

IMMIGRATION EXPECTATIONS CONSULTATION

ILPA RESPONSE

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. 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.

ILPA's experience of the detention estate is of representing persons in, liable to or released from detention, including persons seeking asylum, documented and undocumented migrants, EU nationals and even British citizens in cases involving bail, asylum/immigration and judicial reviews of the legality. 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.

We regret that during the period of this consultation, pressure of other work has limited the time we have been able to spend in responding to it. We have had the advantage of reading Bail for Immigration Detainee's response to this consultation and should like to echo and endorse the concerns BID expresses about producing "expectations that where possible focus more on outcomes and less on process" and about reducing the number of expectations and shortening inspection reports to make them more accessible.

Outcomes based regulation does not always focus on whether what is being done is in accordance with the law or not. The Supreme Court in *Walumba Lumba Congo v SSHD* [2011] UKSC 12 held

"The causation test entails the surprising proposition that the detention of a person pursuant to a decision which is vitiated by a public law error is nevertheless to be regarded as having been lawfully authorised because a decision to detain could have been made which was not so vitiated. In my view, the law of false imprisonment does not permit history to be rewritten in this way."

An outcomes-based approach might have concluded that since there was a power to detain the persons, albeit not the power used, their detention was not objectionable. As for the power to detain, so for the treatment of those who are detained. Standards reflect safeguards there to protect persons against what might happen and

poor treatment is not justified retrospectively because it caused less harm than it might have done. ILPA's first concern is whether the UK Border Agency and its subcontractors are acting lawfully and establishing this necessitates looking at standards and process and necessitates going into detail. Many of our observations relate to the mechanics of process. These are an essential part of placing emphasis on considering the detainee as an individual and identifying and considering his/her specific needs.

We wholeheartedly support Her Majesty's Chief Inspector of Prisons in inspecting to its own standards, based on international human rights norms and the provisions of domestic law rather than monitoring whether the UK Border Agency adheres to the standards it has set itself without considering the adequacy of such standards. We recognise however that this is in compatible with taking note of whether the Agency has complied with the standards it sets itself, for example in Detention Service Orders (DSOs).

ILPA made a submission to the UN Special Rapporteur on Human Rights of Migrants in January 2012 highlighting some of the overarching concerns we have about immigration detention and some of the apparent systemic failings in the system.¹ While recognising the limits of the remit of Her Majesty's Chief Inspector of Prisons we consider that our concerns about matters within that remit must be placed within the context of our concern about the inappropriate use and the overuse of detention.

Home Office immigration statistics for the third quarter of 2011 show a further increase in the use of detention, with 6834 people detained in that quarter.² They record 30 children detained.³ As set out in Chapter 55 of the UK Border Agency Enforcement Guidance and Instructions, and as glossed by judgments, there is a presumption in favour of temporary admission or release and there must be strong grounds for believing that a person will not comply with conditions of temporary admission or release before detention is justified. All reasonable alternatives to detention must be considered before detention is authorised.⁴ Detention must be used sparingly and for the shortest period necessary. The policy recognises that those with a pending appeal or representations may have more incentive to comply with conditions of release and that it would detention should usually only be effected once appeal rights have been exhausted⁵.

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,

¹ ILPA Submission to the UN Special Rapporteur on the Human Rights of Migrants: Immigration Detention, 30 January 2012, available at http://www.ilpa.org.uk/data/resources/14148/12.01.30-ILPA-to-UN-Special_Rapporteur_Human_rights_migrants-detention.pdf

² Immigration Statistics July September 2011, Home Office, available from <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigrationasylum-research/immigration-q3-2011/>

³ *Ibid.*

⁴ *Shepherd Masimba Kambadzi v SSHD* [2011] UKSC 23, Paragraph 55.3.

⁵ Chapter 55.1.3.

such as Somalia⁶. As well as the number of persons detained, ILPA is concerned about 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).

As to matters within the remit of Her Majesty's Inspectorate of Prisons, we highlight four overarching concerns.

1. Access to legal representation

With an increase in the detention estate comes an increase in the number of persons seeking legal representation. Detainees, especially those in prison service establishments, are not best placed to look for a legal representative. In the case of immigration removal centre the Legal Services Commission funds surgeries in the detention centres. However, ILPA and others continue to receive regular reports of persons who have been unaware of a surgery in their place of detention, or unable to secure an appointment, either because they do not know of the surgery at all, or because they do not know where to book. ILPA members, including those who do not do detained work at all but specialise in corporate immigration matters very regularly receive requests for legal representation from detained persons, as does the ILPA Secretariat. We refer you to ILPA's 2007 response to Her Majesty's Chief Inspector of Prisons' consultation on potential topics for thematic reports⁷ in which we highlighted legal advice on immigration to detainees as a potential topic for a thematic report. All the concerns we highlighted in 2007 remain concerns today.

The 2010 Legal Aid contract provisions on who can represent those detained in immigration removal centres further limit access to legal representation, restricting it, subject to exceptions, to firms with a contract for surgeries in a particular centre.⁸

2. Detention of Children

Although the UK Government announced that it intended to end the detention of children in December 2010 following a review,⁹ children continued to be detained. Minors whose age is disputed by the UK authorities continue to be detained if there is an assessment by the local authority that they are 18 or over. Families held at Cedars at Pease Pottage are detained. ILPA opposes the detention of children and urges that Her Majesty's Inspectorate of Prisons subject the conditions of such detention to intense scrutiny.

⁶ See the decision of the European Court of Human Rights in *Sufi and Elmi v UK*, applications of Applications 8319/07 and 11449/07, judgment of 28 June 2011

⁷ Available at <http://www.ilpa.org.uk/data/resources/13017/10.09.510.pdf>

⁸ Legal Services Commission, 2010 Standard Civil Contract – Specification, Section 8 Immigration Specification, Part E. Available at http://www.legalservices.gov.uk/docs/civil_contracting/Section_8_-_Immigration_-_Dec_09.pdf

⁹ See the UK Border Agency documents on its Review into ending the detention of children for immigration purposes, available from <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/26-end-childdetention/>

3. 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. In addition there are concerns about people not receiving prescribed medication that they were taking prior to detention or having their prescription changed. Expectations should ensure that this can be examined closely.

A specific concern is the change in UK Border Agency policy¹⁰ to allow detention of people with serious mental health needs, a change to which ILPA is opposed. The change has not been matched by attempts at adequate psychiatric provision. This affects both the individuals concerned and those held in the same detention centres and the needs of both should be reflected in the expectations.

We refer you to the report *Detained and Denied: The clinical care of immigration detainees living with HIV*, Medical Justice, 2011.¹¹ We urge that expectations draw on the recommendations contained in those reports, in particular as to screening for HIV and availability of medication.

4. Detention of persons with disabilities

The UK Government has announced that it is to maintain its reservation to the UN Convention on the Rights of Persons with Disabilities in respect of persons under immigration control.¹² The Inspectorate is not so constrained and should take into account the standards set in the Convention in developing its expectations.

Detention facilities and staffing are not properly adapted to the needs of persons with disabilities, particularly those with mobility problems, but such persons continue to be subject to immigration detention. The expectations should reflect the provisions of the Equality Act 2010 and monitor compliance with all relevant disability legislation.

COMMENTS ON THE EXPECTATIONS

General

To ensure an appropriate and effective audit and inspection process those inspected should keep accurate and detailed records. Members frequently encounter difficulties in obtaining such records and inadequate written evidence and/or detailed consideration of key events, even when these are required to be produced for the purposes of litigation. It is essential that the expectations set standards for record keeping.

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>

¹¹ Available at <http://www.medicaljustice.org.uk/images/stories/reports/detained%26denied.pdf>

¹² HC Report 22 Mar 2012 : Column 74WS

Any reference to risk assessment throughout the expectations should be preceded with the word “*written.*”

General Immigration Detention Expectations

ILPA has had the advantage of reading the response of Bail for Immigration Detainees on these expectations and we endorse BID’s comments and recommendations. ILPA’s additional comments are set out below.

We echo the growing concern regarding detainees most at risk of harm and the standard of treatment and care received by detainees. These concerns are borne out by the most recent Inspectorate of Prisons report on Harmondsworth.¹³

Section I Safety

Escort vehicles and transfers

Indicators (for Expectation 1. Detainees travel in decent conditions during escort and are treated with respect.)

We suggest an additional indicator relating to night time moves:

- *The reason or reasons for night time moves are properly recorded in writing*

Whilst women and children are included in the indicators at bullet point 5 the provision of emergency and special supplies should be made available to all detainees according to need and particular care should be taken to ensure that, where such persons are detained, those suffering ill-health, with a disability and/or with mental health problems have provisions adequate to their needs.

Expectation 3

The expectation and the indicators should be the same as those adopted in relation to detainees in short term holding facilities namely -:

3... where they are going, **why they are being transferred** and what to expect when they arrive.

Often the reason for transfer is what a detainee is most concerned about.

Indicators

- *Sending establishment and/or escort staff have knowledge of the receiving facility.*

¹³ Unannounced full follow-up inspection of Harmondsworth Immigration Removal Centre, Her Majesty’s Chief Inspectorate of Prisons, published 11th April 2012

This will be the only way to ensure that a detainee can be advised what to expect on arrival.

Indicators (for Expectation 5. Detainees are treated with respect on arrival at the centre)

These include as an indicator the provision of information. Booklets should be provided as part of the induction pack and handed out in the reception area and notices should be displayed in all areas of the centre.

Prescribed medication should be continued unless there is a recorded medical requirement to change it. If a detainee arrives in possession of prescription medication this indicates a previous medical assessment and the status quo should be maintained unless there is a medical need to change or stop the medication.

Indicators (for Expectation 7. Detainees understand the centre's routines and how to access available services that will help them cope with detention.)

Accessing available services is important during the initial period in detention. Within the induction indicators when dealing with services "such as visits, access to immigration staff..." "the existence of the Independent Monitoring Board and how to get in touch with a member of the Board" should also be added.

Sources of help in the final indicator should include "legal advice".

Bullying and Violence Reduction

Expectation 8 Detainees feel and are safe from bullying and victimisation from other detainees and staff through a clear and coordinated multidisciplinary approach.

It is worth considering drawing on the prison service's mechanisms for managing violence reduction¹⁴ which include challenging each individual and providing targets to improve behaviour. We therefore suggest an additional indicator:

- *Interventions provide clear and suitable targets for individuals to work towards to change behaviour*

Safeguarding (protection of adults at risk)

Expectation 12: Detainees, particularly adults at risk, are provided with a safe and secure environment which protects them from harm and neglect. They receive safe and effective care and support.

The indicator on the review of care plans requires a more prescriptive indicator than that currently drafted and the relevant indicator should read

¹⁴ Prison Service Office 2750

- Care plans are thorough and reviewed regularly ,involving staff *and appropriately qualified medical and care practitioners from an appropriate range of specialisms* relevant to the detainee’s needs.

We consider that the qualification “Where possible” in the indicator “Where possible, access to advocates and/or appropriate adults is in place to aid detainees’ capacity to understand and consent” is not helpful. Good practice should include referral to an advocate and/or appropriate adult with any decision not to make such referral (which we find difficult to imagine) recorded in writing with reasons.

Safeguarding children

Expectation 13 Children are properly protected in a safe environment. All staff safeguard and promote their welfare.

ILPA does not consider that detention is ever a safe environment for children.

Expectation 14 Detainees who claim to be under 18 are promptly assessed by social services and properly cared for while in the centre.

We are concerned that the expectation envisages such detainees remaining in the centre.

The UK Border Agency Enforcement Instructions and Guidance ¹⁵ provide that the UK Border Agency will accept a person (including a person who has previously claimed to be an adult) as under 18 unless one or more of the following criteria apply:

- there is credible and clear documentary evidence that they are 18 years of age or over;
- a full “Merton-compliant” age assessment by Social Services is available stating that they are 18 years of age or over. (Note that assessments completed by social services emergency duty teams are not acceptable evidence of age);
- their physical appearance/demeanour **very strongly** indicates that they are **significantly** over 18 years of age and no other credible evidence exists to the contrary.

Note that the Guidance provides that the exception only applies if a full Merton assessment “is available “rather than “will be available promptly”.

The Guidance goes onto indicate in the same subsection that “In borderline cases it will be appropriate to give the applicant the benefit of the doubt and to deal with the applicant as a child.”

These set a minimum standard and ILPA has repeatedly expressed concerns that the approach outlined at the final bullet point is not followed in practice.

¹⁵ Para 55.9.3.1

We therefore suggest that the expectation be amended to read:

14. Detainees who claim to be under 18 are released immediately into appropriate care unless it is established that they are over 18.

The means by which this has been established should be recorded in writing and retained on file.

Consideration should also be given to the appropriate notifications that a person the subject of an age dispute is in the centre. These should be the subject of an expectation. Social Services should be notified at once and In addition, the Independent Monitoring Board and the Refugee Council Children's Panel should be notified and the person should be assisted to obtain legal advice and representation. We suggest that an additional indicator should be added:

Security

ILPA echoes the concerns expressed by Her Majesty's Chief Inspector of Prisons in the latest report on Harmondsworth immigration removal centre¹⁶ that

"The prison-like design of the new units is regrettable and such an environment will always be unsuitable for people held under immigration powers"

Immigration Removal Centre facilities which create prison-like conditions for detainees do not meet with the requirement in Expectation 15 that "security is proportionate". The inspection process should identify where the security is overbearing or inappropriate. Indicators should be devised to allow the regime as a whole, including the physical layout of buildings, to be assessed.

