

# HOUSE OF LORDS

## Secondary Legislation Scrutiny Committee

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### 25th Report of Session 2023–24

Drawn to the special attention of the House:

## **Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2024**

Includes information paragraph on:

Draft Coroners (Suspension of Requirement for Jury at Inquest: Coronavirus) Regulations 2024

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Ordered to be printed 14 May 2024 and published 16 May 2024

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Published by the Authority of the House of Lords

HL Paper 115

### *Secondary Legislation Scrutiny Committee*

The Committee's terms of reference, as agreed on 8 November 2023, are set out on the website but are, in summary:

To report on draft instruments and memoranda laid before Parliament under section 23(1) of the European Union (Withdrawal) Act 2018 and sections 11, 12 and 14 of the Retained EU Law (Revocation and Reform) Act 2023.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

### *Members*

[Lord De Mauley](#)

[Baroness Harris of Richmond](#)

[Lord Hunt of Wirral](#) (Chair)

[Baroness Lea of Lymm](#)

[Lord Powell of Bayswater](#)

[Baroness Randerson](#)

[Baroness Ritchie of Downpatrick](#)

[Lord Rowlands](#)

[Lord Russell of Liverpool](#)

[Lord Thomas of Cwmgiedd](#)

[Lord Watson of Wyre Forest](#)

### *Registered interests*

Information about interests of Committee Members can be found in the last Appendix to this report.

### *Publications*

The Committee's Reports are published on the internet at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>

### *Committee Staff*

The staff of the Committee are Jen Mills (Clerk), Philipp Mende (Adviser), Chris Smith (Adviser), Jane White (Adviser) and Riona Millar (Committee Operations Officer).

### *Further Information*

Further information about the Committee is available at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://statutoryinstruments.parliament.uk/>

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

### *Contacts*

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is [hlseclegscrutiny@parliament.uk](mailto:hlseclegscrutiny@parliament.uk).

# Twenty Fifth Report

## DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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### Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2024 (SI 2024/573)

*Date laid: 30 April 2024*

*Parliamentary procedure: negative*

*These Regulations bring into force changes to the statutory guidance on Adults at Risk in Immigration Detention, which sets out the process for making decisions on immigration detention where an individual may be vulnerable to harm if detained. The changes are in the context of a shift in Government policy towards greater use of immigration detention, and the Home Office accepts that it will “logically follow” that this will include detaining more of those considered vulnerable, despite a “presumption against” such detention.*

*While the Government is entitled to make policy changes that increase the number of migrants held in detention, it has not set out any steps it will take to monitor the effects of the changes; for example, on the number of vulnerable people held in detention and any harm that they may suffer as a result. **The House may wish to press for further details on the Home Office’s plans for monitoring, reviewing and reporting on the changes, including those which reinstate a policy of receiving second medical opinions in relation to potentially vulnerable migrants, following a High Court ruling that the previous approach was unlawful.***

**These Regulations are drawn to the special attention of the House on the ground that they are politically or legally important or give rise to issues of public policy likely to be of interest to the House.**

#### *Background*

1. These Regulations bring into force changes to the statutory guidance on Adults at Risk in Immigration Detention (“the Guidance”).<sup>1</sup> The Explanatory Memorandum (EM) states that the 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”. In particular, the Guidance “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”.
2. The EM explains that there is a general “presumption” in immigration policy that a person will not be detained, and that “where issues of vulnerability are evident, the immigration factors must be balanced against vulnerability factors to determine whether detention is appropriate”.
3. The Government says the revisions principally reflect two changes. First, when the Guidance was originally issued (in 2016), the Government’s

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<sup>1</sup> Home Office, ‘Draft revised guidance on adults at risk in immigration detention’ (30 April 2024): <https://www.gov.uk/government/publications/draft-revised-guidance-on-adults-at-risk-in-immigration-detention-april-2024> [accessed 14 May 2024].

intention was to reduce the use of immigration detention, whereas, as the EM says, “in response to the challenge of illegal migration, the Government is now planning to expand the detention estate”. Second, the Home Office wishes to put on a lawful footing its policy of being able to obtain a second medical opinion as to a migrant’s vulnerability, in addition to that provided on behalf of the migrant themselves. The Home Office’s previous approach in this area, the ‘interim second opinion policy’, was ruled unlawful by the High Court in January 2024.

