Review of the welfare in detention of vulnerable persons
Submission of the Immigration Law Practitioners' Association

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association the majority of whose members 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 committees, including Home Office, and other consultative and advisory groups. ILPA is currently represented in the meetings with the Home Office convened pursuant to the *Detention Action* litigation on the detained fast-trackILPA has also been, and is, represented at related meetings with the Home Office on asylum screening; on Rule 35 of the Detention Centre Rules, the rule pertaining to reports by medical practitioners in detention centres; on the Home Office guidance pertaining to reports by the Helen Bamber Foundation and by Freedom from Torture; on equality, including LGBTI and disability discrimination; on detention and enforcement generally and on human trafficking. ILPA is also represented at meetings with the Legal Aid Agency where the provision of legal advice in detention centres is discussed.

1. Terms of reference of the review

ILPA has protested the terms of the review to the Minister of State:

> *The terms of reference of the review specifically exclude the decision to detain. Unless the review includes the decision to detain, the UK will continue to breach the human rights of persons in detention, causing them acute pain and suffering, which in some cases amounts to torture, inhuman or degrading treatment or punishment.*
>
> *All persons in immigration detention are vulnerable to abuse and to ill-treatment. They are hidden from view, isolated and powerless. To suggest that only the pregnant or ill are 'vulnerable' is fundamentally to misunderstand the power relationships that underlie immigration detention.*
>
> *We cannot overstate the gravity of the situation the review confronts.*

Even if this review is not permitted to impugn the decision to detain, it can examine processes within detention centres which ensure that law and policy in this area are respected. It can highlight where appropriate recommendations cannot be formulated because persons are in detention who are not supposed to be there.

There is a presumption of release, with all alternatives considered before detention is authorised, and detention is for the shortest possible time.[1] This requires that the necessity of detention be kept under constant review and that factors militating against detention are identified, highlighted, recorded and transmitted to inform future reviews of detention. **This review should look for evidence that that is done.**

Paragraph 55.10 of the Home Office Enforcement Instructions and Guidance states:

> *The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:*
> - *those suffering from serious mental illness which cannot be satisfactorily managed within detention (in C[riminal] C[asework] D[epartment] cases, please contact the specialist Mentally Disordered Offender Team). Enforcement Instructions and Guidance 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 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;*
> - *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.*

The review should examine the size of each cohort within the detention estate and the minimum, maximum, mean median and mode of the length of detention of each, with those whose detention is ongoing identified and the length of their detention recorded separately.

2. Containing, resisting and defeating improvement

The UK's failings are known and extremely well-documented, having repeatedly been brought to the UK Government's attention by inspectorates appointed for the purpose and through legal challenges. Yet the UK detention system continues to fail by its own standards and by the standards of international law, which have been collected in the Bingham Centre's *Immigration and the Rule of Law: safeguarding principles.*[2]

[1] Enforcement Instructions and Guidance, 55.1.3., 55.3.
[2] Michael Fordham QC, Justine N Stefanelli, Sophie Eser, British Institute of International and Comparative Law, June 2013. Available at (accessed 29 May 2015): http://www.biicl.org/binghamcentre/activities/immigrationdetention/final_documents/ (accessed 7 October 2014).

The review needs to isolate how the UK system has been so successful at containing, resisting and defeating improvement and propose how this can be overcome as a precursor to making any recommendations for change.

2.1 Chronology of examples of failings

July 2005 Stephen Shaw CBE, Prisons and Probation Ombuds, Inquiry *into allegations of racism and mistreatment of detainees at Oakington immigration reception centre and while under escort*

> *What was revealed by the BBC programme Detention Undercover: The Real Story was a sub-culture of abusive comment, casual racism, and contempt for decent values.*
>
> *…over 100 staff employed by Non-Governmental Organisations (NGOs), many of them philosophically opposed to the very notion of immigration detention, are actually located on the Oakington site to provide services to the detainees. This report explores how an institution subject to such a high level of independent scrutiny could have harboured unseen a sub-culture of such nastiness.*
>
> *I have concluded that ridding the immigration removal process of the abuses catalogued by the BBC requires action on three dimensions. Management must be more robust and better focussed. Monitoring must be enhanced and better informed. And the moral resilience of all those who work as detention and escort staff must be further encouraged through training, personal example, and ease of access to 'whistleblowing' and other arrangements.*

2006 *R (Karas and Miladinovic) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin), Munby J

> *I am driven to conclude that the claimants' detention was deliberately planned with a view to what in my judgment was a collateral and improper purpose – the spiriting away of the claimants from the jurisdiction before there was likely to be time for them to obtain and act upon legal advice or apply to the court. That purpose was improper. It was unlawful.*

2010 *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453 (27 April 2010)[3]

Award of exemplary damages against the Home Office by the High Court, following the unlawful detention of a Dutch national for a period of three months:

> *73. The junior officials acted in an unconstitutional and arbitrary manner that resulted in the imprisonment of Mr Muuse for over three months. The outrageous nature of the conduct is exhibited partly by the way in which they treated Mr Muuse and ignored his protests that he was Dutch, partly by the manifest incompetence in which they acted throughout and partly by their failure to take the most elementary steps to check his documents which they held [...].*

[3] http://www.bailii.org/ew/cases/EWCA/Civ/2010/453.html

74. However, though it is more than sufficient to uphold the decision of the judge to award exemplary damages on the basis of this high handed and outrageous arbitrary conduct of the junior officials, it would not be fair to those officials to say nothing of the system that allowed this to happen. That system was the responsibility of the Home Secretary and his senior officials [...].

75. The decision to make an award of exemplary damages was moreover a good example of the type of case referred to by Lord Devlin in Rookes v Barnard at page 1223 where its effect will serve "a valuable purpose in restraining the arbitrary and outrageous use of executive power". There has been no Parliamentary or other enquiry into Mr Muuse's case. No Minister or senior official has been held accountable. We were not told of any internal or other enquiry conducted by the Permanent Secretary or Head of the Immigration Directorate (or as it now is the UK Border Agency). The only way in which the misconduct of the Home Office has been exposed to public view and his rights vindicated is by the action in the High Court.

[...]

77. Given the absence of Parliamentary accountability for the arbitrary and unlawful detention of Mr Muuse, the lack of any enquiry and the paucity of the measures taken by the Home Office to prevent a recurrence, it is difficult to see how such arbitrary conduct can be deterred in the future and the Home Office made to improve the way in which the power to imprison is exercised other than by the court making an award of exemplary damages. The making of such an award, as Lord Hutton observed in Kuddus, also serves to vindicate the strength of the law. It further demonstrates that the award of punitive damages under the common law has a real role in restraining the arbitrary use of executive power and buttressing civil liberties, given the way the United Kingdom's Parliamentary democracy in fact operates.

2011 *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin)

First of a series of cases[4] in which the Home Office has been found to have breached detained mentally ill persons' rights under Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman and degrading treatment and punishment. Cases continue to progress through the system

***R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (5 August 2011)**

Home Office found to have breached detained mentally ill man's rights under Article 3 of the European Convention on Human Rights.

[4] (All accessed 23 May 2015). *R (S) v* Secretary of State for the Home Department [2011] EWHC 2120 (Admin) (5 August 2011), http://www.bailii.org/ew/cases/EWHC/Admin/2011/2120.html; *R (BA) v* Secretary of State for the Home Department [2011] EWHC 2748 (Admin) (26 October 2011) (http://www.bailii.org/ew/cases/EWHC/Admin/2011/2748.html;*R (HA) v* Secretary of State for the Home Department [2012] EWHC 979 (Admin) (17 April 2012), http://www.bailii.org/ew/cases/EWHC/Admin/2012/979.html; *R (D) v* Secretary of State for the Home Department [2012] EWHC 2501 (Admin) (20 August 2012), http://www.bailii.org/ew/cases/EWHC/Admin/2012/2501.html; *R (S) v* Secretary of State for the Home Department [2014] EWHC 50 (28 January 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/50.html; *R (MD) v* Secretary of State for the Home Department [2014] EWHC 2249 (Admin) (8 July 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/2249.html

"subsequent reviews failed to grapple with the need to understand and apply the policy requirement of exceptional circumstances, to recognise properly S's mental condition and to consider properly objective evidence as to the effect of detention on it." S was detained despite a clear (and documented) history of severe mental illness, and contrary to the clear expert advice of a number of mental health professionals"

***R (Lumba) v SSHD* [2011] UKSC 12, [2011] 2 WLR 671**

The Home Office had acting unlawfully in operating a blanket policy and in operating a secret policy. There had been a deliberate decision not to publish the hidden policy (Lord Dyson §164, Lord Collins §220). The secret policy was known to be at least vulnerable to legal challenge; it was known that it did not accord with the published policy and it was felt to be convenient to blame the courts if the policy were found unlawful (Lord Dyson §§164, 166). Caseworkers gave inaccurate reasons for detention – (Lady Hale §205, Collins §220). There was evidence to support the submissions that the Home Secretary and/or officials knew or were reckless as to the fact that their actions were unlawful , preferring for political reasons to leave it to the courts to remedy the illegality (Lord Dyson §155). It was a '*serious abuse of power'* and *'deplorable'* (Lord Hope §§175, 176, Lord Walker §§194, 195).

***Shepherd Masimba Kambadze* [2011] UKSC 23**

'…from April 2006 to September 2008 the Home Office applied an unpublished detention policy to all foreign national prisoners following the completion of their prison sentences pending their deportation. This followed the revelation on 25 April 2006 that during the past seven years over 1,000 such prisoners had been released from prison on completion of their sentences without being considered for deportation or deported. "Illegal migrants and paedophiles, a toxic mix. The tabloids will go bananas". The words of a contemporary diarist, Chris Mullin, Decline and Fall (2010), p 94, capture the atmosphere of disaster that was engendered among ministers by this announcement. A few days later Charles Clarke was removed from his post and was replaced on 4 May 2006 as Home Secretary by Dr John Reid. A practice of blanket detention was then instituted with a ruthless determination that precluded consideration of the merits of any individual case and was wholly at odds with the presumption in the published policy in favour of temporary admission or temporary release. It remained in place until November 2007 when it was replaced by another unpublished policy which permitted release only in exceptional circumstances. It was not until 9 September 2008 that a revised detention policy was published.'

2012 *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012)

Home Office found to have breached detained mentally ill man's rights under Article 3 of the European Convention on Human Rights

***R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012)**

Home Office found to have breached detained mentally ill man's rights under Article 3 of the European Convention on Human Rights.

2012 Report of the Chief Inspector of Prisons on Cedars[5] (in which families are detained):

> *HE.18 Substantial force had been used in one case to take a pregnant woman resisting removal to departures. The woman was not moved using approved techniques. She was placed in a wheelchair to assist her to the departures area.*
>
> *When she resisted, it was tipped-up with staff holding her feet. At one point she slipped down from the chair and the risk of injury to the unborn child was significant. There is no safe way to use force against a pregnant woman, and to initiate it for the purpose of removal is to take an unacceptable risk.*

2013 *Observer reports abuse of women in Yarls' Wood*
Women in detention have been subjected to abuse by the staff of centres.[6] It was suggested in those cases that an attempt was made to remove the victims from the jurisdiction before they could bring a case.

***R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin)**
'disturbing' evidence of systemic failures concerning the detention of survivors of torture.[7]

2014 *Report of unannounced inspection of Harmondsworth Immigration Removal Centre, Her Majesty's Chief Inspector of Prisons*[8]
Reported on an 84 years' old frail Canadian man suffering from dementia who died in detention in handcuffs having been kept handcuffed for five hours.

2014 *R(MD) V SSHD* [2014] EWHC 2249 (Admin)
Home Office found to have breached detained woman's rights under Article 3 of the European Convention on Human Rights including causing her to become gravely mentally ill.

3. Places of detention under review

3.1 Prisons

Lord Williams of Mostyn said in 1999:

> *Following David Ramsbotham's critical report, it is fair to say that the Government accepted the principle that no detainee ought to be kept in the prison regime. That cannot be brought about*

[5] Her Majesty's Inspectorate of Prisons, 23 October 2012.
[6] *Yarls' Wood affair is a symptom, not the disease*, Nick Cohen, The Observer, 14 September 2013.
[7] *R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin).
[8] *Report of unannounced inspection of Harmondsworth Immigration Removal Centre*, 2014, section 1, paragraph 1.3 available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf

> *overnight, but we accepted the principle immediately and there was not the slightest demur. David Ramsbotham was absolutely right, and we said so at the time*[9]

In 2002 Ministers claimed that the routine use of prison for immigration detainees had ended.[10] But this has changed. The Home Office Enforcement Instructions and Guidance now say

> *The normal expectation is that the prison beds made available by NOMS will be used to hold time-served F[oreign]N[ational]O[ffender]s* ***before*** *any consideration is given to transferring such individuals to the IRC estate.* [11]

Since 2008, the numbers of persons held in immigration detention have increased by 35%, excluding those detained in the prison estate, who are not counted in the statistics. There is now no bar on holding immigration detainees in prisons if there are spare beds there,[12] with no requirement to show that the individual poses any risk that means that s/e cannot be held in a detention centre. Individuals are held with convicted prisoners.[13] As of 26 August 2013, some 936 people, about a quarter of those detained, were held in prisons, 957 at the beginning of December 2013[14] and at the end of 2013 the figure was reported on separate occasions to parliament as both 850[15] and 1214 individuals[16]. Some prisons hold very many foreign nationals, others only a very small number. Litigation exposed that the Home Office had been operating an undisclosed, unlawful practice of detaining foreign national former prisoners on a blanket basis, without permitting officials to consider release in any circumstance[17].

