ILPA SUPPLEMENTARY BRIEFING TO AMENDMENTS TABLED FOR THE IMMIGRATION BILL, LORDS' THIRD READING 12 APRIL 2016

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 has already provided a briefing covering amendments published or that ILPA had seen in their final form as of 11 April 2016. That briefing is at http://www.ilpa.org.uk/resources.php/32044/ilpa-briefing-to-the-amendments-tabled-for-the-immigration-bill-lords-third-reading-12-april-2016 This briefing deals with an amendment of which we have just learned, as described below.

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Clause 62 AMENDMENT 6* in the name of Baroness Lister of Burtersett

Page 58, line 37, at end insert –

( ) No person whom the Secretary of State knows, or could reasonably be expected to know, is pregnant shall be detained

Purpose

To prohibit the detention of women whom the Secretary of State knows, or could reasonably be expected to know, are pregnant.

Briefing

To be read with the witness statement of the Royal College of Midwives in the case of *PA*, appended hereto together with the order of the Court in *PA*.

When Lord Bates wrote on 1 March 2016 to present the amendment which became Clause 62 he produced an Annex, *Annex B: Detaining Individuals for the Purposes of Immigration Control – Consideration Of Risk Issues* setting out the Government's thinking on detention (reproduced below). Lawyers and experts who have studied Annex B are concerned that far from initiating the extra protections recommended by the Shaw Review, it would reduce the protection to be afforded to persons at particular risk, because it would dilute the current longstanding test that

they can be detained only in very exceptional circumstances as set out in the Home Office Enforcement Guidance and Instructions, Chapter 55.10[1] .

Concerns arise because the Adults at Risk policy appears to envisage a balancing act. The 'Draft principles of the policy' section states

- *Detention will not be appropriate if an individual is considered to be at risk **unless and until** there are overriding immigration considerations.*
- *In each case, the evidence of risk to the individual should be considered against any immigration and criminality factors to establish whether these factors outweigh the risk.*

It goes on to say: "*Individuals at the highest level of risk would be detained only in cases in which there is a highly compelling justification on immigration control grounds."*

This suggests that the test in Chapter 55.10 of detention in "exceptional circumstances" is become a test of a 'highly compelling justification' and that it be codified as acceptable to prioritize the risk of a person's absconding over the well-being of the detainee. This appears to be the position taken in Lord Keen of Elie's letter of 21 March 2016 to Baroness Lister of Burtersett and Baroness Hamwee where he says "decisions on the detention of vulnerable people will be based on an assessment of whether immigration control factors outweigh vulnerability factors". Lord Keen said that pregnant women will be regarded as at the highest level of risk. But what does that mean?

- **The Minister should be urged to reconsider his decision that the Government will not agree to Stephen Shaw's recommendation of an outright ban on the detention of pregnant women.**

- **The Minister should be pressed for an assurance that the new "Adults at Risk" policy is in no way intended to reduce the existing levels of protection to persons identified as being at particular risk but rather, as Stephen Shaw recommended, is intended to strengthen them. In particular the Minister should be pressed for an assurance that is the Adults at Risk policy, properly applied, would mean that pregnant women were detained only in the most exceptional circumstances.**

- **The Minister should be asked to undertake, whatever the outcome of debates on the current Bill, to discuss the findings of the Shaw review with the Royal College of Midwives, with Medical Justice, Women for Refugee Women as well as with the Helen Bamber Foundation and Freedom from Torture.**

Stephen Shaw wrote

> "*4.34 On the substantive issue of detaining pregnant women, therefore, and independently of my proposals in respect of single point routing, I believe that the Home Office should*

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470593/2015-10-23_Ch55_v19.pdf

> *acknowledge the fact that, in the vast majority of cases, the detention of pregnant women does not result in their removal. In practice, pregnant women are very rarely removed from the country, except voluntarily. In these circumstances, I am strongly of the view that the presumptive exclusion from detention should be replaced with an absolute exclusion.*
> ***Recommendation 10: I recommend that the Home Office amend its guidance so that the presumptive exclusion from detention for pregnant women is replaced with an absolute exclusion."***

This recommendation can, and should be implemented. It echoes the recommendation of the All Party Parliamentary Groups on Refugees and on Migration, in the report of their enquiry into Immigration Detention[2]. The report of the enquiry cited Hindpal Singh Bhui of her Majesty's Inspectorate of Prisons

