’s arguments in opposition were:

1. She had no power to appoint specific mental health ‘advocates’ for mentally ill detainees;
2. It would breach the detainee’s confidentiality; and
3. The cost would be excessive.

Each of these submissions were rejected summarily by the Court as “entirely unfounded”.

While changes affecting detainees recognised as vulnerable should improve their situation, we think it is essential to ensure that all detainees can engage effectively with bail processes. Currently, detainees’ ability to engage with those processes depends on a range of factors including access to legal advice and representation and access to a wider support network – including access to personal guarantors/cautioners.

As identified in *VC*, an initial assessment of a detainee should be required at the beginning of their detention; and the proposed system of mental health ‘advocates’ to assist detainees to make representations on their behalf would, in our view, be beneficial in providing a detainee with the opportunity to make representations which they may not ordinarily have the ability or capacity to do.

Research into bail hearings at the First Tier Tribunal (Immigration and Asylum Chamber) in Scotland identified that support in the form of guarantors/cautioners (who could provide a personal guarantee in support of the detainee) increased the prospects of release.<sup>5</sup> The Immigration Act 2016 has signalled a possible move away from financial guarantees, which is to be welcomed. However, the Scottish research also showed that of those released from immigration detention in Scotland, just over half were bailed to addresses in England and Wales.<sup>6</sup> Bail for Immigration Detainees (BiD) previously identified “remote detention” as a problem, and made recommendations in its 2012 Report *The Liberty Deficit* to facilitate the participation of guarantors when bail hearings take place in distant locations.<sup>7</sup> Where detainees are held in removal centres which are distant from their homes, their ability to access support networks – including financial guarantors and legal representatives - is inevitably compromised. The different legal aid systems in England and Wales on the one hand and Scotland on the other add to the complexities which

<sup>5</sup> 41% of bail applicants with cautioners (financial guarantors) granted bail; 23% of bail applicants without cautioners granted bail: Susannah Paul and Daniel Ferguson, *Glasgow University Settlement – Find a Solution Report 2016: Immigration Bail Observation Project Scotland (IBOPS)* (2017), and IBOPS, *Guide to supporting detainees in immigration bail hearings in Scotland* (February 2017)

<sup>6</sup> 52% of those granted bail were released to addresses outside Scotland IBOPS 2017

<sup>7</sup> Bail for Immigration Detainees, *The Liberty Deficit: long-term detention & bail decision making* (2012)

detainees face in accessing the support they need to challenge detention and apply for bail. Where a Scottish resident is detained in a removal centre in England and Wales, their access to legal representation may be interrupted or blocked as a result of being moved outside the usual jurisdiction of the Scottish Legal Aid Board (SLAB), and English or Welsh residents likely face similar problems. We have provided further detail on the legal aid system in Scotland, below.

Another significant barrier in a detainee's release from detention arises from the statutory provisions in the Immigration Act 1971 as amended by the Immigration Act 2014. In particular, paragraph 22(4) of Schedule 2 of the Immigration Act 1971 now provides, in certain circumstances, that the Secretary of State can refuse to consent to bail granted by an immigration judge. In *Roszkowski v Secretary of State for the Home Department*, the Court of Appeal held that Parliament's intention in enacting the relevant provisions had intended "an official in the Home Office...[to have the] power to prevent the implementation of the decision of the First-tier Tribunal".<sup>8</sup>

This is deeply concerning. A statutory provision which entitles a member of the executive to overrule a decision of the judiciary (because that official does not agree with it) is not in keeping with the principles of the rule of law.<sup>9</sup> It is a basic principle of the rule of law that a decision of a court is binding as between the parties and that decisions and actions of the executive are reviewable at the instance of an interested citizen.<sup>10</sup> The current immigration bail system does not "guarantee independent judicial oversight" contrary to the statement of the Home Office.<sup>11</sup>

## Legal Aid

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### Scope

Legal aid is available for immigration and asylum work in Scotland:

- Initial advice can be provided under the advice and assistance (A&A) scheme, subject to financial eligibility checks and potentially to a contribution by the client to the costs of that advice - though there is often an overlap between immigration and asylum work, separate applications are required for immigration and for asylum.
- Representation at tribunal can be provided through the assistance by way of representation (ABWOR) scheme, also subject to financial eligibility, potential contribution and also the 'effective participation' test

<sup>8</sup> *Roszkowski v Secretary of State for the Home Department* [2017] EWCA Civ 1893 at [54]

<sup>9</sup> *Evans v Attorney General* [2015] AC 1787 at [51]

<sup>10</sup> *Evans v Attorney General* [2015] AC 1787 at [52]

<sup>11</sup> Home Office, *Immigration Act 2016 Factsheet – Immigration Bail: automatic referrals* (July 2016)

– namely, would the client be unable to effectively participate without the provision of representation through the legal aid system.

- Legal aid is provided for court representation, subject to financial eligibility and client contribution – though unlike A&A and ABWOR, the eligibility threshold and contribution amounts both significantly higher

Details of the financial eligibility and contributions requirements (from 2 April 2018) are available on the [Scottish Legal Aid Board website](#).<sup>12</sup>

By comparison, in England and Wales, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed a number of areas from the scope of civil legal aid, including most non-detention immigration issues. The Scottish Government has committed to retaining the current scope of the legal aid system in Scotland, an approach also endorsed by the report of the recent independent legal aid review, [Rethinking Legal Aid](#).<sup>13</sup>

## Legal aid cases

In the twelve months to February 2017, the last period for which we have seen data, there were around 4800 A&A cases for immigration and around 3,300 for asylum; for ABWOR, there were around 1,200 immigration cases and 1,400 asylum cases.

