

ILPA Submission to the UN Special Rapporteur on the Human Rights of Migrants: Immigration Detention

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional association, the majority of whose members are barristers, solicitors and advocates practising in immigration, asylum and nationality law in the UK. Academics and non-Government organisations are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law. ILPA is represented on numerous Government consultative and advisory groups, and regularly meets the Home Office and UK Border Agency to law and policy, including detention.

The purpose of this brief submission is to highlight the key issues of concern, based on members' extensive knowledge of the UK's immigration detention regime. This knowledge is based on representing persons seeking asylum in detention, documented and undocumented migrants, EU nationals and even British citizens in legal cases involving bail, asylum/immigration and judicial reviews of their unlawful detention. ILPA works closely with other UK non-Governmental organisations who work on behalf of immigration detainees, such as Bail for Immigration Detainees (BID), Detention Action, and Medical Justice, and has referred here to reports they have provided on the issues of concern. We have had sight of Detention Action's submission to the Rapporteur and so will not repeat the evidence there, but can confirm that the examples and concerns reflect those of ILPA's members.

ILPA's Key Concerns

1. Inappropriate/overuse of detention

Home Office immigration statistics for the third quarter of 2011¹ show a further increase in the use of detention, with 6834 people detained in that quarter, including 30 children. Under domestic law, detention should only be used where there is a reasonable prospect of removal within a reasonable period. Yet it continues to be the case that people are detained, and their detention maintained, when they have been settled in the UK for many years and originate from countries to which it is difficult or impossible to remove people at present, such as Somalia (following the European Court of Human Rights decision in *Sufi and Elmi v UK*, applications of Applications 8319/07 and 11449/07, judgment of 28 June 2011). In ILPA's experience, a substantial proportion of those detained are released, particularly if they have legal representation.

¹ Immigration Statistics July September 2011, Home Office, available from <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q3-2011/>

ILPA Lindsey House, 40/42 Charterhouse Street London EC1M 6JN Tel: 020 7251 8383 Fax: 020 7251 8384

email: info@ilpa.org.uk website: www.ilpa.org.uk

Length of detention

ILPA is concerned about the increasingly lengthy periods of detention, for example 52 months in the case of an Iranian who failed to co-operate with his removal in *R(NAB) v Secretary of State for the Home Department* [2010] EWHC 3137 (Admin). The European Court of Human Rights in *Mikolenko v Estonia*, Application no. 10664/05 (judgment became final January 2010), commented that detention for three years and eleven months was extraordinarily long and not justified by non-cooperation.

2. Inadequate access to legal advice/representation

We note a significant increase in the number of detainees seeking legal representation from detention. At the same time there has been a significant reduction in the availability of immigration advice due to cuts to legal aid (free legal advice and representation funded by the State). The Legal Services Commission, which administers the state funded system of free legal representation, has restricted access to some forms of advice to detained persons to specific firms of lawyers. ILPA is concerned that persons in detention may face delays and difficulties in accessing advice about asylum, immigration, bail and unlawful detention, resulting in their prolonged detention. The Legal Aid, Sentencing and Punishment of Offenders Bill currently before the UK parliament would preserve legal aid for asylum cases and for challenges to immigration detention, but remove it from immigration cases.²

3. Detained fast-track

This is the process by which asylum seekers are detained for their application for asylum and any subsequent appeal to be processed quickly under accelerated procedures. In April 2004, the Legal Services Commission changed its rules to limit legal aid provision to certain providers, so reducing access to legal advice to this group. ILPA has produced a Best Practice guide on the Detained fast-track, aiming to offset the difficulties of reduced access to justice³. The guide contains case studies illustrating its adverse effects on vulnerable migrants. For example, current policy allows asylum claims from persons who may have been trafficked to be dealt with under the Detained fast-track.

4. Detention of children

Although the UK government announced that it intended to end the detention of children in December 2010 following a review,⁴ there continue to be circumstances in which children are detained.⁵ Minors whose age is disputed by the UK authorities continue to be detained if there is an assessment by the local Government authority

² For further information see the January 2012 ILPA briefing at <http://www.ilpa.org.uk/data/resources/14052/12.01.05-Briefing-on-First-Immigration-Group-immigration.pdf>

³ *The Detained Fast Track Process a Best Practice Guide*, ILPA, January 2008, available at http://www.ilpa.org.uk/data/resources/13264/ilpa_bpg_detained_fasttrack.pdf

⁴ See the UK Border Agency documents on its *Review into ending the detention of children for immigration purpose*, available from <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/26-end-child-detention/>)

⁵ See the Home Office immigration statistics, *op. cit.*

responsible for their care (called a “local authority”) that concluded that they are 18 or over. This is despite the UK Court of Appeal decision in *SH(Afghanistan) v The Secretary of State for the Home Department* [2011] EWCA Civ 1284, which suggests that such cases should be adjourned and if necessary removed from the detained fast track unless it is pointless to do so.

5. Alternative to detention (for children)

The UK Border Agency announced in August 2011, that it would reduce the notice of removal given to families from five working days to 72 hours⁶; this shorter timescale makes it more difficult for them to access legal representation. At the same time the Government announced the opening of “pre-departure accommodation” for “the least compliant families”, at the Cedars, a hostel/hotel facility near Gatwick airport. ILPA is concerned about access to legal advice and representation, given the centre’s remote location. ILPA is also concerned about the lack of published criteria for selecting families for this accommodation.⁷

6. Detention of adults

ILPA is concerned about the effect of detention on adults who are trafficked, survivors of torture or have mental health problems and on women who are pregnant. In December 2011, the UK Government-appointed Chief Inspector of Prisons published his report on an inspection of the immigration removal centre at Yarl’s Wood and found “*Too many pregnant women, who should only have been held in exceptional circumstances, were detained in the centre*”⁸. ILPA concurs with his suggestion that this is in part due to poor UK Border Agency decision-making when UK Border Agency officials carry out periodic reviews of detention.

