ILPA Comments on the Home Office Draft Detention Services Order: Detainee Access to the Internet

Introduction

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

ILPA agrees that there is a need to produce a detention services order on this topic. Immigration detainees need to access the internet to support the preparation of their immigration applications and to remain in touch with their legal representative, as well as with family and friends. We suggest that the draft detention services order provided to us requires further work as described below.

Detention Services Orders are concerned only with immigration removal centres but we take this opportunity to emphasize the need to ensure that those detained under Immigration Act powers in prison service establishments can have access to the internet in the same way as those detained in immigration removal centres. Those detained in prison service establishments face immense barriers to obtaining legal representation.[1] Stephen Shaw observed in his review

> *4.64 Indeed, whatever the rights and wrongs of using prisons for those who are time served, it is clear that there are significant drawbacks in terms of access to legal advice and access to Home Office staff. Unlike detainees in IRCs, those in prison have no access to mobile phones or the internet, and the use of fax machines (which are in short supply) is discretionary.*

Procedures

At paragraph 3, the statement on access to the internet should reflect that immigration detainees are not held in immigration detention solely for the purpose of removal but may have a pending immigration case. The statement of access to the internet should therefore also highlight the importance of access to the internet during this time to maintain links with legal representatives and to support the preparation of an immigration case, as well to maintain links with friends and family.

This section should also make clear a presumption of open access to the internet subject to the specified categories of restriction. This presumption is appropriate in the context of detainees held for administrative purposes under Immigration Act powers rather than under criminal law provisions. In his *Review into the Welfare in Detention of Vulnerable Persons*, Stephen Shaw reported that access to the internet was identified by Ms Claudia Stourt of the National Offender

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

Management Service as one of the four factors constituting a 'decent life in detention'[2]. He also raised concerns about sites being inappropriately blocked (see further below).

Provision of internet facilities

At paragraph 4, it is stated that access to the internet for detainees is provided subject to demand. It would be helpful to include a service requirement for the number of terminals that should be available in the Immigration Removal Centre proportionate to the capacity of the centre to ensure that access is facilitated in practice.

Paragraph 7 states that detainees should be able to access material relevant to their immigration case. We agree that this is necessary and important. The wording of this paragraph, however, suggests that Immigration Removal Centre suppliers will determine which sites are relevant to an immigration case. This is not appropriate. Information that an individual may need to obtain to evidence persecution will be wide-ranging and may cover human rights abuses in both the political and personal spheres. The wording should instead state the presumption of open access subject to the restrictions identified and provide examples of the wide-ranging nature of sites that may be relevant, including the websites for foreign NGOs and organisations which are omitted in this paragraph.

Paragraph 9 sets out a list of categories for which access to websites is prohibited. We do not consider that the case for such broad restrictions has been made.
We consider that the prohibition on access to Facebook and similar services in paragraph 9 is too restrictive. The stated purpose of the policy is to enable detainees to maintain links with family and friends. Facebook history may also be relevant to evidencing LGBTI asylum claims; claims involving persecution in the private sphere; or the existence of private and family life for the purpose of an immigration claim. No legal aid is generally available for immigration cases and so a detainee may not have a legal representative to assist with accessing Facebook or similarly restricted sites. In his review of detention, Stephen Shaw made the following recommendation in relation to access to Facebook or similar services:

> *I fully appreciate the need for appropriate security measures, but I do not believe there is any rational case for continuing the blanket ban on Skype and Facebook and like services, or for preventing access to websites that support detainees in their immigration claims, help prepare them for return, or facilitate contact with their families and friends. Indeed, from that point of view the current restrictions are actually counter-productive*[3].
>
> *Amending the current approach to one that is based on an individualised risk assessment would, in my view, immediately help to enhance welfare provision. It would also have the potential to facilitate returns by helping to restore, maintain and strengthen links between detainees and their countries of origin.*
>
> *Recommendation 30: The internet access policy should be reviewed with a view to increasing access to sites that enable detainees to pursue and support their immigration claim, to prepare for*

[2] Stephen Shaw (2016) *Review into the detention of vulnerable persons: a report to the Home Office*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf, para 6.135
[3] *Ibid*, para 6.129

their return home, and which enable them to maximise contact with their families. This should include access to Skype and to social media sites like Facebook[4].

Stephen Shaw also recommended that access to Skype/social media sites be facilitated, subject to an individualised risk assessment:

I also discovered that there was no security objection on the part of centre operators to Skype or social networking services, assuming local risk assessments remained in place[5].

The use of keyword searches to restrict access has been a cause for concern. Detainees have reported to members being blocked for typing 'gay' into search engines when accessing the internet in Immigration Removal Centres. Stephen Shaw also highlighted the inappropriate blocking of legitimate sites in his review of immigration detention:

René Cassin reported that detainees were often prevented from accessing sites including those of Amnesty International, the BBC, IRC visitors groups, foreign language newspapers and other NGOs[6].

The issues raised in evidence on these matters were borne out by my own observations. In respect of internet access, I discovered for myself – as had HM Chief Inspector of Prisons previously – that legitimate sites were blocked inappropriately, and that staff were often as bemused as detainees as to why certain sites were unavailable[7].

In any event, detainees may require access to materials within prohibited categories for the purpose of the preparation of their immigration case. For example, detainees may need to access:

- History from dating sites to evidence relationships relevant to an immigration or asylum claim;
- Materials from groups relevant to a person's political activity in their country of origin (for example, the PKK in Turkey, which is on the list of proscribed organisations under Schedule 2 to the Terrorism Act 2000);
- Materials from extremist groups to evidence persecution from these groups;
- Racist / homophobic materials to demonstrate the risk of persecution on these grounds from individuals or groups in the country of origin.