The number of immigration and asylum cases paid by legal aid has increased, as has the cost of fees and outlays for these cases on average, leading the SLAB to suggest that the degree of complexity of these cases a significant driver:

“In 2005-06 immigration & asylum was 17% (£3.6m) ...of the total cost of A&A and ABWOR which was £21.0m.

In 2011-12 these figures were immigration & asylum 21% (£4.5m) ...of the total cost of A&A and ABWOR which was £20.9m.

In 2016 calendar year the figures were 33% (£6.2m) ...out of total cost of £18.6m.

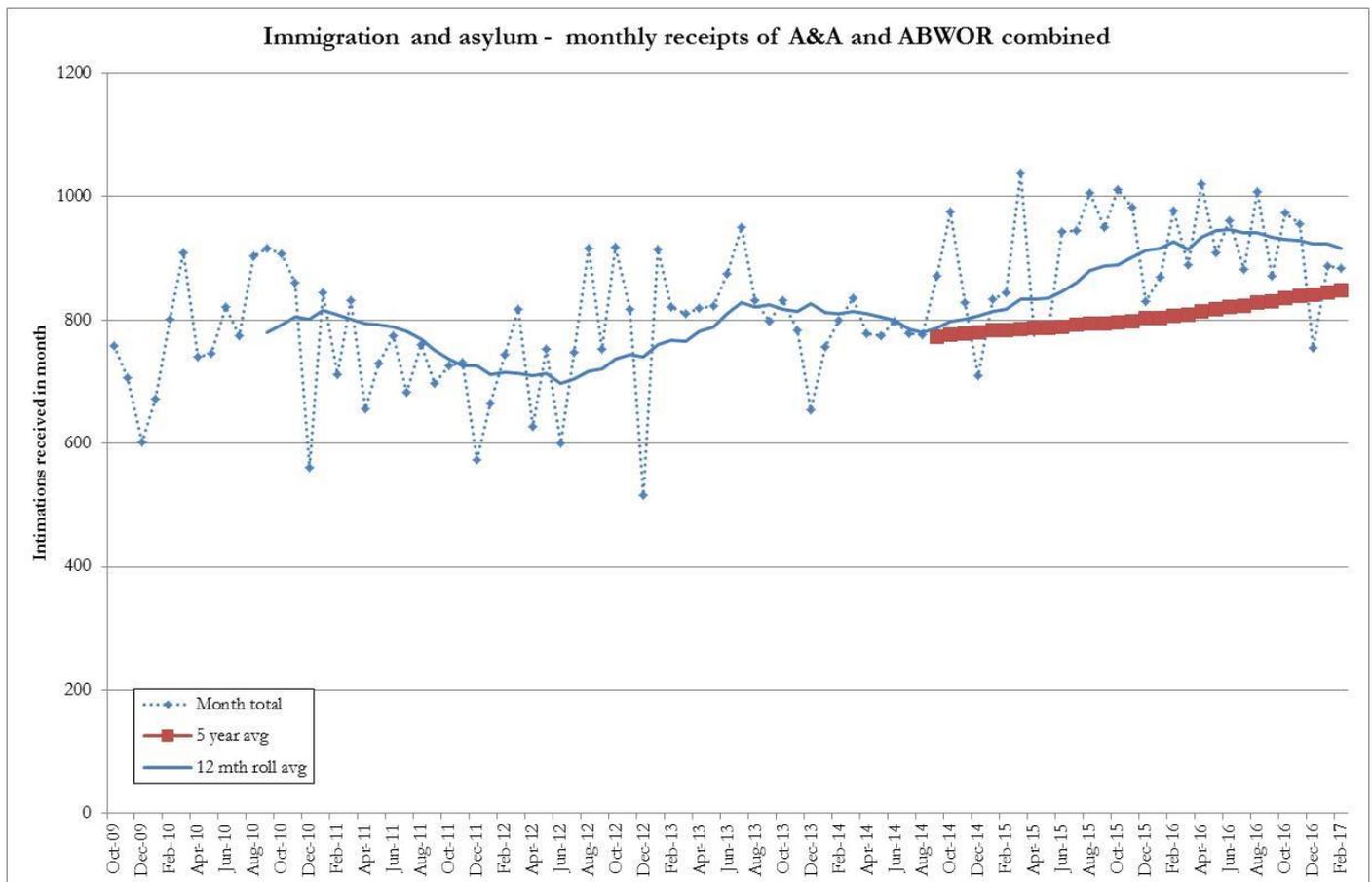
The overall cost of immigration & asylum in A&A/ABWOR has grown by 71% from 2005-06 to 2016. Case numbers paid have increased by 15% whereas solicitors' fees have increased 52% and the

<sup>12</sup> Scottish Legal Aid Board, *Advice and Assistance and Civil Legal Aid Keycard*

<sup>13</sup> Martyn Evans, *Rethinking Legal Aid – An Independent Strategic Review*, (February 2018)

cost of outlays has increased 147%. The average cost of a case is 49% higher than it was in 2005-06 which implies that the length or complexity of cases has increased considerably.”<sup>14</sup>

The number of cases has declined since 2016, though has remained on an upward trend since 2010, as indicated by SLAB:



## Reform options

SLAB had previously considered reform options, publishing in 2011 a [Best Value Review](#) into immigration and asylum work.<sup>15</sup> To address concerns around travel, Scottish Government halved the travel rate payable to solicitors. To address concerns around provision at Dungavel, at that stage, the only detention centre in Scotland, SLAB proposed to develop an in-house service model in conjunction with the Immigration Advisory Service, a project that was discontinued with the insolvency of IAS later that year.

<sup>14</sup> Scottish Legal Aid Board, *Trends Analysis Update – March 2017*

<sup>15</sup> Scottish Legal Aid Board, *Best Value Review: Immigration and Asylum*, (July 2011)



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