As at 15 December 2014, the figures had fallen to 394 detainees held in prison establishments in England and Wales solely under Immigration Act powers as set out in the Immigration Act 1971 or UK Borders Act 2007[18]. The most recent statistics show 374 immigration detainees held in prison establishments at 30 March 2015. The fall in numbers may be explained in part by the reclassification of HMP The Verne as an immigration removal centre in September 2014, leading to detainees at The Verne, which had been used as prison housing 100% foreign nationals pending its designation as an immigration removal centre, being counted instead within the main immigration detention statistics. At the National Asylum Stakeholder Forum meeting on detention and enforcement, held on 07 January 2015, Ms Claire Checksfield of the Home Office stated that the numbers of detainees held in prisons was expected to remain at the level of around 400.

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[9] *HL Deb 19 July 1999 vol 604 cc693-724.*
[10] HC Deb, 27 January 2003, col 708W.
[11] At 55.10.1.
[12] Home Office *Enforcement Instructions & Guidance*, Chapter 55 at 55.10.1 Criteria for detention in prison.
[13] In *Thi Ly Pham v Stadt Scweinfurt* Case C-474/13. See also joined cases C-473/13 and C-514/13 *Adala Bero v Regierungspräsidium Kassel, Ettayebi Bouzalmate v Kreisverwaltung Kleve* it was held that *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third country nationals* must be interpreted as not permitting a Member State to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners even if the third-country national consents thereto. The UK has opted out of that Directive.
[14] HC Deb, 12 December 2013, c319W.
[15] HC Deb, 13 May 2014, c 461W.
[16]HC Deb 13 May 2014, c 459W.
[17] *R (Lumba) v SSHD* [2012] 1 AC 245.
[18] Home Office, Immigration Statistics Quarterly Release October – December 2014, at: https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2014/immigration-statistics-october-to-december-2014 (accessed 29 May 2015).

The then Chief Inspector of Prisons, Dame Anne Owers, said in her foreword to her Inspectorate's 2006 report *Foreign National Prisoners: A thematic review*[19]*:*

> *The third essential building block of provision is to ensure that all foreign nationals are prepared for their eventual removal or release. All of them need to know, as early as possible in sentence, whether or not it is proposed to deport or remove them. They need to have access to appropriate regimes: not only to reduce the risk of reoffending, wherever they are released, but also because safety, security and decency within prisons depend upon prisoners having access to purposeful activity.*

Those tests of safety, security and dignity are not being met in the cases of foreign nationals detained under Immigration Act powers whether in the prison estate or in immigration removal centres.

In the evidence disclosed in *R (on the application of AA (Nigeria)) v Secretary of State for the Home Department* [2010] EWHC 2265 (Admin) where the Judge at para 21 referred to an email from an official which stated that it was "impossible to find a space" for a severely mentally ill foreign national prisoner detained post sentence in a prison "in an Immigration Removal Centre because of the number of mentally ill detainees" in the estate, despite the Home Office's stated policy that the mentally ill should only be detained in "very exceptional circumstances".

The review should examine the situation of those held in prison service establishments and recommend that the detention of persons held under Immigration Act powers in prison service establishments cease. No person detained under Immigration Act powers should be subject to a prison regime, or held with convicted prisoners. The specific needs of those currently held in prisons should be considered.

The review should identify any other factors that affect the numbers of persons detained under Immigration Act powers held in prisons and would cause the numbers to change.

3.2 Short-term holding facilities

These facilities are defined in s 47 of the Immigration and Asylum Act 1999 (c. 33)[20] (*Removal centres and detained persons: interpretation*) as places for detention for a period of "not more than seven days or for such other period as may be prescribed" and persons other than detained persons for any period." Section 5 of the Immigration Act 2014 provides for unaccompanied children to be held in short-term holding facilities in specific circumstances for periods of up to 24 hours.[21]

[19] Her Majesty's Inspectorate of Prisons, July 2006.
[20] As amended by the Borders, Citizenship and Immigration Act 2009.
[21] S.5 Immigration Act 2014, at: http://www.legislation.gov.uk/ukpga/2014/22/section/5/enacted

While rules governing the regulation and management of short-term holding facilities were made in 2002[22] it took until 2006 for draft rules to appear, covering similar ground for short-term holding facilities as do the Detention Centre Rules for Immigration Removal Centres. In 2006 the Home Office consulted on draft rules[23]. ILPA responded[24]. In 2009 the Home Office consulted on another draft of the rules[25]. ILPA responded[26]. No rules have been published despite a number of freedom of information requests[27] and parliamentary questions since.

On 30 April 2012 at HC col 1086W, Dr Julian Huppert MP asked:

> *(2) for what reason the Short Term Holding Facility Rules that would apply to the Cedars secure pre-departure accommodation have not yet been published; which rules apply to the operation of the Cedars secure pre-departure accommodation; and whether the Cedars secure pre-departure accommodation may operate without published rules.*

The then Minister, Damian Green MP, replied:

> *The Short-term Holding Facility Rules remain under development at present[28].*

In October 2013, Lord Ramsbotham asked the Parliamentary Under-Secretary of State for the Home Office, Lord Taylor of Holbeach, when the rules governing short-term holding facilities would be published. Lord Taylor of Holbeach replied:

> *The draft Short-Term Holding Facility Rules have yet to be finalised and, as such, there is at present no fixed date for when they will be made."*[29]

Neither an apology nor an explanation was offered. On 03 March 2014, during the passage of the Immigration Bill, Lord Taylor of Holbeach gave a commitment that rules governing the management and operation of short-term holding facilities and the Cedars pre-departure accommodation would be introduced before the summer recess:

> *I am aware that there has also been a lack of legislative framework governing the operation of the short-term holding facilities. As has been pointed out by noble Lords, this has been a matter of*

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[22] The Immigration (Short-term Holding Facilities) Regulations 2002 (SI 2002/2538).
[23] See www.ilpa.org.uk/resources.php/14494/home-office-draft-short-term-holding-facilities-rules-2006.
[24] See also www.ilpa.org.uk/resources.php/1889/home-office-to-ilpa-of-7-august-2006-re-draft-short-term-holding-facility-sthf-rules.
[25] See www.ilpa.org.uk/resources.php/20183/uk-border-agency-ukba-to-ilpa-re-further-consultation-on-the-draft-short-term-holding-facility-sthf-
[26] See www.ilpa.org.uk/resources.php/13062/uk-border-agency-further-consultation-of-the-draft-short-term-;yxcvbholding-facility-sthf-rules-ilpas-furt . See also The Lord Brett, Parliamentary Under Secretary of State to The Lord Avebury of 11 August 2009 re time limits for detention in Short-term Holding Facilities at www.ilpa.org.uk/resources.php/2919/the-lord-brett-parliamentary-under-secretary-of-state-to-the-lord-avebury-of-11-august-2009-re-time- ; Refugee Council to Kristian Armstrong, Children's Champion, UK Border Agency of 5 August 2009 re short-term holding facilities and child protection www.ilpa.org.uk/resources.php/2940/refugee-council-to-kristian-armstrong-childrens-champion-uk-border-agency-of-5-august-2009-re-short-
[27] See e.g. https://www.whatdotheyknow.com/request/short_term_holding_facilities_2 , https://www.whatdotheyknow.com/request/short_term_holding_facilities_3
[28] Hansard, Written Answers, 30 April 2012, column 1086W at: http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120430/text/120430w0001.htm#120430180000026
[29] http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/131030w0001.htm

concern for years to a number of interested parties, including Her Majesty's Chief Inspector of Prisons, who has responsibility for inspecting the UK's detention facilities. The delay in introducing these rules is regretted, but it has been a case of unavoidable delay being caused by a number of different reasons, including, most recently, the discussions surrounding the legislative framework that should apply to Cedars, which we have just discussed, which initially had been classified as a short-term holding facility and, as such, would have been covered by these rules. We have just debated those amendments. Accordingly, today, I give my noble friend a commitment that separate sets of rules governing the management and operation of short-term holding facilities and the Cedars pre-departure accommodation will be introduced before the Summer Recess. With that, I hope that my noble friend will feel able to withdraw his amendment[30].

Lord Avebury was informed before recess that the commitment would not be met.

In a written answer of 24 October 2014 to a question by Lord Avebury on conditions in the short term holding facilities at Heathrow, Lord Bates indicated that rules on short-term holding facilities remained pending:

We are currently exploring a range of measures as part of the rules governing Short Term Holding Facilities to balance the welfare of those people being held, with effective management of the facilities and immigration control. I welcome the noble Lord's continued interest in this area and his views on the final content of these Rules.[31]

At the time of writing, over six months later, it remains the case that no rules have been published. The situation is unsafe. Home Office statistics on "self-harm," a term which encompasses suicide and attempted suicide, record one death in the period July to September 2013, of a 43-year old man from Pakistan, at Pennine House Short Term Holding Facility in 2013.

3.3 "Pre-departure accommodation"

Like short-term holding facilities, "pre-departure accommodation" for families with children is supposed to benefit from special rules, as per Lord Taylor of Holbeach's commitment cited above but these have yet to be published or laid before parliament.

We recall the 2005 report on Oakington and the question of how the practices identified could have gone unchecked in a place "…widely regarded as the most benign of all the immigration detention centres" and with Non-governmental organisation on site. That report sprang to mind when first ILPA representatives toured Cedars pre-departure accommodation and were shocked to find an isolation cell, with a shower let into the ceiling to clean the cell in case of a dirty protest.

[30] Hansard, HL Deb, Column 1140, 03 March 2014 at: http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140303-0001.htm

[31] Hansard, Written Answer HL2190 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2014-10-20/HL2190

A coercive regime is never far away, and the question of the misuse of force in Cedars evidences this. In 2012 report of the Chief Inspector of Prisons described above, the Inspectorate recommended that force be used against pregnant women and children only in situations where there is a risk of harm to self or another. The Home Office rejected the recommendation and instead offered a consultation. It was only in the face of a legal challenge that it backed down. The case of *R (on the application of Yiyu Chen and Others) v Secretary of State for the Home Department* (CO/1119/2013) was an urgent judicial review challenge to the Secretary of State's failure to have a policy in place in respect of the use of force against children and pregnant women. The claim was issued on 31 January 2013 following the Secretary of State's rejection of the Her Majesty's Inspectorate of Prisons' recommendation. The claimants sought urgent interim relief in the form of an injunction prohibiting the Secretary of State from using force against these two groups until the issues were determined. On 12 February 2013 Mr Justice Collins granted an injunction prohibiting the Secretary of State from using force against the four claimants (a pregnant woman and three children).

On 22 February 2013 the Secretary of State reinstated the former policy from Chapter 45 of the Enforcement Instructions and Guidance, which states that the UK Border Agency cannot use force against pregnant women, save to prevent harm. On 10 April 2013, the Lord Taylor of Holbeach told the House of Lords that:

> *The recommendation in the report by HM Inspectorate of Prisons on Cedars pre-departure accommodation that force should never be used to effect the removal of pregnant women and children was rejected by the UK Border Agency.* [32]

The Government response to the Home Affairs Select Committee Eighth Report of session 2012-2013: *The work of the UK Border Agency (April - June 2012)* states:

> *The UK Border Agency would prefer that pregnant women, vulnerable adults and under 18s who form part of family groups in Cedars left the UK voluntarily and compliantly. It would not be practical to consider a blanket ban on the use of physical intervention on pregnant women and under 18s as this might encourage non-compliance and render the Agency unable to maintain effective immigration controls.*

Bhatt Murphy solicitors, who acted for the claimants in Chen, wrote to the Home Affairs Select Committee on 28 March 2013, saying

> *We are concerned that the policy position set out in that response* [the government's response to the Committee*] directly contradicts the assurances which have been given to the Court and the parties in this action, which is now reflected in policy guidance published on the UK Border Agency's website, and upon which the Claimants have been invited by the Home Secretary to withdraw their claim for judicial review*.

[32] HL Deb, 10 April 2013, c313W.

4. "Vulnerability" or powerlessness?

The terms of reference of the review refer to "vulnerable" detainees. All those detained under Immigration Act powers are vulnerable: to lack of respect for their rights, to abuse, to mental health problems, by the fact of their detention. The notion of being "vulnerable" is perhaps more helpfully considered through the term "powerlessness". Persons detained under Immigration Act powers are relatively powerless and there are structural reasons for that. These have tangible effects not only on a person's ability to vindicate their rights and ensure that they are treated in accordance with law and policy properly applied, but on the distress arising from the powerlessness that detained persons feel.

4.1 No automatic judicial oversight of detention

The lack of any automatic judicial oversight of detention hides detained persons from view and means that those making administrative decisions to detain are shielded from scrutiny. Unless an immigration detainee applies for bail, s/he will never be brought before a court or tribunal to consider either release on bail or the lawfulness of detention.