Provision should be made for detainees to seek access to such sites as are otherwise prohibited (on which subject see our comments above) on a case by case basis on approaching the IRC welfare officer or internet supervisor (as discussed for the specific situation outlined in paragraph 6).

Paragraph 5 in this section sets out a procedure by which a detainee may be suspended and for the notification of suspensions and the reasons for these to the Home Office Immigration Enforcement Manager. Such a level of escalation may not be necessary in many cases and would give rise to concern where this followed attempts to access a blocked site identified through keyword search which may indicate sites blocked inappropriately.

[4] *Ibid*, para 6.130
[5] *Ibid*, para 6.128
[6] *Ibid*, para 6.126
[7] *Ibid*, para 6.128

No provision has been made in this section for protecting confidentiality and legal privilege in the monitoring of internet access and the notification of suspended access to Home Office and Immigration Removal Centre officials. Procedures that disclose the content of correspondence of detainees may not comply with rule 27 of the Detention Centre Rules, SI 2001/238 with reference to the correspondence of detainees.

Adding and removing access to individual websites

It is important that the guidance makes provision for requesting access to websites that have been blocked and for internet provision to be reviewed so that inappropriate blocks on websites may be removed across the detention estate. It should not, however, be necessary for a detainee to make an application in writing to unblock a website. This would make it more difficult for those who do not speak English well from being able to request that a website is unblocked. Detainees should, in the alternative, have the option of reporting a blocked site to the internet supervisor who will record the problem on their behalf.

The guidance should indicate that reasons will be given to the detainee for any decision to deny permission to access a specific, requested website. Failure to do so may be a breach of the detainee's human rights. See for example *Kalda v. Estonia* (application no. 17429/10), European Court of Human Rights.

Monitoring and audit

The order needs to set out how monitoring of internet usage will ensure compliance with Rule 27 of Detention Centre Rules, SI 2001/238 which states:

> *(4) No letter or other communication to or from a detained person may be opened, read or stopped save where the manager has reasonable cause to believe that its contents may endanger the security of the detention centre or the safety of others or are otherwise of a criminal nature or where it is not possible to determine the addressee or sender without opening the correspondence.*
>
> *(5) Detained persons will be given the opportunity of being present when any correspondence is opened or read and shall be given reasons in advance if any correspondence is to be opened, read or stopped under paragraph (4).*

As indicated above, the order also needs to set out how privileged communications and information will be protected under the monitoring envisaged by the policy.

The order should make clear that an internet supervisor should not be obliged to curtail an IT session if an attempt is made to access a blocked site. If these are blocked by keyword, then a detainee may only know that it is blocked if they attempt to access it. It may also be a site to which they should have access. This would not be sufficient reason alone to curtail an internet session.

Detainees have experienced difficulties opening attachments or opening documents on websites (which involves a temporary download of files by the computer). Should there be restrictions on saving documents to the computer system of the Immigration Removal Centre, these should not prevent detainees from opening attachments or opening documents on websites (which involves a

temporary download). This would prevent detainees from reading relevant material and sending documents to and from their legal representatives.

If detainees are unable to download or store documents resulting from an internet search then printing facilities should be more readily accessible, enabling detainees to print without waiting 24 hours to do so. Provision for printing should also take into account that country research reports and other documents relevant to an immigration case may be lengthy. There should be guidance within the order about protecting detainees' correspondence and privileged documents when printing facilities are used.

There should be a commitment to publish the number of website access requests and the numbers of these granted and denied by each Immigration Removal Centre to monitor consistency in the application of the policy, with more detailed information available for inspection by Her Majesty's Inspectorate of Prisons, Independent Monitoring Boards and the Independent Chief Inspector of Borders and Immigration. Inspectors should be able to view any list of keywords used to block sites.

Code of conduct

The Code of Conduct would require detainees to sign a summary document with more detailed instructions provided separately in the internet suite. The Code of Conduct must contain all the terms to which detainees are required to agree so that any consent may be properly informed.

The Code of Conduct must make clear to detainees how their internet activity is monitored and set out the types of internet use that would constitute a breach of the policy.

Detainees should be referred to and able to access the list of proscribed organizations in Schedule 2 of the Terrorism Act 2000 to know what are deemed to be sites with material that promotes terrorism, extremism or radicalisation so that they are aware that these are considered prohibited sites. Such organizations may not be banned or described as terrorist organizations in detainees' countries of origin, for example, the terrorist organisation Al-Shabaab controls large parts of Somalia. Detainees who need to evidence persecution from such groups also need to be aware of the need to seek specific permission to do so.

The language of the Code of Conduct is very difficult to understand for a person with low levels of literacy or English language. We suggest that the language is simplified and that provision is made for the Code to be read to detainees, with the assistance of an interpreter where required and this to be recorded on signing the Code of Conduct. The Detention Services Order should also make explicit that the Code must be given or interpreted into the detainee's own language.

The organisation of the Code of Conduct is confusing and may be difficult to follow. This may be improved by separating sections under topic headings such as 'logging in and out', 'access to websites', 'downloading material' etc. rather than the two current sections 'you must' and 'you must not' where similar topics are addressed under these two different headings.

As discussed with reference to the *Procedures* section of the draft detention services order, the Code of Conduct should not make reference solely to preparation for removal in describing the purpose of ensuring access to internet provision. The Code should make explicit that this is only applicable where relevant and additionally state that the policy supports the maintenance of links with legal representatives and the preparation of an immigration case, as well as with family,

friends and legal representatives. There is a risk that referring exclusively to preparation for removal in the Code of Conduct will increase the anxiety and concern of detainees that they may be removed while their application remains to be determined.

ILPA

26 February 2016