ILPA members are frequently referred detained clients who are at particular risk for the reasons described above. In many instances it is only possible to secure their release after threatening or bringing a public law challenge to the lawfulness of detention, a “judicial review” in the UK High Court. Recent examples include a survivor of torture from Iran who attempted suicide at the Brook House detention facility, and was then transferred to another facility, and numerous examples of persons detained at Colnbrook and Harmondsworth Immigration Removal Centres with diagnosis of a psychotic illness such as paranoid schizophrenia.

The UK Border Agency’s previous policy was that people suffering from a serious illness should only be detained in exceptional circumstances. This changed in August 2010 so that such people can be detained, if their serious mental illness can be “managed” in detention, making it more difficult to challenge the detention of

⁶ See *Judicial Review and Injunctions*, UK Border Agency, undated, available at http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter60_11012010.pdf?view=Binary

⁷ See also the briefing from the Refugee Children’s Consortium, a coalition of UK non-Governmental organisations working with refugee children, *Current situation around immigration detention of children and the new family returns process* of 16 September 2011, available at <http://www.biduk.org/757/news/refugee-childrens-consortium-briefing-current-situation-around-immigration-detention-of-children-the-new-family-returns-process-sept-16th-2011.html>

⁸ *Report on an announced inspection of Yarl’s Wood Immigration Removal Centre 4–8 July 2011* by HM Chief Inspector of Prisons, available at <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/yarls-wood-2011.pdf>

mentally ill. There continue to be a number of judicial reviews challenging the detention of those with serious mental health problems.

7. Detention and treatment of people with HIV

The Rapporteur is referred to a report by the non-Governmental organisation Medical Justice which has documenting the difficulties faced by persons with HIV in detention, such as in getting their medication regularly and confidentially.⁹

In ILPA's view the detention of people with HIV raises potential breaches of Article 7 of the International Covenant on Civil and Political Rights, the right not to be subjected to torture or to cruel, inhuman or degrading treatment and Article 17, the protection against arbitrary and unlawful interference with private and family life, as well as the equivalent provisions of the European convention on Human Rights, Articles 3 and 8.

8. Detention of disabled migrants

ILPA considers that the UK Border Agency should review its policies in relation to the detention of disabled people and improve its initial assessment process to ensure compliance with its duties under section 49B of the Disability Discrimination Act 1995 and its duties under the UN Convention on the Rights of Persons with Disabilities. Detention facilities and staffing are not properly adapted to the needs of disabled migrants, particularly those with mobility problems.

Case Study

In September 2009, a man with achondroplasia (restricted growth) who is one metre tall was transported in a van for nine hours on a metal seat, his legs dangling, resulting in him needing emergency spinal surgery and being further disabled. He was released to hospital for 2 years. In September 2011, he was detained again at Harmondsworth Immigration Removal Centre where there was no adapted shower or suitable lavatory so he was not bathed for a month. He could not transfer out of the bed which was too high so he had to use a bed pan and sleep on soiled sheets. He was transferred back to hospital after a month because the detention centre could not meet his needs, but was only released after a judicial review. He is now in a residential care home (*Humayoun v Secretary of State for the Home Department* on-going judicial review).

9. Inadequate access to medical treatment

In ILPA's experience, detainees do not benefit from access to healthcare equivalent to that which they would receive in the community, although this is provided for under domestic law. The case study below is one of many examples where UK has not met international obligations in relation to the right to health. A specific concern is the change in UK Border Agency policy to allow detention of people with serious mental health needs, which has not been matched by adequate psychiatric

⁹ *Detained and Denied The clinical care of immigration detainees living with HIV*, Medical Justice, 2011, available at <http://www.medicaljustice.org.uk/images/stories/reports/detained%26denied.pdf>

provision.¹⁰ It appears there is currently little or no psychiatric provision at Brook House and Harmondsworth, where persons in immigration detention are held.

Case study

RD was released from detention in 2008 because he had a diagnosis of paranoid schizophrenia and could not be removed. He was re-detained in February 2011 after he broke a window in an immigration office (for which he was prosecuted; the criminal trial resulted in a conditional discharge). He was held at Brook House for six months with no psychiatric treatment. He was then transferred to Harmondsworth Immigration Removal Centre and told there was no psychiatrist there. An independent psychiatrist instructed by his lawyer advised that his condition was worsening and he needed anti-psychotic medication. At a court hearing in September 2011, the Home Office agreed to use its best endeavours to assess and treat his mental illness. No treatment was provided. On one occasion when he asked for treatment, he was placed in isolation. His request to be transferred to a centre with mental health provision was refused. Eventually, at the end of November 2011 he was transferred to Colnbrook Immigration Removal Centre where he is seen once a week by a psychiatrist and was prescribed medication. The independent psychiatrist returned to see him in December 2011 and found his condition had worsened so he lacked mental capacity and needed to be transferred to a psychiatric hospital. At the time of writing, he remains in detention; the judicial review seeking his release continues.

Conclusion

ILPA welcomes the Rapporteur's investigation. We should provide further evidence on any of the above points if it would assist. We should also be keen to work with the Rapporteur and the UK authorities to support implementation of the Rapporteur's recommendations on these issues.

Sophie Barrett-Brown
Chair
ILPA
30 January 2012

¹⁰ The document change is the Enforcement Guidance and Instructions, paragraph 55.10, available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary>