

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (GUIDANCE ON DETENTION OF VULNERABLE
PERSONS) REGULATIONS 2024

2024 No. 573

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

2. Declaration

- 2.1 Michael Tomlinson KC MP, Minister of State for Countering Illegal Migration at the Home Office confirms that this Explanatory Memorandum meets the required standard.
- 2.2 Matthew Bligh, Deputy Director for Enforcement and Criminality policy at the Home Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

- 3.1 Bethany Dent at the Home Office, Telephone: 0300 1053905 or email: Bethany.Dent@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

- 4.1 This statutory instrument brings into effect amendments to the guidance on Adults at Risk in Immigration Detention (“the AAR Statutory Guidance”).
- 4.2 The AAR Statutory Guidance sets out the principles and process for making decisions on immigration detention in respect of individuals who may be considered at risk in detention. It specifies matters to be taken into account in determining whether a person would be particularly vulnerable to harm if that person were to be detained and, if so, whether that person should be detained or remain in detention.
- 4.3 The purpose of the statutory instrument (the “Regulations”) is to amend the existing AAR Statutory Guidance. Firstly, this is to refresh the policy to reflect the current Government’s priorities and approach to immigration detention, and secondly, to place on a statutory footing, the ability of the Home Office to seek a second opinion on professional evidence submitted in relation to persons detained under immigration powers.

Where does the legislation extend to, and apply?

- 4.4 The extent of this instrument is the United Kingdom.
- 4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. Policy Context

What is being done and why?

- 5.1 The AAR Statutory Guidance enables officials to identify vulnerable adults and to make balanced decisions about the appropriateness of their detention. There is a presumption in immigration policy that a person will not be detained. Where issues of vulnerability are evident, the immigration factors must be balanced against vulnerability factors to determine whether detention is appropriate.
- 5.2 AAR Statutory Guidance was brought into force for the first time in September 2016, in accordance with section 59 of the Immigration Act 2016. Since then, both the immigration landscape and the Government's use of immigration detention in response to this have changed. Specifically, with the Government's plans to expand the detention estate in response to the challenge of illegal migration, some of the aims of the policy that were considered relevant in 2016 are no longer considered in line with current plans and priorities. The AAR Statutory Guidance therefore needs to be updated, bringing the policy in line with the Government's current approach.
- 5.3 The core changes to the updated Guidance include: removing reference to the intention of the guidance leading to a reduction in the number of vulnerable people detained, reducing repetition, clarifying that the policy applies where a person is detained under immigration powers for any statutory purpose (not just for removal) and reflecting provisions relating to detention brought into force in September 2023 through section 12 of the Illegal Migration Act 2023 (IMA). Section 12 of the IMA entered into force in September 2023 and establishes that whilst detention must only be for such period as is reasonably necessary to enable the specific statutory purpose of the detention to be carried out, it is for the Secretary of State to decide that reasonable period, rather than the courts.
- 5.4 Additionally, the Regulations amend the AAR Statutory Guidance to provide for the Home Office to seek second opinions on professional evidence. External medical evidence, often in the form of medico-legal reports are regularly submitted through legal representatives acting on behalf of those detained under immigration powers, to present evidence of increased vulnerability, which then requires consideration under the AAR policy. Historically, the large majority of cases involving an external medical report/medico-legal report have led to the person being released from detention, thereby undermining lawful action to remove them from the UK. A Home Office review in 2021, involving clinical experts, independently validated the department's concerns about the reliability of this evidence in some cases.
- 5.5 In June 2022 the Home Office published an interim policy to refer external medical reports and medico-legal reports to a Home Office contracted consultant psychiatrist for a second opinion. The second opinion would then be considered by the Home Office caseworker in addition to the external medical report and any other relevant evidence, to determine an individual's vulnerability level and whether or not continued detention would be appropriate under the terms of the policy. In January 2024, the High Court found the interim second opinion policy to be unlawful, as highlighted below in section 6.4.
- 5.6 The Regulations amend the AAR Statutory Guidance and provide a statutory footing for the Home Office to seek second opinions on professional evidence submitted in relation to those in immigration detention. This addresses the finding by the High Court that the operation of the interim second opinion policy was unlawful, in part because it authorised caseworkers to act contrary to the existing AAR Statutory

Guidance. The Home Office considers there to be value in having access to additional clinical evidence regarding an individual's vulnerability in order to be able to make a fully informed decision about the appropriateness of an individual's continued detention.

What was the previous policy, how is this different?

- 5.7 The existing AAR Statutory Guidance presents a viewpoint reflective of the context and priorities of 2016. At this time the Government's focus was on reducing the use of immigration detention. However, in response to the challenge of illegal migration, the Government is now planning to expand the detention estate and has been clear that those who enter the UK illegally may be detained and promptly removed. The regulations will amend the AAR Statutory Guidance to refresh the purpose of the policy in line with this position, including by removing reference to the intention of the guidance leading to a reduction in the number of vulnerable people detained. However, the amended AAR Statutory Guidance maintains the core elements of the policy, including that the presumption of liberty is strengthened for those considered vulnerable, that decisions must be taken on a case-by-case basis, and that there must be a balancing of risk against immigration factors to determine whether or not detention is appropriate.
- 5.8 The existing AAR Statutory Guidance does not make reference to seeking second opinions. The Regulations will amend the AAR Statutory Guidance to make it clear that the Home Office may obtain a second opinion where external professional evidence is submitted with regard to a person in immigration detention. The amended AAR Statutory Guidance will stress that decisions to detain or maintain detention should be informed by all the relevant information, including that which may be obtained through a second opinion. The time taken to obtain this evidence is considered appropriate. The amended AAR Statutory Guidance will set out that whilst a second opinion is pending, consideration should be given to the needs and circumstances of the person in detention in view of the evidence submitted. This includes providing the external medical report to the responsible clinicians.

6. Legislative and Legal Context

How has the law changed?

- 6.1 Section 59(1) of the Immigration Act 2016 (the "2016 Act") requires the Secretary of State to produce guidance detailing matters to be taken into account in determining whether a person would be particularly vulnerable to harm if that person were to be detained or to remain in immigration detention, and if so, whether that person should be detained or remain in immigration detention. Such guidance was last laid before Parliament on 25 February 2021 and came into force on 25 May 2021.
- 6.2 Section 59(4) of the 2016 Act provides that before issuing guidance under this section the Secretary of State must lay a draft of the guidance before Parliament. Section 59(6) of the 2016 Act provides that the Secretary of State may from time to time review such guidance and may revise and re-issue it.
- 6.3 The Regulations laid before Parliament therefore re-issue the AAR Statutory Guidance in accordance with Sections 59(4) and 59(6) of the Immigration Act 2016.

Why was this approach taken to change the law?

- 6.4 The High Court judgment [2024] EWHC 38 (*Admin*) on 12 January 2024 found that the operation of the interim second opinion policy was unlawful, partly because it

authorised caseworkers to act contrary to the existing AAR Statutory Guidance. It is therefore considered necessary to amend the AAR Statutory Guidance through these regulations, and in accordance with Section 59(6) of the 2016 Act, to be able to re-introduce a policy under which the Home Office can seek second opinions on professional evidence provided in relation to those in immigration detention.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 There is no statutory requirement for consultation on the Regulations making a change to guidance issued under section 59 of the Immigration Act 2016. The Home Office has not undertaken a formal public consultation on these changes. Notwithstanding this, a targeted process of engagement with NGOs with an interest in safeguarding vulnerable people in immigration detention took place in February and March 2024 in relation to the amendments to the AAR Statutory Guidance. This consisted of providing them with a draft of the guidance for review and giving consideration to their feedback in developing the version of the guidance laid before Parliament.

8. Applicable Guidance

- 8.1 The AAR Statutory Guidance will be published by the Stationery Office and copies may be obtained from the Stationery Office bookshops or online shop from 30 April 2024. The guidance will also be available on publications pages of the gov.uk website.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 A full Impact Assessment has not been prepared for this instrument because there is expected to be no, or no significant impact on business, charities or voluntary bodies. Such an assessment would therefore be disproportionate. An Equalities Impact Assessment will be published on the same day that this instrument is laid.

Impact on businesses, charities and voluntary bodies

- 9.2 There is no, or no significant, impact on business, charities or voluntary bodies.
- 9.3 The legislation may have a small positive impact on small or micro businesses, through opportunities for private doctors to provide services to support this policy. However, due to the limited need for resource of private doctors under the previous interim second opinion policy, the actual impact was negligible.
- 9.4 There is a small impact on the public sector (Immigration Enforcement) owing to the short additional duration of detention in some cases whilst the second opinion process is concluded. Pilot evidence suggests that time taken for a second opinion to be received is 10 days on average and there were 30 second opinion reports received over the 18 months that the previous interim policy was active.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

- 10.1 The approach to monitoring this legislation will be subject to the normal post-legislative review.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).