4. We have received a submission on the changes from Medical Justice, an organisation whose activities include providing medico-legal reports on the vulnerability of migrants. The submission, and the Government’s responses to our questions that cover issues raised in it, are published on the Committee’s website.<sup>2</sup>

#### *How does the Guidance operate?*

5. There are three stages to an assessment under the Guidance. First, a migrant is assessed for ‘indicators of risk’. These include factors such as suffering from a mental health condition or serious disability, being pregnant, being aged over 70, being transgender or having been a victim of torture, sexual violence, human trafficking or modern slavery.
6. Second, the ‘level of evidence’ supporting the indicator of risk is rated, on a scale of one to three. For example, Level One is that the individual has self-declared to be at risk, and Level Three is evidence from a professional (such as a medical practitioner) that the person has indicators of risk, and that detention is likely to cause them harm.
7. Third, the individual is assessed against a range of ‘immigration factors’, such as whether the period of detention would be ‘reasonable’ and whether detention is necessary to protect the public from criminality or to reduce the risk of a person absconding, based on their previous record.
8. These factors are then combined by weighing the immigration factors against the indicators of risk, with the indicators of risk being given more weight if the level of evidence supporting them is higher. If the indicators of risk thus derived are greater than the immigration factors, the person will be released (or not detained in the first place).

#### *Expansion of the immigration detention estate*

9. As described above, the Home Office states that its overall policy has changed from reducing immigration detention to expanding it. Hence, for example, the revised Guidance will no longer state an intention to reduce the number of vulnerable people detained. Nevertheless, the EM says that the Guidance maintains the “core elements” of the previous policy, including that “the presumption of liberty is strengthened for those considered vulnerable”.
10. The Guidance is also changing to reflect aspects of the Illegal Migration Act 2023; for example, that whilst detention must only be for a period reasonably necessary to enable the specific statutory purpose of the detention to be carried out, the Secretary of State will decide that period, rather than the courts.

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2 SLSC, ‘Scrutiny evidence’: <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/8/scrutiny-evidence/>.

11. The submission we received states that the changes weaken the protective purpose of the Adults at Risk policy and risk exposing more vulnerable people to harm in immigration detention. For example, the submission points to a change of wording from a “clear presumption [ ... ] that detention will not be appropriate if a person is considered to be ‘at risk’”, to a general presumption of liberty that “is strengthened for those considered vulnerable under this guidance”. A key concern in the submission is, therefore, whether the overall increase in the number of people detained will also lead to a greater number of vulnerable people being detained, with the possible adverse impacts that detention might have on these people.
12. In response to these points, the Home Office reiterated that “the right to liberty remains a fundamental principle which underpins all of our detention policy. In all cases the presumption is against detention”. However, the Home Office went on to say that “there may be circumstances where it is necessary to detain an individual in order to maintain effective immigration control”. In its Equality Impact Assessment, the Home Office accepts that it “logically follows that a rise in the detained population will result in a rise in those that are considered vulnerable, particularly when the policy includes those who self-declare to be adults at risk”. However, the Home Office reiterated that such detention will only occur “where the immigration factors outweigh the risk factors in their particular case”.

#### *Second opinion policy*

13. The EM states that “external medical evidence, often in the form of medico-legal reports (MLRs) are regularly submitted through legal representatives acting on behalf of those detained under immigration powers, to present evidence of increased vulnerability”. The Home Office states that, historically, the large majority of cases involving an external MLR have led to the person being released from detention, “thereby undermining lawful action to remove them from the UK”. The EM also states that “a Home Office review in 2021, involving clinical experts, independently validated the department’s concerns about the reliability of this evidence in some cases”.
14. Following the review, in June 2022, the Home Office introduced an ‘interim policy’ to refer external MLRs to a Home Office-contracted consultant psychiatrist for a second opinion. However, this policy was challenged by Medical Justice via Judicial Review and was found to be unlawful by the High Court in January 2024.<sup>3</sup> Part of the reason for the finding was that the policy led caseworkers to act in a way that was incompatible with the Guidance. The Guidance is therefore being altered to remove this inconsistency. The Home Office has also been granted permission to appeal the result of the Judicial Review.
15. The submission argues that the provision for the Home Office to seek a second opinion “risks prolonging the detention of vulnerable people and putting them through a potentially re-traumatising process”. The submission suggests that the reason migrants currently seek MLRs is because “they are not appropriately protected by safeguards in the immigration detention

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3 High Court, Medical Justice, *R (On the Application Of) v Secretary of State for the Home Department*, [EWHC 38 \(Admin\)](#) (12 January 2024).

system”, and that this has been supported by external reviews.<sup>4</sup> The submission also argues that the data and evidence that the Home Office cited in support of its concerns around MLRs were flawed.

