

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (GUIDANCE ON DETENTION OF VULNERABLE
PERSONS) REGULATIONS 2021

2021 No. 184

1. Introduction

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

2. Purpose of the instrument

- 2.1 This statutory instrument brings into effect amendments to the guidance on Adults at Risk in Immigration Detention (“the AAR Statutory Guidance”).
- 2.2 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 in immigration detention and, if so, whether that person should be detained or remain in immigration detention.
- 2.3 The purpose of the statutory instrument (the “Regulations”) is to bring people who are potential victims of modern slavery and/or trafficking fully within the scope of the AAR Statutory Guidance. This is intended so that detention considerations for potential victims of modern slavery and trafficking will be made using criteria consistent with those that apply to other categories of vulnerable people.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

- 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 27 March 2018 and came into force on 2 July 2018.
- 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 Section 49 of the Modern Slavery Act 2015 provides that the Secretary of State must issue guidance on various matters relating to identifying and supporting victims of slavery or human trafficking, including under section 49(1)(b) on arrangements for providing assistance and support to persons where there are reasonable grounds to believe may be victims of slavery, or human trafficking. Section 49(2) of the 2015 Act sets out that the Secretary of State may, from time to time, revise the guidance issued under subsection (1). Section 49(3) of the 2015 Act sets out that any guidance issued or revised, under this section, must be published in a way that the Secretary of State considers appropriate.

7. Policy background

What is being done and why?

- 7.1 The Adults at Risk in Immigration Detention guidance (“the AAR Statutory Guidance”) sets out the principles and process for making decisions on immigration detention, for the purposes of removal, in respect of individuals who are or may be considered at risk. 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 or to remain in immigration detention and, if so, whether that person should be detained or remain in immigration detention.
- 7.2 The AAR Statutory Guidance is well-established, having come into force on 12 September 2016. It enables officials to identify vulnerable adults more effectively and to make better balanced decisions about the appropriateness of their detention. There is a presumption in immigration policy that a person will not be detained. The AAR Statutory Guidance strengthens this presumption against the detention of those who are particularly vulnerable to harm in detention and is supplemented by guidance for caseworkers. However, detention may still be appropriate in an individual case when immigration control considerations outweigh the presumption of release, even for a person considered to be at risk.
- 7.3 The AAR Statutory Guidance includes a list of matters which may make a person particularly vulnerable to harm in detention, which includes the experience of having been a victim of human trafficking or modern slavery.
- 7.4 At present, the AAR Statutory Guidance requires any decisions as to the detention of individuals who have received a positive reasonable grounds decision under the National Referral Mechanism (NRM), and who are therefore considered to be potential victims of trafficking or modern slavery, to be 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, creating a policy anomaly. We believe that the AAR policy itself provides the appropriate framework for all detention considerations of potential victims of trafficking or modern slavery, to enable consistent consideration of all vulnerable individuals within a single policy and to remove the policy anomaly.

7.5 The purpose of the Regulations will be to amend this policy anomaly and issue amended AAR Statutory Guidance to bring people who have been granted a positive reasonable grounds decision under the NRM, and who are therefore regarded as being potential victims of trafficking or modern slavery, fully within the scope of the AAR policy. This will mean that detention considerations for potential victims of trafficking or modern slavery will be made using criteria consistent with other categories of vulnerability set out in the AAR Statutory Guidance.

7.6 However, particular considerations arise in the management of cases within the NRM – for example, the requirement for a recovery and reflection period in accordance with Article 13(1) of the European Convention on Action Against Trafficking in Human Beings² (subject to the public order considerations in Article 13(3)), which is reflected in the Modern Slavery Act 2015 Statutory Guidance. These considerations can impact on the likely removal date and the appropriateness of detention or continued detention when consideration is made under the AAR policy. To ensure caseworkers are aware of the particular circumstances and processes which apply to potential victims of trafficking or modern slavery, the AAR caseworker guidance, which supplements the AAR Statutory Guidance, will be amended to reflect these considerations. The Modern Slavery Act 2015 Statutory Guidance will also be amended to make clear that detention should be considered under the AAR policy.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 The Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2021 bring into force revised guidance and so the issue of consolidation does not arise.

10. Consultation outcome

10.1 There is no statutory requirement for consultation on the Regulations making a change to the AAR Statutory Guidance.

11. Guidance

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

¹ 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#:~:text=1.1.%20Modern%20slavery%20is%20a%20serious%20crime%20that,is%20at%20the%20heart%20of%20this%20Statutory%20Guidance

² https://ec.europa.eu/anti-trafficking/sites/default/files/cets_197.docx.pdf

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been produced for this instrument as there is expected to be no, or no significant, impact on business, charities or voluntary bodies. Such an assessment would therefore be disproportionate.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The provisions of the 2016 Act and, by extension, the provisions of this instrument, will be subject to the normal post-legislative review.

15. Contact

- 15.1 Bethany Farr at Removals, Enforcement and Detention Policy (Telephone: 0300 1053905) or email: Bethany.Farr@homeoffice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Matthew Bligh, Deputy Director for Enforcement and Criminality Policy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Chris Philp, Parliamentary Under-Secretary of State Immigration Compliance and the Courts, can confirm that this Explanatory Memorandum meets the required standard.