The UN High Commission on Human Rights Resolution 2004/39: *Arbitrary Detention* of 19 April 2004, E/CN.4/RES/2004/39 provides:

> *"3. Encourages the Governments concerned: (c) To respect and promote the right of anyone who is deprived of his/her liberty by arrest or detention to be entitled to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful, in accordance with their international obligations".*

In 1999 the then Government introduced provision for routine bail hearings as part III of the Immigration and Asylum Act 1999 . At its second reading in the House of Lords, Lord Williams of Mostyn for the then Government said

> *Part III introduces important new safeguards for immigration detainees. It introduces a more extensive judicial element into the detention process by means of a system of routine bail hearings, but the Government have decided that we should go further. The Government intend to bring forward amendments during the proceedings in this House to provide for a statutory presumption of bail, with exceptions to ensure effective immigration control and enforcement.*[33]

He later explained:

> *Perhaps I may set out our intention in setting time-limits for routine bail hearings and their determination. One element that is lacking in the present system—I do not disagree with what has been said in part—is any degree of certainty or structure with regard to bail hearings. We intend that the first routine bail hearing—to use the word "routine" is not to play down its*

[33] HL Deb 29 June 1999 vol 603 cc176-257.

importance, but to underline the fact that it must be regular—should take place about seven days after the original detention. In practice, the reference will normally be made much earlier.[34]

The Nationality Immigration and Asylum Act 2002 repealed that part of the Immigration and Asylum Act 1999 which would have introduced a new bail regime without its ever having been brought into force. This despite nothing having changed since 1999 regarding the gravity of the shortcomings of the system of immigration detention nor the urgency of addressing them to warrant this.

Detention is authorised and reviewed by relatively junior officials who work remotely. Their decisions are in turn reviewed by more senior officials but they latter rely on the written submissions of the junior officials, which in our experience are often unbalanced and of poor quality. In criminal casework cases, release has to be authorised at strategic director level, and as the *BA* case referred to above illustrates, by the time the submission gets to the senior official to consider release the information provided may not reflect the actual position with the consequent risk of a legally unsound decision being made. In any decision making process, a detainee's interests must be properly represented by allowing written and oral representations to be made. The recommendation made in the joint HM Inspect of Prisons/Independent Chief Inspector of Prisons that there be an independent panel to consider the detention of long term detainees was rejected by the Home Office. In the context of the detention of children and families, an Independent Family Returns Panel has been established tasked with overseeing decisions to detain children and families. ILPA has long advocated for automatic bail hearings. There should be a judicial process for deciding on the detention of the mentally ill at which the detainee has the right to be represented and heard.

4.2 No time limits

Persons are detained in the UK under Immigration Act powers for longer periods than in other EU countries. [35] Home Office statistics provide a snapshot of the numbers of people in immigration removal centres at the end of each quarter with details of the length of time those individuals have spent in detention. In the first quarter of 2015 (January – March), there were 3483 people held in immigration removals centres of whom 2224 had been held for over 28 days. Of these, 488 had been detained for more than six months including 153 who had been held in immigration detention for over a year. Of the 153 individuals held in immigration removals centres for more than a year, 25 individuals had been detained for over two years, including one individual held for more than four years[36].

The Home Office also records on a yearly basis the length of time spent in detention by individuals leaving detention in any one year. In 2014, 29,655 people left immigration removal

[34] HL Deb 19 Jul 1999 : Column 707.
[35] See the joint Her Majesty's Inspectorate of Prisons/Chief Inspector of Borders and Immigration report, *The effectiveness and impact of immigration detention casework*, December 2012 at 2.7. In France there is a limit of one and a half months on immigration detention, which is subject to automatic oversight by the courts. The Netherlands too has a maximum time limit of one and a half months and Spain a limit of two months.
[36] Home Office, *Immigration Statistics Quarterly Release, January to March 2015: Data Tables*, table dt_11_q, at: https://www.gov.uk/government/statistics/immigration-statistics-january-to-march-2015-data-tables

centres, either through removal, grant of temporary release or bail, a grant of leave to enter/remain or as a result of other reasons. 5155 individuals had been held over 28 days, of whom 696 had been held for more than six months, including 161 who had been held in immigration detention for more than a year. Of the 161 individuals held in detention for more than a year, 27 had been detained for over two years including one individual held for more than four years[37].

In the context of a stated intention to reduce to an absolute minimum[38] the detention of children in families, the shortest possible time is envisaged as seven to 28 days.[39]

The impact of the lack of automatic judicial scrutiny, alongside an absence of time limits on immigration detention, is that detention in the UK does not conform to international standards including:

- UNHCR Detention Guidelines (2012), Guideline 6: "To guard against arbitrariness, maximum periods of detention should be set in national legislation. Without maximum periods, detention can become prolonged, and in some cases indefinite".

- UNHCR/Office of the High Commissioner for Human Rights Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011):

  > *2: "Maximum time limits on … administrative [immigration detention] in national legislation are an important step to avoiding prolonged or indefinite detention".*
  > …
  > *11: "Lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal or practical reasons".*

- UN Working Group on Arbitrary Detention Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 7: "A maximum period should be set by law".

The UN Committee Against Torture recommended in its concluding observations on the UK's fifth periodic report that the UK adopt a time limit and end "de facto indefinite detention." [40]

The UK is not a party to Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third country nationals, which sets a six-month limit on detention with the possibility of further detention for limited periods to a maximum of 18

[37] Home Office, *Immigration Statistics Quarterly Release, January to March 2015: Data Tables*, table dt_06, at: https://www.gov.uk/government/statistics/immigration-statistics-january-to-march-2015-data-tables
[38] HL Committee, Immigration Bill, 3 March 2014, col 1125 per the Lord Wallace of Tankerness.
[39] Immigration Act 2014, s 2.
[40] Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013), paragraph 30(c). Available at http://www.justice.gov.uk/downloads/human-rights/cat-concluding-observations-may-2013.pdf (accessed 28 May 2015).

months *in toto* where, despite the State's reasonable efforts, lack of co-operation by the detainee or in obtaining documentation from third countries had caused time to be extended[41].

In *Mathloom v Greece*[42] it was held that absent the time limits on detention, Greek legislation on detention under immigration powers did not meet the "in accordance with the law" test laid down in Article 5 of the European Convention on Human Rights because it was not sufficiently precise or its consequences sufficiently foreseeable.

When Lord Hylton moved amendments in 1999[43] to set a maximum time limit on detention this was in the context of proposals that all detainees would be brought before a court or tribunal seven and 28 days after their detention started[44] and the number of persons detained beyond six months was 120[45]. In May 2013, the UN Committee against Torture urged the UK to "(i)ntroduce a limit for immigration detention and take all necessary steps to prevent cases of de facto indefinite detention."[46]

In the debates in on the bail provisions of the Immigration and Asylum Act 1999, Baroness Williams of Crosby said

> *One characteristic of a tyrannical or dictatorial regime is that it detains innocent people without any indication as to how long they will be detained. A few months ago, I had the obligation of visiting the last standing prison under the gulag archipelago system, Perm 65 in the Soviet Union as it then was, now Russia. I discovered that the most dreadful agony faced by people who had been at that detention centre was not knowing if or when they would ever get out. There was no clear procedure.*
>
> *An obligation rests upon those of us who are more privileged in a democratic society to limit that sense of being almost totally lost within the system—not knowing when, if ever, the procedures will be concluded. The main purpose of the new clause is to limit that period to a maximum of six months.* [47]

Lord Williams of Mostyn rebuked her gently

> *719 . The noble Baroness spoke of the Gulag. There is no automatic application after seven days paid for at public expense, nor after the further period paid for at public expense. No reasons are given in writing. There is no presumption of bail. I take the point, but we have produced a series of circumstances which are infinitely better than that. They are very significant advances. We seek to attack a machine which is not subject to judicial overview or written reasons without a presumption of bail. Without the automatic first and second routine bail applications, applications for bail can be made, or applications for judicial review*[48].

[41] See Case C-357/09, Kadzoev [2009] ECR I-11189, 30 November 2009.
[42] Application 48883/07, judgment 24 April 2012.
[43] HL Deb 19 July 1999 vol 604 cc 693-724.
[44] Immigration and Asylum Act 1999 s 44.
[45] HL Deb 28 July 1999 vol 604 cc1611-66, letter of Lord Williams of Mostyn to Lord Avebury, to which reference is made by Lord Avebury.
[46] Committee against Torture, Fifth periodic report of the United Kingdom, (6-31 May 2013)
[47] *HL Deb 19 July 1999 vol 604 cc693-724*
[48] *Ibid*. Col 719.

That rebuke sounds very different when detention is without limit of time, by administrative fiat, and the detainee will never ever be brought before a court or tribunal if s/he does not instigate this. Reasons for detention all too often take the form of tick boxes and inadequate or inaccurate bail summaries served at the door of the bail hearing.

5. Legal Aid

One way to assist persons in situations of powerless is to ensure that they can be assisted by those who can assert and help to vindicate their rights. But, increasingly, those detained under Immigration Act powers are unable to obtain legal advice, often because they cannot pay but also because of problems in getting legal advice in detention.

Following Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid is available for challenges to immigration detention, including by way of judicial review.[49] It is not however available for the substantive immigration, as opposed to asylum,[50] case, success in which would mean that the person is no longer liable to be detained.

Legal aid is available for inquests and associated civil actions;[51] civil actions where a public authority has abused its position or powers that is deliberate or dishonest and results in harm that is reasonably foreseeable;[52] civil actions concerning "significant" breaches of human rights;[53] and civil actions concerning discrimination contrary to the Equality Act 2010.[54]
Cases based on negligence and those in which the primary objective of the claim is financial compensation are expressly excluded. According to the 2010 consultation[55]:

> *4.53…We consider that cases where state agents are alleged to have abused their position of power, significantly breached human rights, or are alleged to have been responsible for negligent acts or omissions falling very far below the required standard of care have an importance beyond a simple money claim. We consider that these cases are an important means to hold public authorities to account and to ensure that state power is not misused. We consider that the class of individuals bringing these claims is not necessarily likely to be particularly vulnerable and some cases will be suitable for funding through CFAs. However, we believe that the determining factor is the role of such cases in ensuring that the power of public authorities is not misused…*

According to the 2010 consultation[56], the determining factor requiring public funding in these cases is to ensure that public authorities do not misuse their powers. That justification applies irrespective of the immigration status or personal interest of the person who has been

[49] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 1, paragraphs 19, 20, 25, 26 and 27 read with parts 2 and 3 of that Schedule.
[50] See the Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 1, paragraph 30.
[51] Ibid. paragraph 41.
[52] Ibid. paragraph 21.
[53] *Ibid.* paragraph 22.
[54] *Ibid.* paragraph 43.
[55] *Proposals for the Reform of Legal Aid in England and Wales,* Ministry of Justice.
[56] *Proposals for the Reform of Legal Aid in England and Wales, op.cit.*

wronged. These claims also provide a valuable mechanism for exposing systemic failures and ensuring that public authorities make improvements and learn lessons.

5.1 Obtaining effective legal representation in practice

5.1.a Access to legal representation in immigration removal centres

Her Majesty's Chief Inspector of Prisons has frequently reported on persons in detention's lack of access to legal advice and representation by detainees in his recent inspections of immigration removal centres, commenting in the report of the unannounced inspection of Haslar Immigration Removal Centre in 2014 as follows:

> *As at many of our recent inspections, increasing numbers of detainees did not have a lawyer to assist them with their immigration cases or to apply for bail. Some detainees were held for unreasonably long periods. One man, who we first met at our previous inspection in 2011, was released into the UK during this inspection after three-and-half years in detention*[57].

At Haslar Immigration Removal Centre, the Chief Inspector found:

> *In our survey, 22% of detainees said they required an immigration lawyer but did not have one. Since our last inspection most immigration advice had been removed from the scope of legal aid funding. Fewer detainees than at our last inspection (32% against 50%) said that they received free legal advice. Free representation in relation to bail for detainees who could not pay for it was still available, but centre staff and detainees were unaware of this.*

There was a similar picture at Campsfield Immigration Removal Centre:

> *... Too many detainees were without an immigration lawyer. Detainees sometimes had to wait for over two weeks to access legal advice surgeries, which was too long*[58]
>
> „In our survey 22% of detainees said they did not have a lawyer[59].
>
> ... All detainees should have received ongoing representation during bail proceedings but we were not assured this was happening[60].

And at Dover Immigration Removal Centre:

[57] Her Majesty's Chief Inspector of Prisons, Unannounced inspection of Haslar Immigration Removal Centre (10-11 and 17-21 February 2014) at: http://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/07/Haslar-2014-Web.pdf

[58] Her Majesty's Chief Inspector of Prisons, Report on an unannounced inspection of Campsfield House Immigration Removal Centre (11 – 21 August 2014), at: https://www.justiceinspectorates.gov.uk/hmiprisons/inspections/campsfield-house-immigration-removal-centre/#.VWcS3UYsAj8, p.14

[59] Ibid, p.26

[60] Ibid, p.26

...Too many detainees who required an immigration lawyer did not have one. Detainees could wait two weeks for a legal surgery appointment, which was too long, given the rapid turnaround of cases[61].

...In our survey, 37% of detainees said they did not have an immigration lawyer, but only 8% of those surveyed said they did not require one, suggesting 29% were in need of legal representation[62].

5.1.b Access to legal representation in the Detained Fast-track

Those in the Detained Fast-track have an opportunity to be provided with legal representation as part of the process. However, the mere presence of a lawyer, without provision for that lawyer to make their work effective, is not enough.The judgment in *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) (09 July 2014) details the shortcomings of the Detained Fast-track and the barriers to those subject to the process obtaining a determination of their application for asylum that is sustainable. The Detained Fast-track is currently the subject of further litigation, in which ILPA is intervening.

5.1.c Surgeries

Surgeries operate in detention. However, as indicated above, it can be difficult in practice for detainees to access those surgeries. At a meeting at the Legal Services Commission on 2 May 2014, at which the Home Office was present, ILPA and others again highlighted the difficulties detainees have in gaining access to the surgeries and drew attention to the practice of "gate-keeping" that exists in some centres. What was striking at the meeting was that those officials present did not have clarity over the responsibility for sorting out problems of access as controlled by detention centre staff. There was no service level agreement and an acknowledged lack of contract management by the legal aid agencies. It took many months to extract a note of the meeting from the Home Office, after those who had led it, John Facey and Stuart Hollings, two of its most experienced staff members in the field of detention under immigration act powers, were moved off this work. When eventually we obtained a note on 25 July 2014 it was cursory.

Especially with the removal of immigration from the scope of legal aid, many detainees will attend a surgery only to be told that they will have to pay for any legal representative. Not only the costs of a legal representative but disbursements, for example paying for an interpreter who will travel to the immigration removal centre or prison, and paying application and appeal fees, mean that access to justice is beyond the reach of many.

[61] Her Majesty's Chief Insector of Prisons, Unannounced inspection of Dover Immigration Removal Centre (3 –14 March 2014) at: https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/07/Dover-2014-Web.pdf , p.14
[62] Ibid, p.29

5.1.d Prisons

For those held in prisons under Immigration Act powers, there are no legal surgeries[63] and the difficulties of obtaining any legal representation at all are high. People with a mental illness or suffering from depression are among the least likely to be able to take the necessary steps to instigate a bail hearing.

Many prisoners will not qualify for legal aid for their immigration case, because it is out of scope. However, all should be getting advice on bail and other matters remaining in scope.

We highlight the effect upon foreign national prisoners and ex-offenders held in prison at the end of their criminal sentence under Immigration Act powers. Family members, for example of those whose claims for asylum have failed, who are likely to be subsisting on non-cash support under section 4 of the Immigration and Asylum Act 1999, have difficulties in visiting at all, so the location of the detained person may result in isolation from the family and breaches of the Home Office duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of the child, whether the detainee's child be a person under immigration control, settled or a British citizen.

Legal aid was previously only available for 'treatment' cases where it is 'practically impossible' for the prisoner to use the prison complaints system[64]. The Legal Aid Agency must give prior authority in such cases and we understand that in 2011, prior authority was granted in only 11 cases.

Home Office concerns about the risk of absconding affect prison categorisation of foreign nationals. Access to rehabilitation programmes[65] and/or planning for release are affected by presumptions that the person will be removed at the end of the sentence, however strong the case against this may be and however unlikely it is in any event that a decision on return will rapidly be resolved. The Criminal Legal Aid (General) (Amendment) Regulations 2013,[66] cut legal aid from matters such as categorisation, segregation, dangerous and severe personality disorder referrals and assessments, and resettlement matters. They are the subject of a challenge on appeal from *R(The Howard League for Penal Reform & Prisoners Advice Service) v The Lord Chancellor* [2014] EWHC 709 (Admin) (17 March 2014). The judgment of the High Court in that case details the evidence of the effect of the changes. These matters are all of relevance to the outcome of any parole hearing: it avails little that parole remains in scope if the evidence relevant to consideration of release is not there to put before the Parole Board.

[63] A brief exception was made for The Verne just before it became an immigration removal centre as described below.
[64] See Annexe B to the consultation paper.
[65] See Bail for Immigration Detainees' February 2013 submission to the Ministry of Justice consultation *Transforming rehabilitation: a revolution in the way in which we manage offenders 2013*, available at http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html (accessed 28 May 2013).
[66] SI 2013/2790.

At the beginning of 2014, it had been announced that HMP the Verne, on Portland Island in Dorset, would become an immigration removal centre. Pending its formal designation, the Verne was none the less used, as a prison, to house 100% foreign nationals. The Legal Aid Agency indicated that it would provide legal surgeries there, as it does in other immigration removal centres, when it became an immigration removal centre. However it was not prepared to such surgeries while the Verne remained a prison. The charity Detention Action visited The Verne and told ILPA:

> *"The majority of detainees we have met in the Verne are unrepresented and it is proving difficult to find solicitors willing to take on even strong cases. There are few if any firms within the local area and despite our efforts to engage representatives from further afield the travel distance and lack of a Detention Duty Advice Scheme [the surgeries] set up have led to our having very little success.*
>
> *Of the 42 people we have supported in the Verne so far only 15 have had legal representation. The majority of these have been served with deportation orders but have received no legal advice on their right to appeal or how to go about doing so. Of these we have met two recognised refugees who were unable to make in time deportation appeals due to their lack of access to such advice.*
>
> *We are greatly concerned at the length of time many the Verne detainees have been held for. Around half of those we have met have been detained for at least 6 months while two have been for over 18 months."*

We and others continued to protest the lack of legal advice at The Verne. Eventually on 12 June 2014 the Agency announced that it would fund surgeries in The Verne until its reclassification and that these would commence within a few weeks of the announcement.

Those detained in prisons are often those detained for the longest periods. They face immense barriers to obtaining legal representation.[67]

The Equalities and MBU manager at HMP Styall, a woman's prison in Lancashire, got in touch with ILPA about the lack of legal advice and representation on immigration for women detained there. We were able to identify members who would have been willing to provide surgeries were funding available. We got in touch with the Legal Aid Agency who investigated and responded as follows:

> *"As a snapshot – on day of our visit there may have been 15-30 women being detained who were[foreign nationals], of which two had come to the end of their criminal sentence and were being held under immigration powers…..*
> *What was not immediately clear to us is whether these two individuals had received legal advice prior to or after being served with the relevant immigration detention papers. It would seem to us that they are certainly entitled to be given legally aided advice, advice on detention and bail being in scope. I cannot be sure whether this had happened in these two cases; one of the*

[67] Report: Denial of Justice, the hidden use of UK prisons for immigration detention, Bail for Immigration Detainees 15 September 2014.

individuals themselves indicated to me that she had possibly seen a legally aided lawyer as well as seeing a privately funded one. At the very least an individual under these circumstances should see a lawyer before an IS91 (or similar document) authorising further detention is served.

We certainly believe that the two individuals who were being detained under immigration powers should be seen by an advisor immediately. As to the other detainees, they appear to be at various stages of mid to long term criminal sentences having had the benefit of criminal legal aid. Immigration legal advice should be available for these individuals in relation to whether they wish to pursue asylum or article 3 claims (advice being in scope of Schedule 1, Part 1, LASPO 2012 paragraph 30), it was simply not possible or indeed appropriate for us to get a sense of this on our visit, even though we were able to meet with many (15 or so) of the detainees.

At present we do not believe the population is either stable enough or the numbers of those detained under immigration powers consistent to warrant formal on-going regular legal advice surgeries, we could not justify the sustainability of those, we will keep this under review though.

As a first step … is contacting the local supplier base this week to get an indication and details of a named individual at the firm who can be contacted by the prison welfare officer …by phone or email in order to facilitate a legal visit for those who request it and certainly as a priority for the two immigration detainees.[68]

The situation is in ILPA's view representative of the situation in many prisons. The outcome in this case is not. It is the result of considerable effort by an Equalities and MBU manager who has made this a priority and ILPA's own interventions, which included brining the matter to the attention of the National Audit Office.

5.1.d Possible future changes

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2004 was debated in the House of Commons on 1 July 2014[69] but withdrawn from consideration by the House of Lords following a successful challenge in *R(PLP) v Secretary of State for Justice (Office of the Children's commissioner for England intervening)* [2014] EWHC 2365 (Admin) (currently under appeal) would have restricted the ' rights of those detained to legal aid further, and may still do so if at any stage it is re-presented to parliament, in its current or an amended form and accepted. While immigration detention cases[70] and related judicial reviews[71] were to have been exempted from the test, access to legal aid would have been denied those who could not satisfy the residence test in cases of abuse of position or power by public authorities;[72] and breaches of a person's human rights by public authorities.[73]

There is a specific problem with the proposed residence test in the context of human rights claims. Claims under the Human Rights Act 1998 must ordinarily be commenced within 12

[68] Davinder Sidhu, Legal Aid Agency to ILPA 7 August 2014.
[69] http://www.publications.parliament.uk/pa/cm201415/cmgeneral/deleg5/140701/140701s01.pdf
[70] Paragraphs 25(2) and 26(2) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.
[71] Paragraph 19(2A)(a) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.
[72] as fn. 39 in relation to paragraph 21 of Part 1 of Schedule 1 to the 2012 Act.
[73] as fn. 39 in relation to paragraph 22 of Part 1 of Schedule 1 to the 2012 Act.

months of the events giving rise to the claim. Under the residence test proposals a person would have to accrue 12 months' lawful residence before becoming eligible for legal aid. Thus, by the time persons became eligible for legal aid, they would be barred from bringing a claim under the Human Rights Act 1998.

6. Movement around the detention estate

Movement of immigration detainees around the removal centre (and prison) estate is often presented as the exception. In our experience it is the norm and **we urge the inquiry to try to obtain figures on this.** Movement makes it more difficult to obtain and retain a lawyer, and has implications for all that is being examined by the review.

7. Creation of risk

Even though the review is banned from considering the decision to detain, it is wholly within its remit to consider whether the risks the current criteria, and their application, are to be managed. It should not start from the assumption that they can be.

As described in the chronology, UK has been found to have breached detainees' rights under Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman and degrading treatment and punishment, in no less than six cases involving mentally ill individuals held in immigration detention in the last four years.[74] ILPA is aware of other cases that are pending or have settled. The Home Office continues to pay very substantial damages to persons unlawfully detained or who have been harmed in detention. The higher courts have identified failings by the Home Office in operating its system of reviews of detention and in failing to safeguard the health and welfare of the individuals it incarcerates.

Caseworkers responsible for authorising detention usually work remotely and often have little or no direct contact with persons detained and with custodial and healthcare staff who are responsible for those persons on a day to day basis. In most centres there is one contractor responsible for custodial functions and a separate contractor responsible for healthcare. The local NHS is responsible for secondary care (including providing in-patient treatment) and the Ministry of Justice, which again has no onsite presence at detention centres, is responsible for authorising transfer under section 48 of the Mental Health Act 1983. The Legal Aid Agency leaves staff in detention centres to see that those detained reach legal surgeries and fails

[74] (All accessed 23 May 2015). *R (S) v* Secretary of State for the Home Department [2011] EWHC 2120 (Admin) (5 August 2011), http://www.bailii.org/ew/cases/EWHC/Admin/2011/2120.html; *R (BA) v* Secretary of State for the Home Department [2011] EWHC 2748 (Admin) (26 October 2011) (http://www.bailii.org/ew/cases/EWHC/Admin/2011/2748.html;*R (HA) v* Secretary of State for the Home Department [2012] EWHC 979 (Admin) (17 April 2012), http://www.bailii.org/ew/cases/EWHC/Admin/2012/979.html; *R (D) v* Secretary of State for the Home Department [2012] EWHC 2501 (Admin) (20 August 2012), http://www.bailii.org/ew/cases/EWHC/Admin/2012/2501.html; *R (S) v* Secretary of State for the Home Department [2014] EWHC 50 (28 January 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/50.html; *R (MD) v* Secretary of State for the Home Department [2014] EWHC 2249 (Admin) (8 July 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/2249.html

adequately to supervise its contracts there, as described above. There are fragmented lines of responsibility and failures in the transmission of information and in communication at all levels.

The effect of detention on an individual goes to the lawfulness of detention at any given time.[75]

We strongly recommend that the review examine pre action protocol letters sent the Home Office about persons in detention, subsequent judicial reviews whether settled or heard by a judge or tribunal judge and the action subsequently taken by the Home Office to understand the extent of unlawfulness and the reaction to the risks identified.

7.1 Paragraph 55.10 of the Enforcement Instructions and Guidance

Paragraph 55.10 of the Home Office Enforcement Instructions and Guidance described above, creates risk both because of the categories of person it permits to be detained and because of practical problems in its application which means that those whom the Home office does not intend to detain, save in "exceptional circumstances", are unlikely to be detected. In our experience, it is far from exceptional that the mentally ill, survivors of torture and trafficked persons, the elderly and those with physical health problems are detained. It is not exceptional that under-18s are detained because of an age dispute that the Home Office consider far from borderline. Partial statistics on this have started to be published. **The review should make a special study of age dispute cases and also examine how those subsequently released as children were treated in detention.**

There is evidence that immigration detention is detrimental to the mental and physical health of persons detained[76] and therefore to accept into detention anyone with pre-existing mental or physical health problems is to create additional it is the position of the Royal College of Psychiatrists that immigration detention militates against successful treatment of mental illness. The focus of current NHS mental health services is to not only treat the symptoms of mental

[75] *R (I) v SSHD* [2003] INLR 196 at para 48 the Court of Appeal held that the effect of detention on a detainee will relevant to the question of how long it is reasonable to detain a person under immigration powers; *R (M) v SSHD* [2008] EWCA Civ 307 "if it is shown that a person's detention has caused or contributed to his suffering mental illness, this is a factor which in principle should be taken into account in assessing the reasonableness of the length of the detention."; *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 Baroness Hale at para 218: *"When considering what was a reasonable period for which to detain Mr Lumba in accordance with the Hardial Singh principles, however, I would stress that his psychiatric condition must be among the factors taken into account.";R (Das) v Secretary of State for the Home Department* [2014] EWCA Civ 45 Beatson LJ at para 16 that "It is clear from the decisions on the *Hardial Singh* principles that the state of a person's mental health will affect the determination of what is a reasonable period for which to detain the person" and at para 69: "…as part of the operation of the Hardial Singh principles… in assessing whether to detain a person known to have mental illness, particular care is needed. The Secretary of State, through her officials, should consider whether, if the decision is taken to detain, particular arrangements will need to be made for the detainee's welfare and to monitor him or her for signs of deterioration."

[76] Burnett, A. Peel, M. (2001). 'The health of survivors of torture and organised violence.' BMJ, 322, pp.606-609; Steel Z et al. (2006) 'Impact of immigration detention and temporary protection on the mental health of refugees' British Journal of Psychiatry 188: 58-64. 2006; Pourgourides C, et el. (1996) 'A second exile: the mental health implications of detention of asylum seekers in the United Kingdom'. In: Birmingham: North Birmingham Mental Health Trust, 1996; Robjant K, et al, Mental health implications of detaining asylum seekers: systematic review. Traumatic Stress Service, Clinical Treatment Centre, Maudsley Hospital, Denmark Hill, London SE5 8AZ, UK.

disorder but also to support community rehabilitation. The Royal College of Psychiatrists identifies that the recovery model that is not possible to put into action in a detention centre[77].

We often see detention reviews in cases of severely mentally ill detainees where detention is justified by a history of criminality without considering evidence (in particular probation assessments) of continuing risk of serious harm or re-offending and other cases where detention is justified by reference to mere liability to be removed and refusal to leave voluntarily.

It is also our experience that lawyers acting on Home Office instructions advance differing interpretations of the policy in litigation which in our view demonstrates the scale of the confusion within the Home Office as to what the policy means.

While we advocate a general exemption from detention for the mentally ill , on the assumption that policy will remain substantially in its current form, we endorse the formulation put forward Medical Justice and MIND in their joint intervention in *Das*. That is that "suffering from a serious mental illness" means persons whose mental illness is not insignificant and who suffer active symptoms which impair their functioning, or who are at risk of deteriorating to such a level. Further, for a mental illness to be "satisfactorily managed" the person has to have access to any treatment they would be able to access outside of detention and that would improve their health or prevent deterioration. A person's mental illness is not satisfactorily managed if detention is causing or exacerbating their mental health problem, or if the person's health could be improved or treated in the community including if it could be improved by a specific treatment which is not available in the detention but would be available in the community.

7.2 Screening and routing

As to the criterion pertaining to a history of torture, this most often arise in asylum cases, very often cases entering the Detained Fast-track. About half of those entering the Detained Fast-track have not claimed asylum at the Asylum Screening Unit, but instead have claimed and are screened while in a form of immigration detention, for example at port or having being taken to immigration detention by the police following been dropped off from a lorry. **The review should take care not to focus too much on the Asylum Screening Unit when considering cases of torture but, as with other cohorts, to consider entry into detention from short-term holding facilities at ports and from enforcement teams.**

Difficulties with the criteria governing the decision to place a case in the Fast-track for inclusion in the Detained Fast-track are compounded by there not being a record of the reasons for the decision to place an applicant in the Fast-track which a representative could then challenge. Home Office policy requires that the decision to place a case in the Detained Fast-track is made by the Asylum Intake Unit on the basis of information provided by those carrying out

[77] The Royal College of Psychiatrists, Position Statement on detention of people with mental health disorders in Immigration Removal Centres, October 2013, updated January 2014 at: http://www.rcpsych.ac.uk/pdf/Satisfactory%20Treatment%20in%20Detention%20document%20March%202014%20edit.pdf (accessed 23 May 2015).

screening.[78] Information provided by Home Office staff to ILPA in workshops and meetings evidences a lack of precision as to the way in which decisions are made.[79]

The standard screening interview document obtains little information of relevance to the assessment of suitability for the Detained Fast-track. The questions asked pertain to biometric data, family details, the method of entry to the UK and provision of travel documents. [80] ILPA favours the approach of gathering minimal information at screening. As Ouseley J observed in the *Detention Action* case in July 2014 at paragraphs 110-11:

> *`"It is not the substantive interview and it is rightly intended that it should not become one...'a detailed preliminary investigation of the claim'…could do more harm than good"*

Ouseley J observed at paragraph 117 of *Detention Action* [2014] EWHC 2245 (Admin):

> "Voluntary disclosure of torture is rare at screening interviews"[81] and said of the trafficked applicant at paragraph 144 "I accept…that this sort of case can take time in which trust is built up between asylum seeker and representatives, and then a case is prepared, …the DFT timetable is too short for such a case."

Even in those cases where a disclosure is made at a screening interview or representations are made to the screening unit/ officer, it is our experience that decisions are frequently made to place an applicant in the Detained Fast-track contrary to the stated policy.

Trafficking cases have always been treated differently from cases involving allegations of torture.[82] As detailed in ILPA's 7 February 2008 (first) submission to the Home Affairs Committee for its enquiry into human trafficking:

> *On 3 October 2007, the Strategic Director for Asylum in the Border and Immigration Agency, wrote to Asylum Aid and the Anti-Trafficking Legal Project (AtLeP), who had requested that referrals to the Poppy Project be treated in the same way as referrals to the Medical Foundation for the Care of Victims of Torture, saying*
>
> > *In relation to your recommendation that upon receipt of a letter from the Poppy Project stating that they wish to assess a woman in the detained fast track, the case should be taken out of the fast track. I understand your concerns but I am afraid that it is not possible to release these individuals from the detained fast track until they have been interviewed/assessed. We will do all we can to work with the UKHTC [UK Human Trafficking Centre] and Poppy to try and ensure that the assessment is done within a reasonable time frame. If, following an interview/assessment, a representative from the Poppy Project or the UKHTC has reasonable grounds to believe that an individual has been trafficked, we already try to release them as quickly as possible, usually within 24 hours.'*

[78] Detained Fast-track processes, paragraph 4.1.1.
[79] See ILPA's letter to Mr Kirk of 29 February 2008.
[80] See *Detention Action* [2014] EWHC 2245 (Admin) a t paragraph 97.
[81] See also paragraphs 118-120 of the judgment.
[82] As set out in *Detention Action* [2014] EWHC 2245 at paragraph 144.

It is common for persons not to identify themselves as trafficked at screening and to agree that they are "fit and well" to be interviewed although they later say that they are not. A single lawyer, working in a firm with an exclusive contract, has seen some 20 cases in the last six months where torture or trafficking was raised at screening but the person was nonetheless put into the fast track, and some 10-15 cases (including some of the 20) where pre interview representations had been made explaining that the person was a survivor of torture or trafficking and the person was nonetheless put into the fast track.

7.3 Identification of problems within detention

In 2013 the UN Committee Against Torture indicated:[83]

> ***Immigration detention***
> *30. The Committee notes that the expansion of immigration detention has prompted some reforms including the adoption of the Borders, Citizenship and Immigration Act (2009), aimed at streamlining immigration processes; the official disavowal of child detention and revised processes for dealing with Rule 35 of the Detention Centre Rules. The Committee remains concerned at:*
> *(a) Instances where children, torture survivors, victims of trafficking, and persons with seriously mental disability were detained while their asylum cases were decided;*
> *(b) Cases of torture survivors and people with mental health conditions entering the Detained Fast Track (DFT) system due to a lack of clear guidance and inadequate screening processes, and the fact that torture survivors need to produce 'independent evidence of torture' at the screening interview to be recognized as unsuitable for the DFT system;*
> *(c) The absence of limit on the duration of detention in Immigration Removal Centres (arts. 2, 3, 11 and 16).*
> ***The Committee urges the State party to:***
> ***(a) Ensure that detention is used only as a last resort in accordance with the requirements of international law and not for administrative convenience;***
> ***(b) Take necessary measures to ensure that vulnerable people and torture survivors are not routed into the Detained Fast Track System, including by: i) reviewing the screening process for administrative detention of asylum-seekers upon entry; ii) lowering the evidential threshold for torture survivors; iii) conducting an immediate independent review of the application of Rule 35 of the Detention Centre Rules in immigration detention, in line with the Home Affairs Committee's recommendation and ensure that similar rules apply to short term holding facilities; and iv) amending the 2010 UK Border Agency Enforcement Instructions and Guidance, which allows for the detention of people with mental illness unless their mental illness is so serious it cannot be managed in detention;***
> ***(c) Introduce a limit for immigration detention and take all necessary steps to prevent cases of de facto indefinite detention***

[83] *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session* (6-31 May 2013), CAT/C/GBR/CO/5, 24 June 2013.

7.4 The "satisfactory management" of conditions within detention

In August 2010, Home Office policy[84] changed. Prior to that date the policy was that those with physical and mental illnesses and/or disability would be "suitable" for detention only in the most exceptional circumstances. After that date the policy was changed to refer to those with such conditions "which cannot be satisfactorily managed within detention." One judge described this as a "seismic" change.[85] The changes were made without notice to or consultation with stakeholders. The Home Office's explanation, in response to a letter from ILPA, was that the changes were made so that the published policy more accurately reflected what the Home Office understood the policy to mean and was implemented in practice. Through the case of *HA,* discussed herein, the changes were challenged on the basis that they had been made without an equality impact assessment and because the amended policy created unacceptable risks that people would be detained unlawfully, including in breach of their article 3 rights.

It is ILPA's position that immigration detainees who are physically or mentally ill should not be managed in the detained setting at all.

Her Majesty's Inspectorate of Prisons uses a set of criteria for assessing the conditions for and treatment of immigration detainees, called "expectations".[86] However, a recent review of these expectations in pursuit of more 'light-touch' inspection has removed a number of expectations, including Expectation 18 from the healthcare section (at page 58 in the earlier document[87]), which stated that:

> *"There is a presumption against detention of any detained person whose mental or physical wellbeing is likely to be adversely affected by continued detention".*

In a consultation on new expectations in 2012 ILPA member Bail for Immigration Detainees wrote to Her Majesty's Inspectorate of Prisons saying

> *"We strongly recommend that [expectation 18] be reinstated. We believe that this offers an important statement of principle in light of the ongoing role of human rights principles in the work of the Inspectorate, and the forward looking stance of the implied restrictions on the power to detain for the purposes of removal set out in the Hardial Singh principles".*

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[84] Chapter 55.10 of the Enforcement Instructions and Guidance. Version 9 was replaced with version 10 in August 2010.

[85] *AK, R (on the application of) v Secretary of State for the Home Department & Anor* [2011] EWHC 3188 (Admin) (02 December 2011) at para 16

[86] HM Inspectorate of Prisons, (2007), '*Immigration Detention Expectations: Criteria for assessing the conditions for and treatment of immigration detainees*' [currently under review]. See Section 5, 'Healthcare' for details of inspection expectations in relation to mental health. Available at http://www.justice.gov.uk/downloads/about/hmipris/immigration-expectations-2007.pdf

[87] UK Border Agency, '*Detention Services Operating Standards Manual*' available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/immigrationremovalcentres/

The effect of the change was to define more narrowly the numbers of people with mental illness who would be considered Home Office to be unsuitable for detention thus reducing their numbers at a stroke. The new instruction introduced in August 2010 required that a person must be 'suffering from' mental illness (i.e. symptomatic), and would need to have a 'serious' mental illness, before they could be considered possibly unsuitable for detention.

This significant revision to the guidance was protested by ILPA. For example, clarity was sought as to whether the new guidance meant that a mentally ill person could continue to be detained until their mental state deteriorated to the point where 'satisfactory management' was no longer possible, at which point they would be considered for release. It was pointed out that it was unclear how the policy change fitted with the UK Border Agency's positive duty of care toward those deprived of their liberty. In its response to ILPA the UK Border Agency said[88] that the qualifier 'satisfactorily managed'

> *"Is not defined, nor do we consider it necessary to do so. The phrase is intended to cover the broad basis on which a person's healthcare, mental health or physical needs might need to be met if they were to be detained, with the expectation being that where these needs cannot be met the persons concerned would not normally be suitable for detention."*

There is further confusion because the Detained Fast-track processes document makes reference to cases that can be managed "adequately" within detention; paragraph 55.10 the Enforcement Instructions and Guidance to cases that can be managed "satisfactorily".

This revised UK Border Agency policy (s 55.10 of the Enforcement Instructions and Guidance) and the manner of its introduction was subject to legal challenge in the case of *R (HA) v Secretary of State of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012).

On 28 January 2014 the Court of Appeal gave authoritative guidance on the current policy in *R (Pratima Das) v Secretary of State for the Home Department (with Mind and Medical Justice intervening)* [2014] EWCA Civ 45 and any formulation of the policy must at the very least comply with the guidance from this judgment as any lesser form of protection would further increase the risk of unlawful decision making.

At first instance (see [2013] EWHC 682 (Admin)) the court had given a restrictive meaning to the policy, holding that it was only engaged where the mental condition of a detainee is such that the detainee has a serious inability to cope with ordinary life, at or about the level or level of requiring in-patient treatment or a real risk that detention could reduce the sufferer to that state; and that in considering whether the detainee's condition is satisfactorily managed, the Home Secretary is entitled to have regard to treatment that may be expected to prevent a detainee from slipping into a state of serious inability to cope with ordinary life, rather than treatment that avoids all risk of suffering or deterioration in mental ill health. The claimant, supported by the interveners, argued that the judge had set too high a threshold for an illness to qualify as a "serious mental illness", and too low a standard for concluding that mental ill health could be satisfactorily managed in detention. It was also submitted that in confining the policy

[88] Written response from Alan Kittle, Director of UK Border Agency Detention Services to ILPA, 20th December 2010.

broadly to illness requiring a particular form of medical intervention, hospitalisation, was wrong, particularly since the majority of those with serious mental illnesses are treated in the community.

Allowing the appeal, the Court of Appeal held that the judge's construction of the policy was flawed and remitted the case to the Administrative Court for a fresh determination of whether the claimant had suffered loss such as to justify an award of substantial damages. Whilst the fact-sensitive exercise required by the policy militated against an overly prescriptive approach it was possible to make a number of general points:

- it is for the Secretary of State to consider whether the policy at paragraph 55.10 of the Enforcement Guidance and Instructions applies to an individual whose detention is being considered and acquaint herself with the information necessary, in particular in relation to the person's mental condition, for that purpose (paragraph 66);
- the threshold to engage the policy is that the mental illness must be serious enough to mean it cannot be satisfactorily managed in detention and in assessing whether a condition can be satisfactorily managed, the Secretary of State should have regard to the medication a person is taking, whether the person's "demonstrated needs" can be met in detention, the facilities available at the centre the person is to be detained and the expected period of detention before removal (paragraph 67);
- where the policy applies there is a "high hurdle to overcome to justify detention": mere liability to be removed and refusal to leave voluntarily will not be sufficient and detention cannot be justified by reference to that person's own well-being. The balancing process required by the policy means that those who pose a serious risk to the public ("for example a person who poses a high risk of killing someone else") or where removal will take place in a very short time may mean that detention is justified (paragraph 68).

7.5 Detention for a person's own good

Paragraphs 30(2)(c) and (d) of Schedule 2 to the Immigration Act 1971 which allow the Tribunal to refuse release on bail in circumstances where "30(2)(c)… *the appellant is suffering from mental disorder and continued detention is needed in his interests or for the protection of others*" and 30(2)(d) *the appellant is under the age of seventeen…arrangements ought to be made for his care in the event of his release and ….no satisfactory arrangements for that purpose have been made".*

These grounds for refusing bail exacerbate the risk of using immigration detention rather than act to make appropriate provision **The review should ask to see all cases where these grounds have been relied upon to resist bail, or to refuse to grant temporary admission and then inspect how the persons in question were treated in detention.**

7.6 Suicide, attempted suicide and self-harm

Deaths in immigration removal centres, including suicides and incidents of what is called "self-harm" but includes suicide attempts are recorded by the Home Office. These statistics are not

formally or consistently published. They have only become publicly available through Freedom of Information requests.

In 2011, the Home Office recorded the numbers of people on 'self-harm watch' (what would elsewhere be called suicide watch) as 1664 individuals, with the number incidents described as 'self- harm' requiring medical attention recorded as 155 incidents[89], a number that should be revised to 214 incidents in light of the correction made by a Home Office letter of 03 March 2015[90] identifying that only 1 incident had been recorded for Yarls Wood that year when there had in fact been 60 incidents.

In 2012, the Home Office recorded 1795 individuals on 'self- harm watch' with 206 incidents of 'self- harm' requiring medical attention[91] .

In 2013, the figures increased to 2354 individuals on 'self- harm watch' with 323 incidents recorded[92].

The Home Office has not formally published figures for 2014, only presenting snapshot figures from a Freedom of Information request for the period of July – September 2014 on its website. Figures for January – December 2014 have been released to a NGO following Freedom of Information requests and record in total 2335 individuals placed on 'self-harm watch' with 353 incidents of self harm requiring medical attention recorded[93].

There are no figures for incidents of self harm not requiring medical attention and so the scale of such incidents cannot be fully assessed. The figures, even as published, illustrate high and rising levels of risk, , particularly in light of the substantial increase in the numbers of individuals on 'self- harm' watch and the numbers of incidents of 'self- harm' requiring medical attention since 2011.

7.7 Torture, inhuman and degrading treatment or punishment

7.7.a Segregation

Home Office treatment of persons detained under Immigration Act powers has repeatedly been found to constitute inhuman and degrading treatment. Mental illness is often treated as 'behavioural' and dealt with through disciplinary measures such as the use of force and

[89] Home Office, *Detainees considered at risk of self harm and put on an Assessment Care in Detention and Teamwork plan from 2011-2013*, FOI Release 30858 released 24 March 2014, published 12 June 2014 available at: https://www.gov.uk/government/publications/detainees-considered-at-risk-of-self-harm-from-2011-to-2013

[90] Letter of 03 March 2015 from Returns, Immigration Enforcement, Home Office to Mr John O of National Coalition of Anti-Deportation Campaigns, on file at ILPA.

[91] Home Office, *Detainees considered at risk of self harm and put on an Assessment Care in Detention and Teamwork plan from 2011-2013*, FOI Release 30858 released 24 March 2014, published 12 June 2014 available at: https://www.gov.uk/government/publications/detainees-considered-at-risk-of-self-harm-from-2011-to-2013

[92] Home Office, *Detainees considered at risk of self harm and put on an Assessment Care in Detention and Teamwork plan from 2011-2013*, FOI Release 30858 released 24 March 2014, published 12 June 2014 available at: https://www.gov.uk/government/publications/detainees-considered-at-risk-of-self-harm-from-2011-to-2013

[93] FOI releases 31766 of 13 June 2014, 32738 of 25 September 2014, 33569 of 17 December 2014 and 34468 of 09 March 2015 on file with ILPA, summarised at: http://www.no-deportations.org.uk/Media-2014/Self-Harm2014.html

segregation. The use of these measures on the mentally ill will have disproportionate effects. In the case of *MD*[94], in which a breach of Article 3 of the European Convention on Human Rights was found in relation to the lack of measures or ineffective application of measures to ensure that MD's mental health was properly diagnosed, treated and managed, MD suffered from major depression with psychotic features and generalised anxiety disorder and was held at Yarls' Wood. The response to her distress, self-harm and aggressive outbursts was to remove her from association and isolate her, actions that an independent doctor identified as liable to make her condition worse. The independent physician also identified that physical force was used in response to her distress, frequently increasing her anxiety and experienced by her as traumatic. The High Court held:

> *I also accept that removal from association and isolation and restraint in its various forms whilst carried out without any intention to inflict suffering on the Claimant increased her suffering and was degrading because it was such as to arouse in the Claimant feelings of fear, anguish and inferiority likely to humiliate and debase the Claimant in showing a serious lack of respect for her human dignity.*[95]

In our experience, the use of force and segregation for mentally ill detainees is far from isolated. For example, both the 2012[96] and 2013[97] reports of the Harmondsworth Independent Monitoring Board pointed to other cases where mentally ill men had been segregated for prolonged periods of time:

> *A lack of bed capacity in mental health units does not make it right for detainees to be held in a segregation unit awaiting a hospital place. The cases of two detainees who were accommodated in 2012 in the segregation unit (one for 2 months, one for 5 months) and who were eventually transferred to hospital should be of great concern to the Minister. They were held under the power contained in Rule 40…*
>
> *In our Report for 2011 (page 15) we referred to a detainee, Mr A, who appeared to have physical or mental health issues causing him to have severe tantrums, who was placed on Rule 40. The full picture has now emerged following our letters to the Minister and a report by UKBA's Professional Standards Unit. This detainee was in fact in segregated accommodation, in Harmondsworth and other IRC's, for 22 months and was moved between IRCs 8 times. His was a difficult case because he refused all the help that was offered. However, this help was offered in the context of living in the segregation unit rather than in anything approaching a therapeutic environment. This European detainee was eventually returned to his home country with the removal being monitored by an IMB member up to the foot of the steps of the aircraft.*
>
> *The Professional Standards Unit's report on the case of Mr A echoed those of HMCIP and the IMB, stating that there is a "lack of a suitable alternative to R40 for someone in Mr A's circumstances. It is recommended that the agency gives serious thought to the introduction of a specialist wing or Unit, in an IRC, where people such as Mr A can be accommodated and*

[94] *R (MD) v* Secretary of State for the Home Department [2014] EWHC 2249 (Admin) (8 July 2014), http://www.bailii.org/ew/cases/EWHC/Admin/2014/2249.html
[95] *Ibid*, para 141
[96] http://www.imb.org.uk/wp-content/uploads/2015/01/harmondsworth-2012.pdf
[97] http://www.imb.org.uk/wp-content/uploads/2015/01/harmondsworth-2013.pdf

treated more in line with their conditions and behaviour". The Minister's response, by letter to the IMB, was that UKBA "will consider this recommendation carefully and ensure that this is included in future plans *for enhancement of the detention estate.*

7.7.b Hunger Strikes

Eight detention centres reporting strikes in March 2014. [98] Hunger strikes, a term that captures the protest and the purposive nature of the action better than "food and fluid refusal," are often used by people who see no other way of making their voices heard. In the case of *Muhammad & Ors, R (on the application of) v Secretary of State for the Home Department* [2013] EWHC 3157 (Admin) 17 October 2013, Mr Justice Stewart refused an application for interim relief, in the form of release from detention, of three detainees who were currently refusing to either take food or water, as he held that it was in their power to make the decision to receive the appropriate medical treatment. This must depend upon the facts of the case, for Article 2 of the European Convention on Human Rights imposes a positive obligation on the state to take steps to protect life and this extends to an obligation to prevent self-inflicted death in custody: *Keenan v UK (2001) 33 EHRR 38*.)

Accounts on the blog "Detained Voices" shows examples of the motivation behind the strikes,

> *Dover. Friday March 13: "We are not eating in Dover Detention – we having a strike. There are half of the people are already on strike. We are organising and talking with all the people. We are human beings."*[99]

The causes of hunger strikes must be addressed if hunger strikes are to be managed.

The procedures that must be adopted for handling food and fluid refusal by detainees in Immigration Removal Centres are set out in the latest Detention Services Order on Food and Fluid refusal.[100] The guidelines do place an emphasis on establishing whether or not the person has capacity, however they do not require a proper capacity assessment according to General Medical Council guidelines.[101] Proper mental capacity assessments are rarely carried out.[102] There have been various well reported cases in the media of the Home Office refusing to release immigration detainees despite their appearing too ill to be cared for in detention. [103]

7.7.c Those who lack capacity

ILPA has raised concerns about the absence of systems for identifying and making provision for those who lack mental capacity to make decisions about their immigration cases, in particular in the context of the detained fast track process operated at Yarl's Wood and Harmondsworth.

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[98] http://rt.com/uk/240205-detention-center-hunger-strike/; rabble.org.uk 16th March 2015, http://rabble.org.uk/hunger-strikes-spread-to-8-detention-centres/

[99] Detained Voices,

[100] Detention Services Order 03/2013 Food and Fluid Refusal in Immigration Removal Centres: Guidance ---

[101] *Mental Capacity Act, http://www.legislation.gov.uk/ukpga/2005/9/contents*. 2005.

[102] Medical Justice, *Briefing for the Home Office on Food and Fluid Refusers. 14th November 2013. http://www.medicaljustice.org.uk/images/stories/reports/FoodFluidRefusalBriefing.pdf*

[103] http://www.theguardian.com/uk-news/2013/nov/16/end-of-life-plan-hunger-striker; http://www.theguardian.com/uk-news/2013/jul/30/asylum-detainee-hunger-strike

The Office of the Official Solicitor will act as "litigation friend" in civil litigation but not in immigration proceedings (i.e. pre-decision and on appeal to the First-tier and Upper Tribunals). In local authority care homes, advocates are appointed to assist mentally incapacitated persons. We are not aware of any system for representing the interests of mentally incapacitated individuals in the immigration system. Due to the speed of the detained fast-track process they are likely to suffer particular disadvantage in that process; we are also not aware that the process is capable of being adjusted so as to comply with the reasonable adjustment duty under sections 29(6) and 20(3) of the Equality Act 2010. Mentally incapacitated persons will also be disadvantaged in pursuing other immigration proceedings, such as appeals against deportation. They will suffer particular disadvantage if their incapacity is due to a mental condition which is exacerbated by immigration detention.

7.7.d Risk on release

Persons who are very ill have been released from detention without accommodation being put in place, without appropriate care plans or referrals to community mental health services or without medication or prompt access to medication being organised, giving rise to risks to the person on release. Legal representatives, having fought for release, have had to bring get an injunction to *prevent* the Home Office releasing a client at night without support.

Transfers under the Mental Health Act 1983 and release on TA/Bail for assessment in community or hospital rarely used or used in a planned *way.*. The very specific problems of transfers under the Mental Health Act are addressed in ILPA's December 2012 paper for the Department of Health on this point, which is appended hereto.

7.7.e The cases

In R (BA) v Secretary of State of State for the Home Department [2011] EWHC 2748 (Admin) (26 October 2011) BA, a Nigerian national who had been convicted and sentenced in connection with importing drugs, was detained at Harmondsworth IRC between February and August 2011. He had been sentenced to 10 years imprisonment and had spent the best part of the last two years of his prison sentence in psychiatric detention under the Mental Health Act. BA had a documented history of severe psychosis. BA was detained by the Home Office despite clear medical advice that detention would cause him to deteriorate.

BA was to be transferred to an in-patient bed at Harmondsworth but was instead placed in ordinary accommodation. He was then seemingly forgotten by medical staff and deteriorated, such that by April he was unfit to be interviewed in connection with his asylum claim and by June it was assessed that he needed to be transferred to hospital under the Mental Health Act. By early July he was assessed as acutely psychotic by the doctors working at the detention centre (Harmondsworth) and deteriorated to the point that he was assessed as unfit for detention and by late July he was assessed as on the verge of death: he had had BA was also refusing food and fluids, and medical interventions, matters that had previously been identified by a consultant psychiatrist as signs of deterioration in his mental health. . He had also been assessed as requiring in-patient treatment but there were a lack of beds in the local NHS in-patient facility.

He was referred on two separate occasions to the Director for criminality and detention for a decision on whether he should be released. The Home Office caseworker responsible for reviewing detention, who was based at an office in Croydon, submitted a release submission to senior Home Office officials. The submission contained inaccurate information and senior Home Office staff treated BA's behaviour as a form of protest and refused to authorise release. In an email disclosed in the proceedings, another senior official at Assistant Director level, in words described by the judge as "chilling", planned to manage press interest in the event of his death. It was only after the intervention of the High Court that BA's transfer to hospital was achieved. The High Court went on to find that the conditions BA was detained in at the time his continued detention was considered and his release refused by senior Home Office staff constituted inhuman and degrading treatment in breach of article 3 of the European Convention on Human Rights.

Again, it was only after the intervention of the court that BA was transferred to hospital, in August, then released, in October 2011. In her judgment, Elisabeth Laing QC held that BA was unlawfully detained from June onwards. She also found that the circumstances of his detention, again at Harmondsworth, constituted inhuman and degrading treatment in violation of article 3. Those circumstances included:

- Detaining him despite a clear and documented history of severe mental illness and contrary to expert advice that detention would be likely to cause deterioration. There was *"a deplorable failure, from the outset, by those responsible for BA's detention to recognise the nature and extent of BA's illness"*[104];
- The serious deterioration in his physical and mental health, including allowing him to reach a state where he was assessed as unfit for detention and, at one stage, on the verge of death;
- The failure, expeditiously, to make arrangements for his transfer to hospital once he had been assessed by medical staff as requiring urgent transfer; and
- The failure within the Home Office to ensure that clinical information about his deteriorating condition was accurately communicated to senior officials responsible for deciding whether he should be released. The judge referred to *"a combination of bureaucratic inertia, and lack of communication and co-ordination between those who were responsible for his welfare"* and described the Assistant Director's concern to manage press interest in the event of his death as *"callous indifference to BA's plight"*[105].

In *R (S) v Secretary of State of State for the Home Department* [2011] EWHC 2120 (Admin) (5 August 2011) S, an Indian national, who had a history of severe trauma, was detained at Harmondsworth IRC between April and August 2010. Imprisonment following a criminal sentence had precipitated serious deterioration in his mental health – he developed psychotic symptoms and self-harmed. He attempted to escape during escort to a bail hearing and instead of receiving a further sentence of imprisonment the criminal court made him the subject of a hospital order. He spent five months in psychiatric detention where he received intensive psychiatric treatment. He was stabilised. Detailed reports were prepared by psychiatrists who warned in clear terms that a return to prison like detention would cause him to deteriorate to a point where he would have to be sectioned again.

[104] Judgment, paragraph 236.
[105] Judgment, paragraph 237.

On discharge from hospital, ignoring the clear medical advice, the Home Office detained him. Within days of arriving at Harmondsworth, he had deteriorated, experiencing psychotic symptoms and self-harming. By June, he was, as predicted, unfit for detention and required urgent transfer to hospital under the Mental Health Act. It took the intervention of the court in July for S to be transferred to hospital. Even then, after S was stabilised in hospital, the Home Office proposed to return him to Harmondsworth and would have done so were it not for a mandatory order from the court.

In his judgment, David Elvin QC held that S was unlawfully detained from the outset because the Home Office had not lawfully applied its policy. The judge also found that the circumstances in which S was detained at Harmondsworth constituted inhuman and degrading treatment in breach of art 3. Those circumstances included:

- Detaining him despite a clear (and documented) history of severe mental illness, and contrary to the clear expert advice of a number of mental health professionals;
- Serious deterioration in his mental state, with numerous acts of self harm, psychotic symptoms, feelings of acute anguish and distress, and allowing him to reach such a deteriorated state that he lacked capacity to make decisions in his own best interests;
- The failure to respond assessments by the in-reach psychiatrist that he was unfit for detention and required urgent compulsory treatment in hospital under the Mental Health Act; and
- One incident in which officers encountered S, naked and bleeding, being pulled along a corridor by another detainee in view of a crowd of detainees after he had attempted suicide.

In *R (HA) v Secretary of State of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012), HA, a Nigerian national who suffers from paranoid schizophrenia, was detained under immigration powers after being convicted and sentenced for being concerned with the supply of Class C drugs. The focus of his challenge was to his detention under immigration powers at Brook House and Harmondsworth IRCs between January and July 2010 and again in November and December 2010. In the intervening period, he was detained in a psychiatric unit at Hillingdon Hospital. HA was paranoid that detention centre staff were trying to harm him. His "odd" and "bizarre" behaviour led to him being removed from association and placed in segregation for prolonged periods of time. In segregation, he continued to show disturbed behaviour, for example spending long periods sleeping, often naked, in a toilet area. He also neglected himself, for example not eating properly and not washing or changing clothes for prolonged periods. Decisions to place HA in segregation were made by senior Home Office officials up to Director level. Like S and BA, detaining HA caused him to be too unwell to be able to participate in his asylum case.

In his judgment, Mr Justice Singh ruled that HA was detained unlawfully (in the first period because those responsible for authorising detention had not taken into account evidence that HA was suffering from mental illness and was unfit to for detention, and in the second period because the decision to return HA from psychiatric detention to Harmondsworth, contrary to medical advice, was Wednesbury unreasonable). The circumstances which led the Court to find that HA had been subjected to degrading treatment included:

- Acts which *"violated his own dignity"* (prolonged periods of time in isolation; sleeping on the floor, often naked, in a toilet area; drinking and washing from a toilet; neglecting himself, including not eating properly and not washing or changing clothes for prolonged periods; and suffering from insomnia);
- Not receiving appropriate medical treatment for a prolonged period of more than five months;
- The use of force on him on several occasions; and
- In the second period, detaining him when the Home Office had been explicitly warned by a psychiatrist that Harmondsworth did not have the medical facilities to treat him should he suffer a relapse and that an aspect of his mental illness was paranoia about detention centre staff.

The judge also found that when the Secretary of State "reformulated" her published policy in August 2010 her public sector race and disability equality duties were triggered and she should have carried out an equality impact assessment before making the changes, rejecting her argument that because there had been no change in policy the equality duties were not triggered. The judge declared that the changes made in August 2010 were unlawful.

Singh J granted the Secretary of State permission to appeal on all grounds. HA has also cross appealed on two points .Unfortunately, after Singh J's judgment, the Court of Appeal gave judgment in *LE (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 597, suggesting that a seriousness threshold and manageability criterion were inherent in the pre August 2010 policy – thereby undermining the argument that there had been a change in policy.

The Strasbourg court has consistently made clear that there is an obligation on the state to seek to learn lessons when article 3 has been breached.

In *R (Aziz Lamari) v Secretary of State for the Home Department* [2013] EWHC 3130 (QB)case, exemplary damages were awarded against the Home Office for the unlawful detention of the claimant, including in breach of an undertaking given to the Court in *'wilful and highhanded disregard of the court and the rights of the Claimant'*, in a context where his continued detention was causing his continuing mental health problems, he had attempted suicide or serious self-harm on at least four occasions since April 2011 and he was at high risk of future (potentially fatal) suicide attempts. Describing the manner of the claimant's eventual release as *'little short of shameful conduct'*, the Court held:

> *34. However the sad chronology of relevant factual issues does not end with the decision to release taken on 14th June 2012. Ms Weston set out within her witness statement at paragraph 37 et seq that the Defendant released the Claimant from detention at 21:00 hours on 14 June 2012 (Ms Honeyman states that he was released at 20.48 ; see Bp125 paragraph 15) and that he arrived at the nominated bail house at 4.00 a.m. As no warning had been given by the Defendant to the manager he was unaware of the Claimant's existence and the Claimant was forced to sleep outside the premises with no money for food or water. All he had was a telephone number of the manager who was not expecting a call from anyone. [...]*
>
> *36. So after seventeen months of being detained, including contrary to an undertaking to release arising from his very poor state of mental health, the Claimant, who speaks no English and who,*

ironically, was still considered by the Defendant as a person likely to abscond, had to sleep the night rough outside a bail house and did not eat or drink from 6.00 pm to after 11.38 a.m. This was in my view, to say the very least a wholly unacceptable state of affairs for which there has been no attempt at challenge or explanation. His was an important case that appears to have been reviewed at a very high level immediately prior to his release. [...]

37. So if there was indeed so much ongoing and careful scrutiny of the arrangements for release of a man still considered a flight risk and subject to bail how did the regrettable state of affairs that occurred that night possibly come to unfold without anyone realizing what would happen ? Viewed objectively and given the history of the case and the conscious decision not to explain it I am sadly forced to the finding that something went very badly wrong in the decision making process. Given all the circumstances it difficult to accept that it was just yet another "administrative oversight". I can go no further without speculation. However, what I am now satisfied happened is more than enough to cause me very real concern. Indeed viewed with no mitigation the conduct amounted to little short of contempt for his well-being. Worse still the position he was placed in was likely to tempt him to abscond or seek money or food with potential consequences for members of the public. In the absence of any other information as to how events came to pass I consider it as little short of shameful conduct. The courts hear criticism of the approach of other countries to the welfare of individuals pending immigration or asylum decisions with the assumption that such conduct could never occur here. However, this case proves that all may not always be as it should be. I sincerely hope that following this judgment the circumstances of the Claimants release are carefully reviewed.

- *Insufficient communication between IRCs and NASS accommodation providers in the community to ensure transfer of medical files and provision for vulnerabilities.*

We, and a number of NGOs, have repeatedly pointed that these are not isolated cases, that they simply illustrate the systemic problems

The claimants in *R (S) v SSHD* and *R (BA) v SSHD* had not been identified by the immigration authorities as lacking capacity to participate in their immigration cases; no adjustments had been made to the immigration process or in ensuring that they understood the reasons for their immigration detention and how to go about challenging it. The claimant S regained capacity after he was released and BA was of fluctuating capacity. In other cases immigration detention caused deterioration in mental illness such that the individual lost capacity and after release improved such as to regain capacity. The policy as currently formulated leads to a "wait and see" approach by Home Office caseworkers – that is, that caseworkers treat mental illness as being satisfactorily managed if healthcare staff confirm that a detainee is "fit for detention" and that only when there is an "unfit for detention" assessment is release considered, by which time the detainee may be in such a deteriorated state that he/she cannot participate in his/her immigration case and has to be admitted to hospital (as happened with S and BA).

7.7.f. The use of third party contractors

The use of private contractors to run detention centres is used by the Home Office to distance itself from accepting or being ascribed responsibility for failings in immigration removal centres.

In our experience this goes both to how matters are presented, for example in the media, but also how the Home Office officials think about them.

Thus after the allegations of abuse in Yarls' Wood broke, not only in the media but in meetings the Home Office did not speak of what had happened as its failure but rather that of the private contractors.

A recent specific example is the resistance of the Home Office to accepting a non-delegable duty of care for the actions of medical services provided within Immigration Removal Centres in the case of *GB (a protected party by her litigation friend the Official Solicitor)* [2015] EWHC 819 (QB) 31 March 2015.

In this case, the High Court considered, as a preliminary issue in a civil claim for negligence brought by GB, whether there was non-delegable duty owed to GB by the Home Office to take reasonable care in the medical advice and treatment provided to her whilst she was detained in Yarl's Wood. GB was detained whilst pregnant and it was her case that she became liable to be sectioned having suffered a severe psychotic reaction to the anti-malarial drug, Mefloquine administered by a medical practitioner in Yarl's Wood to provide medical services at Yarl's Wood in preparation for her removal to Nigeria. Medical services were provided in Yarl's Wood through the private contractor, Serco, holding a service-level agreement with a GP surgery to provide cover in Yarl's wood two days per week.

In considering whether it was fair, just and reasonable to impose a duty on the Home Office, having made findings on the other relevant elements of the applicable test, the High Court held:

> *41 Ms Anderson's submissions in relation to this aspect of the case amounted really to no more than this: that there was no proper reason why GB was not pursuing either Serco or the doctor in these proceedings. Since they were more directly responsible for what had happened, it was not just, fair and reasonable to impose potential liability on the defendant. I note that this submission, taken to its legal conclusion, would have defeated the existence of the non-delegable duty in Woodland .*
>
> *42 In my view, the submissions put forward by Mr McCullough QC are to be preferred, and demonstrate why it is fair, just and reasonable for a duty to exist in this case. The out-sourcing should be irrelevant in law. Rather, it should not be for GB to have to try and work out which private contractor or individual doctor might be liable for which failure, and then litigate on the basis of that assessment. She was detained by the defendant; she was in the defendant's control; she was entitled to look to the defendant for proper protection. If she did not receive it, the defendant was in breach of its duty. Accordingly, for all these reasons, I conclude that the imposition of a non-delegable duty in this case is fair, just and reasonable.*
>
> *43 It is also worth undertaking something of a reality check at this point. The defendant decided to detain GB, and consequently had clear responsibilities for her treatment as a detainee as a result. It would not be just, fair or reasonable to conclude that those responsibilities disappeared simply because of an outsourcing decision.*

It is also noteworthy that, in submissions on another element of the test, the Home Office sought to argue that the claimant was not especially dependent on the protection of the Home Office in the same way as a prisoner might be in an ordinary prison as the regime in detention centres was more benign; a submission that was roundly rejected by the Court.

The use of private contractors also highlights the question of profit. Details of contracts are not made public or discussed, with "commercial confidentiality" pleaded. **The review should scrutinise these contracts in detail.** Work is a particular concern. Clients in detention often want to work *to relieve boredom.* But the private contractor's model is dependent upon the use of their labour, for which they are paid nominal rates, far below the minimum wage. Those in immigration detention are subject to administrative detention. Not to pay them the minimum wage is to allow them to be exploited. This has nothing to do with the prohibition on those subject to immigration control being allowed to work: all the reasons for that, for example to deny persons with no leave opportunities to integrate, do not apply in detention. And in any event, they are working.

7.6 Rule 35

The UN Committee on Torture's report, cited above, suggests that Rule 35 of the Detention Centre Rules has been overhauled but it remains extremely problematic. Rule 35 of the Detention Centre Rules is concerned with the identification of physical and mental health conditions that militate against detention and with a history of torture.[106]. The Home Office requires "independent evidence" of these. Examination of what this means is pertinent to this review as it is indicative of how those who raise problems are treated within detention and of the attitude to risk. say that they have been tortured are treated within detention.

ILPA in its submission to the enquiry into Mental Health and Detention, commissioned by the Home Office in part in response to the succession of cases in which the treatment of the mentally ill in immigration detention had been found to breach the prohibition on torture, inhuman and degrading treatment contained in Article 3 of the European Convention on Human Rights.[107]

> *ILPA and other organisations have for many years expressed concern that the process for ensuring that information about detainees is brought to the attention of those responsible for authorising detention, as set out in Rules 34-35 of the Detention Centre Rules, has not and is not functioning as it was intended to function by Parliament when the Detention Centre Rules were introduced.*
>
> *The Home Office has shown an unwillingness to acknowledge that there is a problem and has only done so as a result of litigation or the threat of litigation and even then there has been a*

[106] See the discussion in *Detention Action* [2014] EWHC 2245 at paragraph 122.
[107] *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120; *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748; *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501; *R (HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979; *R (S) v Secretary of State for the Home Department* [2014] EWHC 50 (Admin).

> *refusal or reluctance to acknowledge the scale of the problem. The changes that have followed have focused on Rule 35(3) (the duty to report on survivors of torture) with the result that there has been too little attention paid to Rules 35(1) and 35(2) (the duty to report on those whose health is likely to be injuriously affected by detention and those who are suicidal) which are particularly relevant to the mentally ill. We continue to see poor quality decisions by those tasked with authorising detention; in the context of the detention of the mentally ill in particular, even when presented with cogent medical evidence caseworkers demonstrate a fundamental misunderstanding of clinical information.*[108]

The Home Office has also held meetings to discuss the operation of Rule 35 of the Detention Centre rules.[109] A template for a new report has been shared. Ouseley J recorded in his July 2014 *Detention Action* judgment at paragraph 133 that efforts had been made to monitor and improve the system "which may yet bear greater fruit."[110] Thus efforts are nothing new. They have yet to bear fruit. We have yet to see concrete improvements to the Rule 35 process, only proposals. It remains the case, as described by Ouseley J, that

> *Rule 35 reports do not work as intended, either by themselves or with Rule 34, to remove from the DFT those with independent evidence of torture, or whose case is no longer suitable for determination on the quick DFT timetable, as a result of evidence of torture.*[111]

In January 2015 ILPA alerted the Independent Inspectorate of Borders and Immigration that it had seen responses to rule 35 reports (torture) signed off by Capita, maintaining detention. This was in the context of urging that subcontracting of casework to Capita be made the subject of an inspection.[112]

Although detainees are normally seen within 24 hours of arriving at a detention centre by a GP, when they raise torture a separate consultation for the rule 35 report to be considered is often booked. While this sometimes happens promptly, sometime there is a delay of weeks.

The standard response to representations and requests for temporary admission based on rule 35 reports identifying the person as a survivor of torture is either no response or that there is insufficient probative value as independent evidence of torture. Another is that the report does not expressly state that the client is not suitable for detention. Some medical centre staff take a view that for the purposes of rule 35 only reports of ill-treatment by state actors can properly be regarded as torture and that only torture can found a Rule 35 report. This is contrary to settled case law (*R (EO, RA, CE, OE et RAN)* [2013] EWHC 1236 (Admin), 17/05/2013).

The official minutes of the 26 August 2014 meeting of the Home Office with legal representatives and non-governmental organisations, including the Helen Bamber Foundation, Freedom from Torture and Medical Justice, following the Detention Action judgment, at which

[108] 21 March 2014.
[109] E.g. the meeting of 7 November 2014 at which ILPA was represented.
[110] *Detention Action* [2014] EWHC 2245 (Admin) at paragraph 133.
[111] *Ibid.*
[112] ILPA proposals for the Independent Chief Inspector of Borders and Immigration's Inspection Plan 2015-2016, 21 January 2015.

ILPA is represented, record the following exchange, as any other business as Rule 35 was not on the agenda:

> ***ILPA -*** *Rule 35 process for identifying vulnerable applicants has been failing for sometime*
>
> **HO Response** – We acknowledge that Rule 35 process is not just a DFT matter. However for the purposes of the DFT remedial actions we are currently conducting a dip sample of Rule 35 cases and auditing them. Results should be expected by the end of the month, depending on file availability. However we agree that the forum for discussion should be widened to include the holders of the Rule 35 Policy and NHS England.

The Home Office reported on a sampling exercise reviewing Rule 35 reports at the Detention Action follow-up meeting on Rule 35 of 07 November 2014:

> *RJ opened the meeting (Forum) and gave key points from the Dip Sample: 4 week period to 24 July 2014. 33 cases total, 26 files were available for the exercise. 25 of the 26 reports were issued as a result of torture concerns. Variable quality. All used correct pro-forma. 24 had a body map. All responses within 2 day timescale. This was significantly better than the 2011 audit where only a third of the responses were on time and a third received no response. In 4 cases, r35 accepted as independent evidence of torture, claimants released. 2 others possible, later released for other reasons.*

RJ is Mr Rob Jones of the Home Office, leading on asylum and family policy. The Home Office acknowledged at the meeting that the Rule 35 reports were of variable quality. The sample did not audit the clinical aspects of the Rule 35 process. Subsequent discussion at the meeting highlighted issues of training of detention centre health care personnel, their understanding of the applicable definition of torture and whether they recognised the psychological effects of torture.

The Home Office has subsequently released statistics since on a larger sample. At the 7 April 2015 meeting between the Home Office, legal representatives and non-governmental organisations to follow up on the *Detention Action* judgment Rule 35 for the Detained Fast-track in Harmondsworth and Yarls' Wood for the period 02/01/2015 to 13/03/2015, as well as a snapshot for January 2015 were provided orally, and subsequently in the minutes:

> *Rule 35s for Harmondsworth and Yarlswood DFT for the period 02/01/2015 to 13/03/2015, as well as a snapshot for January 2015:*
>
> *Total Rule 35s: 175*
> *Harmondsworth: 151*
> *Yarlswood: 35.* [These figures do not add up to 175, but this is as they were presented in the minutes]
>
> *Breakdown: 4 under Rule 35 I; remainder under Rule 35iii 148 for HW, 23 for YW.*
> *Released due to Rule 35: HW 37 (25%), decision (to detain) maintained 114 (75%) YW: 5*

released (21%), 16 maintained (79%).

January snapshot:
DFT intake: 373
Rule 35 reports: 55 (15% of intake).Broken down: 5 were Port; 28 were Enforcement; 22 were Asylum] Screening U
Total released from this January cohort: 10 (18%). Maintained: 45 (82%). 54 were Rule 35 iii;1 was Rule 35 i.

The statistics are based on Rule 35 reports that reach Home Office caseworkers. They do not capture problems with the clinical aspect of the process that may result in no report being written, or in the contents of the report being inadequate. We also question the extent to which the Rule 35 report alone led to release as oppose to other factors, including the actions of the legal representative, also playing a role in a particular case.

Mr Smith of the Home Office stated at the meeting that the reason for maintaining detention in the majority of cases was no independent evidence of torture. Very familiar concerns were raised. Firstly, whether Home Office caseworkers raise the report with health care staff if further information is required. The default position seemed to be that an absence of information meant that detention was maintained rather than that more information was sought. It was questioned whether this was consistent with guidance. Second, whether doctors understand the process and what is required of them. The Home Office made a commitment to discussing the template with doctors in detention centres with a view to improving how it is completed at a meeting scheduled for 07 May 2015. We do not know if this meeting took place. This is a very long way from having embedded or evaluated improved practice.

The official minutes of the 7 April 2015 meeting suggest that the meeting to include NHS England is to take place some nine months after it was agreed to include NHS England in the discussion. It is unclear from the minutes of the meetings in August and November 2014, February and April 2015, whether the problem has so far proved intractable, or whether it has not been regarded as a priority.

It gives some idea of the tenor of those meetings that, despite repeated protests in the strongest possible terms, the (complicated) statistics on Rule 35 are not provided in advance or in writing at the meeting itself, but instead read out at dictation speed during the meeting and then reported in the minutes. As ILPA has expressed to the Home Office in the strongest possible terms, this deprives us of any opportunity to comment in a meaningful way or ask sensible questions about the figures given.

The Home Office has produced a new draft template for responses to Rule 35(3) reports. This is not, as we understand it, in use and there is, as far as ILPA understands, no start date for its use.

Summary of recommendations

ILPA considers that persons should not be detained under Immigration Act powers. The Home Office is not acting in accordance with a policy of detaining persons as a last resort and for the shortest possible time. It cannot rely on any justification of necessity. Against this backdrop and mindful that the review has been banned from examining the decision to detain:

- There should be a judicial process for authorising and reviewing detention;
- As recommended by the United Nations Committee Against Torture, there should be a time limit on immigration detention;
- Those detained under Immigration Act powers should not be held in prisons
- Persons deprived of their liberty must enjoy access to legal advice, for free if they are unable to pay, and must be able to challenge all aspects of the decision to hold them and of their treatment in detention;
- Transfers around the detention estate must be kept to a minimum;
- Challenging behaviour should not be met by the use of segregation, the use of force and other disciplinary measures. The Home Office should implement HM Inspector of Prisons' recommendation that an initial health screening should be carried out before segregation and that there are multi-disciplinary reviews of segregation as there is in the prison context. Policies and practices must be developed to ensure that challenging behaviour is dealt with in the least restrictive and most therapeutic way possible;
- Systems must be in place to ensure that those who lack capacity are identified and in consultation with local authority social services departments and other relevant bodies steps should be taken to ensure that their interests are represented in immigration proceedings and any proceedings or processes to challenge their detention. No active steps should be taken in immigration proceedings until steps have been taken to ensure a mentally incapacitated person's interests are represented;
- The processes for ensuring that the suffering of those detained is identified and brought to the attention of those with responsibility for authorising detention must be improved, including by ensuring that prior medical records are obtained prior to any decision to detain and in any event on entering immigration detention.
- There must be systems in place to identify people with protected characteristics in the immigration detention for the Home Office to comply with its duty under section 149 of the Equality Act 2010 to have due regard to how its immigration functions impact on protected groups;

As to health and mental health in particular:

- Those responsible for authorising detention must have compulsory mental health aware awareness training (to include the Mental Health Act 1983 and the Mental Capacity Act 2005) and must take active steps to ensure that they have the information necessary to determine that a detainee's needs may be met in immigration detention.
- Healthcare must be at least equivalent to that available in the community. If a detainee requires a certain form of treatment which cannot be provided due to the circumstances of detention (see October 2012 Royal College of Psychiatrists' statement) the person will not be receiving treatment equivalent to that available in the community and will be enduring

suffering that is greater than that inherent in the fact of incarceration and will consequently suffer disadvantage as a result of mental illness.

- Healthcare and disciplinary staff in detention centres must have compulsory mental health awareness training, including on what is culturally appropriate, and training in respecting detainee confidentiality and privacy;
- Once immigration detainees are identified as requiring in-patient treatment, a bed must promptly identified (even if that means commissioning a private sector bed) and, in consultation with the responsible doctor and bearing in mind the "least restriction principle" under the Mental Health Act 1983[113], those responsible for authorising detention should consider release on temporary admission so that the detainee may be treated as a voluntary patient. At the end of in-patient treatment the individual should be managed in the community and not returned to immigration detention;
- Steps must be taken to ensure that the treatment and care of immigration detainees after release is co-ordinated with healthcare departments liaising with community healthcare providers.

Further reading

ILPA has produced very may submissions and briefings on immigration detention. These can be found at http://www.ilpa.org.uk/pages/briefings.html and include:

- Briefing for Lord Ramsbotham's topical question: UN Special Rapporteur on Violence against Women denied access to Yarls' Wood Immigration Detention centre, May 2014;
- Response to the Home Office consultation on Mental Health in Detention consultation, 21 March 2014;
- Comments on the Draft Asylum Policy Instruction: Medical Reports from Freedom from Torture and the Helen Bamber Foundation, 29 August 2013;
- Evidence to the Home Affairs Select Committee Enquiry into Asylum, 15 April 2013;
- ILPA letter to the Department of Health re immigration detention and release from detention and how this interacts with transfers under the Mental Health Act, 17 December 2012; **(appended hereto)**
- Submission to the Equality and Human Rights Commission consultation on the forthcoming examination of the UK by the UN Committee Against Torture, 27 April 2012;
- Submission to UK Border Agency on the Proposed Asylum Instruction on Handling Claims Involving Allegations of Torture, 30 March 2010;
- Submission to UK Border Agency on the Detained Fast-Track & Detained Non-Suspensive Appeals - Intake Selection (AIU Instruction), 12 September 2008;

[113] See Mental Health Act Code of Practice, paragraph 1.3, [accessed 21 March 2014] http://www.lbhf.gov.uk/Images/Code%20of%20practice%201983%20rev%202008%20dh_087073[1]_tcm21-145032.pdf

- Submission to Border and Immigration Agency on the draft Detained Fast-Track (DFT) & Detained Non-Suspensive Appeals (DNSA) - Intake Selection (Asylum Intake Unit (AIU) instruction), 29 February 2008;

- *Best Practice Guide to the Detained-Fast Track,* 2008

Adrian Berry
Chair
ILPA
2 June 2015

Appendix: ILPA Briefing for the Department of Health on the legal basis for immigration detention and release from detention, and how this interacts with transfers under the Mental Health Act, December 2012.