



Immigration Bill 2015-16

Briefing on Schedule 7: Immigration Bail and Electronic Monitoring (Ping-Pong)

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Summary

JUSTICE remains concerned about a number of Government amendments made to the Immigration Bill in the House of Lords. However, such are the rule of law and human rights implications of Government amendments 183 to 209 to Schedule 7, introduced in the Lords, which deal with electronic monitoring, that we have confined this briefing to those.

JUSTICE considers that Lords' Amendments 186 and 192 require amending so that the First-tier Tribunal and the Special Immigration Appeals Commission remain the final arbiters of whether or not an electronic monitoring condition is impractical or breaches a person's rights under the European Convention on Human Rights.

As they stand, those Government amendments would be contrary to the rule of law and incompatible with the European Convention on Human Rights.

Introduction

1. Established in 1957, JUSTICE is an independent, all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. We have produced this briefing to inform the House of Commons debate on Government amendments 183 to 209 which deal with electronic monitoring as set out in Schedule 7 to the Bill. Such are the rule of law and human rights implications of those amendments that we have confined this briefing to those. We remain concerned about many of the provisions in the Bill and refer to our previous briefings.¹ Where we do not comment, this should not be read as implicit approval.

Schedule 7 Immigration Bail

Amendments 183 to 209

(1) PROPOSED AMENDMENT

That the Commons amend **Lords Amendment 186**:

In subparagraph (2C) leave out “the Secretary of State informs the Tribunal that the Secretary of State” and replace with “it”.

In subparagraph (2E) after “the Secretary of State” insert “or the Tribunal”.

Purpose

3. To designate the First-tier Tribunal (FTT), rather than the Secretary of State, as the final arbiter of whether or not an electronic monitoring condition would be impracticable or contrary to a person’s rights under the European Convention on Human Rights (ECHR).

(2) PROPOSED AMENDMENT

That the Commons amend **Lords Amendment 192**:

Leave out “the Secretary of State notifies the” and “that the Secretary of State” in paragraph 6B(3)

And

Insert the following after “the First-tier Tribunal” in paragraph 6B(5)—

“, and the First-tier Tribunal accepts the Secretary of State’s view,”

Purpose

4. To designate the FTT, rather than the Secretary of State, as the final arbiter of whether or not an electronic monitoring condition would be impracticable or contrary to a person’s rights under the ECHR.

¹ Which can be found on our website at <http://justice.org.uk/immigration-bill-4/>

Briefing

5. Government amendments 183 to 209 seek to remedy the fact that the previous provisions relating to electronic monitoring contained in the Bill were contrary to the rule of law. Following concerns expressed in that regard by, inter alia, the Select Committee on the Constitution² and the intervention of Lord Mackay of Clashfern, Lord Pannick, Lord Judge and Baroness Hamwee,³ the Government agreed to think again.⁴
6. The amended provisions extend not just to the FTT but, by virtue of amendments 207 and 209, to the Special Immigration Appeals Commission (SIAC), which is a court of record presided over by a High Court judge.

Compatibility with the Rule of Law and Convention Rights

7. JUSTICE considers that the amended provisions are still very much contrary to the rule of law and are incompatible with the ECHR.
8. Firstly, the amendments would require the FTT and SIAC to submit to the Secretary of State's assessment as to whether or not an electronic monitoring condition would be contrary to the person's ECHR rights. This would breach a fundamental principle of the rule of law that it is for the independent and impartial courts, and not the executive, to be the final arbiter of whether or not a person's ECHR rights are breached.
9. As Lord Neuberger put it, giving the lead judgment in *R (on the application of Evans) v Attorney-General*:⁵

"...it is [...] fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen."⁶

10. Secondly, the amendments would require the FTT or SIAC to breach Section 6 of the Human Rights Act 1998, the duty on public authorities to act compatibly with Convention rights. Where the FTT or SIAC felt that to impose an electronic monitoring condition would breach the person's ECHR rights, but the Secretary of State disagreed, the Government's amendments would require the FTT and SIAC, nevertheless, to impose the condition in breach of that person's rights.

Assessment of Impracticability

11. Our concerns arise not just in relation to assessments as to whether or not an electronic monitoring condition would breach a person's ECHR rights, but also in relation to the assessment of impracticability: if the FTT or SIAC is required to accept the Secretary of State's view that the imposition of an electronic monitoring

² Select Committee on the Constitution, 7th Report of Session 2015–16, paragraphs 20 - 28, available at <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/75.pdf>

³ Amendment 221, House of Lords Committee stage.

⁴ Lord Keen of Elie, HL Deb, 1 February 2016, c1652

⁵ *R (on the application of Evans) v Attorney-General* [2015] UKSC 21

⁶ *Ibid.* Paragraph 51.

condition would be impracticable, without scrutiny, it could be obliged to refuse bail – potentially in breach of a person’s rights under Article 5 ECHR – simply on the basis of the Secretary of State’s assertion.

12. We therefore strongly urge the Government to reconsider and, failing that, for the House of Commons to amend Government amendments 186 and 192.

JUSTICE
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