16. In response to our questions on these points, the Home Office said that “in cases where a second opinion is sought, detention will normally continue for a short period pending the completion of that process. The time taken to obtain and consider this evidence is considered appropriate in order to make a fully informed decision”. The Home Office also noted that consideration should be given to the individual’s needs in the meantime. The Home Office cited “clinical evidence” from “medical professionals” in support of its view that the quality of MLRs gave rise to concerns. However, the Home Office also rejected any explicit or implicit assumption that the second opinion doctor’s assessment is more accurate than that of the MLR.
17. The Home Office provided us with data from the period when the interim second opinion policy was in place—although it cautioned that this was “internal data, and has not been through the rigorous analytical process required of Home Office published statistics”. This information suggested that, over a period of approximately 19 months, 199 MLRs were received on migrants in detention, of which 47 were referred for a second opinion report and, of these, 30 second opinions were received. Of these 30, 14 cases were released and 16 remained in detention, although all but two of those 16 were later released following a further review. In total, then, 28 out of the 30 cases with a second opinion still resulted in a release. However, the Home Office noted that the reasons for such releases varied and were not all related to the MLR report. The Home Office also found that of the 199 MLRs, 195 failed to meet the standards set within the Guidance.
18. **This data does not provide compelling evidence either way on the need for the second opinion policy. The Home Office should continue to monitor its effects closely, particularly the number of release/detention decisions that are changed as a result of the second opinion and the impacts on those whose detention is extended to obtain a second opinion. The results should be published.**

### *Consultation*

19. The submission argues that the consultation process on the changes was deficient in that it was over too short a timeframe and was carried out prior to the publication of key information, such as the Equality Impact Assessment and evidence relating to previous experience of the second opinion policy.
20. In response to our questions in this area, the Home Office said that the “engagement period” was in line with its usual practices and listed a number of changes that had been made to the guidance as a result of the consultation process.

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4 For example: Independent Chief Inspector of Borders and Immigration, *Third annual inspection of Adults at risk in immigration detention* (January 2023): [https://assets.publishing.service.gov.uk/media/63bd780ad3bf7f263231a3bd/Third\\_annual\\_inspection\\_of\\_Adults\\_at\\_Risk\\_Immigration\\_Detention\\_June\\_to\\_September\\_2022.pdf](https://assets.publishing.service.gov.uk/media/63bd780ad3bf7f263231a3bd/Third_annual_inspection_of_Adults_at_Risk_Immigration_Detention_June_to_September_2022.pdf) [accessed 14 May 2024]; and House of Commons Home Affairs Committee, *Immigration Detention* (Fourteenth Report, HC 913, Session 2017–19).

*Conclusion*

21. The Government is entitled to make policy changes that increase the number of migrants held in detention. The Home Office accepts that it will “logically follow” that this will include more of those considered vulnerable, despite a “presumption against” such detention. However, the submission we received contends that a rise in the number of detained people should not result in a rise of those considered vulnerable in detention. **The possible adverse impact of detention on vulnerable people makes these changes controversial, and the House and the general public will wish to be kept abreast of their effects in practice. The Government has not set out how it will monitor and report on the policy, and the House may wish to press for further details.**

## INSTRUMENTS OF INTEREST

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### Draft Coroners (Suspension of Requirement for Jury at Inquest: Coronavirus) Regulations 2024

22. COVID-19 is designated as a ‘notifiable disease’, which would ordinarily mean that any inquest into a death which the coroner suspects to have been caused by COVID-19 must be held with a jury. However, this requirement was disapplied by the Coronavirus Act 2020 and then by the Judicial Review and Courts Act 2022 (“the 2022 Act”), which has effect until 27 June 2024. These Regulations exercise a power in the 2022 Act to extend the disapplication by a further two years, to June 2026. The intention is to relieve pressure on coroners and to help tackle the inquest backlog that has built up since the COVID-19 pandemic: the number of cases not concluded within 12 months rose from 2,278 in 2019 to 4,812 in 2022 and 6,149 in 2023,<sup>5</sup> an increase of 28% between 2022 and 2023 alone. Meanwhile, the average time to process an inquest rose from 27 weeks in 2019 to 31.5 weeks in 2023.<sup>6</sup> The Ministry of Justice (MoJ) told us that a sample of six out of 440 coroners suggested that, in these six areas alone, the absence of an exemption would have led to around 420 more jury inquests since June 2022; this is significant given that the total number of jury inquests in the whole of England and Wales in 2023 was 474.<sup>7</sup>
23. Under the Act, MoJ must review the effects of the disapplication before any further extension after 2026. **We expect MoJ to publish the outcome of any such review.**
24. We note that the most recent report of the Chief Coroner of England and Wales describes “chronic under-resourcing” in the service and identifies a number of issues, other than COVID-19, that have contributed to the backlog.<sup>8</sup> For context, we asked MoJ what other steps it was taking. MoJ described how its powers to affect resourcing in the sector were limited, saying that “Parliament has placed funding and operational responsibility for coroner services in the hands of local government and policing. The MoJ therefore has neither the statutory ambit, nor the general responsibility for grant provision, to provide direct financial support for the day-to-day running of local coroner services”. Nevertheless, MoJ said that it, and the Chief Coroner’s Office, “work closely with a wide range of local government stakeholders” to support them in fulfilling their duties. MoJ also referred to a number of reforms:
- the implementation, on 9 September 2024, of the Medical Examiner scheme;<sup>9</sup>