Legal Rights

Indicators (for Expectation 19: Detainees are supported by centre staff to freely exercise their legal rights)

As indicated in the introduction to these submissions we consider that access to legal representation on immigration is an area where there are extensive and long-standing problems. We share all BID's concerns about access to surgeries.

A person arriving in detention has much to absorb and oral explanations should be supported by written information. Thus we suggest amending the second indicator to read

- *During the induction process detainees are provided by UK Border Agency staff with written information in a language they understand setting out their appeal and bail rights and how to access competent and regulated legal representation. This is backed up with oral explanations by UK Border Agency Staff of these rights and of how to access such legal representation, in a language the detainee understands, within 24 hours.*

¹⁶ Unannounced full follow-up inspection of Harmondsworth Immigration Removal Centre, Her Majesty's Chief Inspectorate of Prisons, published 11th April 2012

Lessons might usefully be learned from the prison system of allocated personal officers. This would give the detainee a point of contact for seeking or obtaining information, forms and explanations or re-explanations of where to obtain advice and assistance. Therefore we would suggest a further indicator (possibly under Expectation 6) as follows:-

- *Each detainee is allocated a personal officer within 24 hours and retains a personal officer throughout their detention.*

Casework

To meet Expectation 21 “Detainees understand why they are detained. The reasons are clearly communicated and effectively reviewed” the detainee should have access to independent legal advice and representation and this should be reflected in the indicators.

Given the on-going concerns regarding the quality of Rule 35 reports the indicator dealing with this should read -:

- Initial Rule 35 reports are written by *appropriately qualified* healthcare professionals, are comprehensive and provide an assessment of the impact of detention

Section 2: Respect

We concur with the detailed submission prepared and submitted by BID.

Complaints

Indicators (for Expectation 21 Detainees have confidence in complaints procedures which are effective, timely and well understood.)

Complaints handling must be prompt. We are aware of the danger that any time limits mentioned are taken as minima, rather than maxima, but question whether nonetheless it is worth including some timescales for acknowledgment of a complaint or other stages? We are undecided on this point.

Indicators (for Expectation 22 Detainees feel safe from repercussions when using complaints procedures and are aware of an appeal procedure)

As ensuring that staff at an appropriate level deal with the investigation of a complaint, avoidance of the appearance or potential for bias should be a further safeguard. Consideration should be given to including a requirement of independence on the part of those investigating complaints. Appeals should always be to a person independent of the management chain in which the person or persons complained of sit. Detainees are particularly at risk and most likely to be deterred from making a complaint because of fear. They therefore need to benefit from the highest possible safeguards.

Health Services

We concur with the detailed submission prepared and submitted by BID. The standard of health care provision is an area of grave concern.

The only additional observation we would make relates to **Expectation 23** which should be amended to read

“23 Detainees are cared for by a health service that properly assesses and meets their health needs and which promotes continuity of health and social care on release.”

This would provide a standard by which the inspection process can evaluate the quality of assessment.

Family Detention Expectations

ILPA is a member of the Refugee Children’s Consortium and we endorse the comments of the consortium on the Family Detention Expectations, which are also repeated in comments of Bail for Immigration Detainees on these expectations.

In addition, in section 1, Safety, Escort vehicles and transfers, we suggest that it will rarely if ever be justified on the basis of risk assessments to use vans to transport families. Therefore bullet point 2 should be replaced with the following indicators:-

- *Families are not held or transported in vans for any period except in exceptional circumstances and then only where this is necessary for reasons set out in a written risk assessment deems it necessary*
- *Reasons for placing or transporting families in vans are recorded and held on file.*

Short-term holding facility expectations

Section I: Safety

Escort vehicles and transfers

Expectation

- I. Detainees travel in decent conditions during escort and are treated with respect.**

We consider that the words ‘**and appropriate**’ should be added between the words ‘decent’ and ‘conditions’ in the expectation. This would create a need to consider the individual circumstances of the detainee at an early stage and ensure that the expectations relate not only to the condition but also to the type of vehicle.

Indicators

We suggest the following amendments and additions:

- *Detainees are transported in appropriate vehicles and held in vans only when a written security assessment sets out, with reasons, that this is deemed necessary.*

- *Reasons for movements around the detention estate and/or night time moves are recorded in writing.*

Expectation

2....individual needs are recognised, **properly assessed** and given proper attention.

Setting out the expectation that assessment is required is a useful tool in monitoring, and thereby, it is to be hoped, improving, standards of initial treatment.

