

ILPA response to Her Majesty's Inspectorate of Prisons consultation on potential topics for thematic reports

The Immigration Law Practitioners Association

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency and other 'stakeholder' and advisory groups.

Suggested topics for thematic reports.

Number one is the top priority, numbers two and three are of equal priority.

I. Legal Advice to detainees on immigration

ILPA proposes this topic both for the immigration detention estate and for those detained in prisons, whether serving custodial sentences or held in prisons under immigration act powers. It would include persons held in remand prisons under immigration act powers (see second topic below) and those held in police stations or short term holding facilities.

It is of relevance to all prisoners/detainees who are not British citizens or settled but is also of relevance to those who are settled, or are dual national British citizens, in circumstances where they may be at risk of revocation of indefinite leave/deprivation of British citizenship.

ILPA has suggested this topic because of concerns voiced repeatedly by members and by other organisations working in the field about the difficulties those in prisons and immigration detention centres have in getting legal representation or indeed in obtaining information about their case from the UK Immigration Service. We are aware that the Legal Services Commission funds surgeries in certain immigration removal centres, but there are very consistent reports of detainees not having heard about these surgeries. Foreign national prisoner officers in prisons get in touch with ILPA not infrequently raising the question of legal advice and representation for

those in the prison in which they work. There have also been occasions when welfare officers in immigration removal centres get in touch with ILPA expressing similar concerns. For example, this happened after Refugee and Migrant Justice went into administration, when Refugee and Migrant Justice ceased to be able to do their surgeries, but welfare officers pointed out that even when Refugee and Migrant Justice were doing the surgeries, they did not necessarily have capacity to take all the cases they thought needed representation and sometimes had considerable difficulty in finding other lawyers to whom to refer the cases.

The question of whether those who see someone in a surgery get legal representation as a result is a more general problem. One difficulty is that the approach to the case, and thus whether the person is told that they qualify for free legal advice and representation appears to vary considerably depending upon which firm is doing the surgery. Another is whether there is case needing representation subsequent to the surgery the firm doing the surgery may not have capacity to take the case and may have difficulty finding a firm to whom to refer it. Many prisons in particular are remote and the Legal Services Commission, with only a couple exceptions for prisons, albeit that representatives can seek to make the case on a case by case basis, will only fund three hours travel time – making prisons more than 1 ½ hours from the solicitors firm an unattractive prospect.

There are no automatic bail hearings for immigration detainees and a detainee only gets a bail hearing if they have instigated this. Bail for Immigration Detainees does work so that detainees who do not have legal representation have basic information on representing themselves, but it remains the case, as they acknowledge, that without legal representation getting bail is difficult. It is a matter of grave concern that some people are detained for many months without their detention ever being tested before a court.

We are not able to give immigration advice from the ILPA Secretariat and refer those who get in touch with us to our Directory of Members. We do receive a steady stream of requests from prisoners and detainees for assistance in finding an immigration lawyer. We are aware that members, including those who do not have legal aid contracts, and indeed including those who do only business immigration law, get a steady stream of requests for representation from detainees which they are unable to fulfil.

ILPA has also raised with the UK Border Agency the question of the Agency getting in touch with detainees directly rather than through their legal representative, even where there is a legal representative on record. We raised this as part of wider concerns about the Agency getting in touch with represented clients directly, and the Law Society has seconded our concerns. We understand that the UK Border Agency now has a working group on the topic. Detained clients were one of the examples we gave the Agency, for example if a person in detention is given documents directly or is asked to sign a waiver, without this going through their legal representative.

2. Detention of immigration detainees in prisons following completion of their custodial sentence

ILPA proposes this topic for immigration detainees held in prisons under immigration act powers at the end of their custodial sentence, although it may also be useful to include in the study those in the immigration detention estate who were held within the prison estate under immigration act powers at the end of their sentence but subsequently transferred to immigration removal centres. It would include looking at remand prisons, for the reasons set out below.