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5 Chief Coroner, ‘Chief Coroner’s Annual Reports’: <https://www.judiciary.uk/courts-and-tribunals/coroners-courts/annual-reports/> [accessed 13 May 2024]; see Report for 2018–19 and 2019–20, para 21, and Report for 2023, para 2.5.

6 Ministry of Justice, ‘Coroners statistics 2023: England and Wales’ (10 May 2024): <https://www.gov.uk/government/statistics/coroners-statistics-2023/coroners-statistics-2023-england-and-wales#time-taken-to-process-an-inquest> [accessed 13 May 2024].

7 Ministry of Justice, ‘Coroners statistics 2023: England and Wales’ (10 May 2024): <https://www.gov.uk/government/statistics/coroners-statistics-2023/coroners-statistics-2023-england-and-wales#inquests-opened> [accessed 13 May 2024].

8 Chief Coroner, *Annual Report for 2023* (8 May 2024): <https://assets.publishing.service.gov.uk/media/662a32a555e1582b6ca7e5aa/chief-coroner-annual-report-2023.pdf> [accessed 13 May 2024], p 44.

9 See comments in our *23rd Report* on SIs [2024/492](#), [2024/493](#) and [2024/494](#) (Session 2023–24, HL Paper 107).



- an action plan to address the shortage of pathologists; and
  - other measures in the 2022 Act, including: discontinuing investigations where the cause of death becomes clear; conducting non-contentious inquests in writing; and using audio or video links at inquests.
25. We note the Chief Coroner's concerns about resourcing in this area of the justice system and observe that relieving pressure on coroners is a key rationale for these Regulations. The rapid increases in the backlog are particularly alarming as the delays will lead to additional distress for bereaved families. We note that the oversight structure for coroner services limits the extent to which central government can address these issues, but the wider financial stresses on local authorities also mean that significant additional funding at the local level is unlikely to be forthcoming. **This makes the overall situation unsatisfactory, and the House may wish to enquire further about how the serious issues in the coroner system can be tackled.**

## INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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### Draft instruments subject to affirmative approval

Draft	Coroners (Suspension of Requirement for Jury at Inquest: Coronavirus) Regulations 2024
Draft	Human Medicines (Amendments relating to Registered Dental Hygienists, Registered Dental Therapists and Registered Pharmacy Technicians) Regulations 2024
Draft	Recognition and Enforcement of Judgments (2019 Hague Convention etc.) Regulations 2024

### Instruments subject to annulment

SI 2024/570	Merchant Shipping (Prevention of Pollution by Garbage from Ships) (Amendment) Regulations 2024
SI 2024/571	Online Safety Act 2023 (Pre-existing Part 4B Services Assessment Start Day) Regulations 2024
SI 2024/575	National Health Service (Primary Medical Services and Performers Lists) (Amendment) Regulations 2024
SI 2024/577	Education (Pupil Information, School Performance Information and National Curriculum Attainment Targets and Programmes of Study) (England) (Amendment) Regulations 2024
SI 2024/579	Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2024
SI 2024/590	Aviation Security (Amendment) Regulations 2024
SI 2024/594	Insurance and Reinsurance Undertakings (Prudential Requirements) (Transitional Provisions and Consequential Amendments) Regulations 2024
SI 2024/595	Civil Procedure (Amendment No. 2) Rules 2024

## APPENDIX 1: INTERESTS AND ATTENDANCE

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://members.parliament.uk/members/lords/interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 14 May 2024 and included in this report, Members declared no interests.

### **Attendance:**

The meeting was attended by Lord de Mauley, Lord Hunt of Wirral, Baroness Lea of Lymm, Lord Powell of Bayswater, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool, Lord Thomas of Cwmgiedd and Lord Watson of Wyre Forest.