Indicators

These could usefully be more detailed. We suggest:

- *Handcuffs are only used if justified. The justification and the reasons for it are set out in an individual written risk assessment*
- *Handcuffs are not be used on any person assessed as being under 18 or the subject of an age dispute*
- *Records and processes comply, as a minimum standard, with DSO 13/2011*

Expectation

3. ...where they are going, **why they are being transferred** and what to expect when they arrive.

Often the reason for transfer is what concerns a detainee most.

Indicators

We suggest the addition of:

- *Sending establishment and/or escort staff have knowledge of the receiving facility.*

This is the only way to ensure that a detainee can be advised what to expect on arrival.

Arrival

We do not consider that a distinction should be made between detainees in short term holding facilities and other detainees for the purposes of first night monitoring. Often the shock of detention is as great, in some circumstances greater, for those who have been living within the community have an established family life. First night monitoring for all detainees is good practice.

Indicators (for Expectation 5: Detainees are treated with respect on arrival at the facility)

- Translated information is provided *in booklet form directly to the detainee, notices which are prominently displayed and DVDs which are made readily available. These give details of the facility and procedures...*

There have been many reports that while information existed, detainees were not given it or were not directed to it and found it only, if at all, by chance or thanks to supportive fellow detainees.

Bullying and personal safety

Indicators (for Expectation 6: Detainees feel and are staff from other detainees and staff)

- Clear rules setting out expected standards of behaviour.....readily available *and are provided at induction.*

These can form part of an induction pack.

Self-harm and suicide prevention

Expectation

7. The facility provides a safe environment **and proper system of monitoring** which reduces the risk of self-harm and suicide.

This area is governed by Detention Service Order 04/2006. However, this detention service order is extremely short and relates to the communication of relevant documents confirming a concern regarding risk of self-harm.

Safeguarding children

Indicators (for Expectation 9. Children are properly protected in a safe environment. All staff safeguard and promote their welfare.)

- Staff are aware of their duty to raise concerns ... *and the procedure by which to do this.*

The word 'legitimate' should be removed from before 'concerns.' The staff member should be reporting concerns expressed to them, not judging these.

Staff need to be clear about how to report so that they are able to do so rapidly at a time when they may feel under extreme pressure. It is good practice to provide staff with information on both the extent of their duty and how it can be discharged.

Use of force

Indicators (for Expectation 10. Detainees are only subject to force which is legitimate, proportionate, used as a last resort and for no longer than necessary.)

- Handcuffs are only used where there is evidence to support their use and with the proper authority. *The reasons for use are properly recorded and documented.*

Legal Rights

Indicators (for Expectation 11. Detainees are supported by the facility staff to freely exercise their legal rights.)

- *Centres provide adequate facilities to accommodate legal visitors in both urgent and non-urgent cases.*

This is important to ensure that adequate provision is made for surgeries. There have been reports that private contractors have struggled to get the funding from the UK Border Agency to provide adequate staff to extend visiting times where necessary.¹⁷

Casework

Indicators (for Expectation 12. Detainees understand why they are detained. The reasons are clearly communicated and effectively reviewed.)

- Detainees have received written individual reasons for their detention...*at the point of detention*

This is a legal requirement as set out in the Detention Centre Rules 2011 (SI 2001/238). See also Article 5 of the European Convention on Human Rights.

Section 2: Respect

Equality and diversity

Indicators (for Expectation 3. Staff promote a respectful and safe environment, in which each of the distinct protected characteristics of detainees is recognised and addressed with respect and dignity.)

- All protected characteristics are recognised, *recorded* and addressed.....

Indicators (for Expectation 4. Detainees of all groups are treated equitably and according to their individual needs.)

- Professional *independent* interpretation is used with detainees who are not fluent in English

Section 4: Preparation for removal and release

¹⁷ At an Independent Monitoring Board meeting with centre staff at Harmondsworth –July 2011

Indicators (for Expectation 2. Detainees are helped to prepare for their release, transfer or removal)

- Detainees being removed should be given *written* information in a language they *understand* about sources of support in their destination country.

This can assist in resolving problems at the earliest possible stage.

Indicators (for Expectation 3. Detainees who are to be removed or released are treated sensitively and humanely. Detainees are able to retain or recover their property.)

Access to property, especially money, may assist resettlement in country of origin. The prospect of losing reference numbers required, points of contact and property in transit is greater the longer after removal the transfer of property remains unresolved. Therefore the suggested amendments to encourage better practice are:

- Systems are in place to arrange for *all retained* property and any private cash that the detainee does not carry with them to be *returned to them on arrival at destination or as soon as possible thereafter*. Detainees being removed have basic clothing, suitable to climate to which they are going, *and toiletries...*

Alison Harvey
General Secretary
ILPA
11 April 2012