This topic assumes extra importance because the average length of detention and the maximum time for which people are detained appears to ILPA and to other organisations with whom we work to be increasing. We recall that historically the power to detain immigrants was ancillary to other immigration measures; they were holding powers pending administrative acts of examination, removal or deportation. Section 62 of the Nationality Immigration and Asylum Act 2002 gave the Secretary of State power to detain, a power previously reserved to immigration officers, and extended powers of detention. Rather than being detained pending administrative action a person could be detained pending a decision to, for example, give directions for his/her removal as an overstayer or illegal entrant. Section 36 of the UK Borders Act 2007 provides that a person who has served a period of imprisonment may be detained while the Secretary of State 'considers whether' they are a person in respect of whom the Secretary of State must make an 'automatic' deportation order as well as pending the making of the order if the Secretary of State, having so considered, 'thinks' that they are such a person. The power to detain while the Secretary of State 'considers whether' an automatic deportation order must be made results in the decision to make such an order being taken much later on in the process than was formerly the case, when people have already been detained under immigration act powers for a long time. Because a person can be detained while the Secretary of State 'considers whether' a person falls A combination of the changes to the legislative framework and the way in which the law is implemented mean that people are held for more lengthy periods.

Members have seen examples of those who remain in immigration detention at the end of their custodial sentence being held with convicted prisoners. This is a matter of concern. While some detainees have been asked to sign waivers to enable them to remain detained with other convicted prisoners, others appear to be held on wings where convicted prisoners are serving without having signed any such waiver. Members have seen examples of people who refused to sign such waivers being transferred to remand prisons rather than to immigration removal centres.

3. Assessment on entry into detention and periodically thereafter.

ILPA proposes this topic with particular reference to those held in the immigration detention estate, although comparison with those held within the prison estate under immigration act powers would also be helpful.

The Detention Centre Rules 2001¹ state:

Medical examination upon admission and thereafter

34.—(1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with rules 33(7) or (10)) within 24 hours of his admission to the detention centre.

(2) Nothing in paragraph (1) shall allow an examination to be given in any case where the detained person does not consent to it.

(3) If a detained person does not consent to an examination under paragraph (1), he shall be entitled to the examination at any subsequent time upon request.

Special illnesses and conditions (including torture claims)

35.—(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.

(2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.

(3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.

(4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.

(5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care.

It would be helpful for a thematic inspection to examine:

- Whether these assessments are being carried out, adequately or at all
- Whether appropriate action is taken on information gleaned from such assessments.

¹ SI 2001/236, as amended.

Reports from members as well as research such as Medical Justice's *State Sponsored Cruelty: children in detention*² suggest that the requisite assessments are not been carried out on entry to detention, adequately or in some cases at all; and that it is not straightforward to ensure that a satisfactory assessment takes place subsequently and that where an assessment does take place it does not necessarily feed in, adequately or at all, to the decision as to whether to release or to maintain detention. We very much hope that the detention of children will have been ended, in accordance with the unconditional assurance given by the coalition Government, before any inspection on this topic could get going, but, as indicated in *State Sponsored Cruelty*, the adequacy of such assessments of children and their parents, and responses to such assessments, goes to the heart of whether the UK Border Agency is fulfilling its duty to safeguard and promote the welfare of children.³ It also goes to the heart of whether the UK Border Agency is acting in accordance with its policies as set out in the Agency's Enforcement Guidance and Instructions:

“55.1.3 General

Detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted. A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable.

...

55.10. Persons considered unsuitable for detention

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.

In CCD cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention. Enforcement Instructions and Guidance

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:

- unaccompanied children and young persons under the age of 18 (but see 55.9.3 above);
- the elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention;

² Medical Justice, 9 September 2010

³ Borders, Citizenship and Immigration Act 2009, s 55.

- pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 above for the detention of women in the early stages of pregnancy at Yarl's Wood);
- those suffering from serious medical conditions which cannot be satisfactorily managed within detention
- those suffering serious mental illness which cannot be satisfactorily managed within detention (in CCD cases, please contact the specialist Mentally Disordered Offender Team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;
- those where there is independent evidence that they have been tortured;
- people with serious disabilities which cannot be satisfactorily managed within detention;
- persons identified by the Competent Authorities as victims of trafficking (as set out in Chapter 9)."

ILPA

22 September 2010