> *"…pregnant women are only meant to be detained in the most exceptional circumstances. And again, we look for evidence of this. And on the last couple of occasions that we've looked, we haven't found those exceptional circumstances in the paperwork to justify their detention in the first place."*

The report of the enquiry found:

> *We were also told of pregnant women being forced to travel long distances, sometimes over several days, when initially being detained, and failures in receiving test results and obstetric records. In one case, we were told that an immigration interview was prioritised over a 20-week anomaly scan.210*
>
> ***We are disappointed that the Home Office does not appear to be complying with its own policy of only detaining pregnant women in exceptional circumstances. We recommend that pregnant women are never detained for immigration purposes***

The Home Office currently has a policy that pregnant women should be detained only in the most exceptional circumstances. But it fails to follow that policy. It has policies as to the care and treatment pregnant women, and indeed all women, and indeed all detainees, should receive. But it fails to follow those policies as the All Party Parliamentary Groups documented. Pregnant women suffer from the failure to implement policies specific to them, but also the failure to implement more general policies. The risks are too great, even if pregnant women are classified as being "at the highest level of risk" that what is supposed to happen to them will not happen, and that they and their babies will suffer as a result.

Pregnancy can be verified; no questions of "credibility" or of a person's claiming to be pregnant when she is not arise. Pregnancy is a condition that lasts for a finite period. The risks to the Home Office of not being able to detain pregnant women are minimal and should be contrasted with the situation of pregnant women in detention which is wholly unacceptable. . The consequences have been documented in detail, as described below. Pregnant women should not be detained.

[2] https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf

Lord Keen of Elie claims in his 21 March letter that a blanket ban is not possible. He cites the hypothetical example of a pregnant woman with no right of entry who is fit to fly and whom the Government wants to return within a short period. The very example exposes that matters are not as cut and dried as is suggested in the letter. Persons are given temporary admission, or asked to remain of their own volition, when there turns out to be something untoward about their leave to enter. Very often, a removal will be made swiftly. There can be no presumption that there will not be compliance without detention. If a person is unwilling to return, this may be because of a fear of persecution. Any person who claims asylum cannot be removed until their claim has been determined; whether pregnant or not, they cannot be removed swiftly if such a claim is made. How in the circumstances of the example, would the Home Office be able to carry out the balancing act envisaged by Lord Keen? How will it know about the women's state of health, the history of her pregnancy and any risks to her? If the notion of pregnant women being at the "highest level of risk" is to mean anything, surely it would mean that a newly arrived pregnant woman should not be detained just because she does not have her entry papers in order? Yet this is the hypothetical example used.

In her witness statement for the case of *PA*, appended hereto, Louise Silverton of the Royal College of Midwives identifies increased morbidity and mortality rates among pregnant asylum seekers because they often have complicated pregnancies, may be poor health and may not make good use of health services. Other women under immigration control, particularly those without leave, may be in a similar position.

Ms Silverton expresses concern at the midwifery services provided in detention, particularly the lack of information available to those providing those services, making it impossible to carry out adequate foetal and maternal risk assessment. She identifies the risks of stress and tiredness.

At the meeting hosted in parliament on 22 march 2016** by Caroline Spelman MP, a woman who had been pregnant in detention described how nausea left her unable to eat at mealtimes in the dining room, but she was not allowed to have food separately or at different times. She was denied extra helpings the things she felt able to eat and as a consequence of being unable to swallow other things, or to keep them down, went hungry. Ms Silverton says of the pregnant woman in detention

> "She cannot purchase the food she needs; she cannot sleep in her own bed and make it more comfortable. Even if a pregnancy is completely healthy and uncomplicated; the dignity and care that should be afforded all pregnant women is compromised by detention."

Ms Silverton also raises the question of the use of force against pregnant women. This is a matter ILPA has raised many times. A case revealed that the Home Office and its contractors had been operating an unlawful policy on the use of force on pregnant women and children in immigration detention.[3] The 2012 report of the Chief Inspector of Prisons on the Cedars centre in which families are detained found:

> *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.*

[3] *Chen and Others v SSHD* CO/1119/2013.

> *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.*

The Inspectorate called for force not to be used. Instead the Agency 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 claim challenging 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 that she use force against these two groups only in situations where there is a risk of harm to self or another.

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's from using force against the four claimants (a pregnant woman and three children, all at risk of an enforced removal).

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 10th April 2013, 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.* [4]

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.*

Medical Justice produced a report on pregnant women in detention 2013: *Expecting Change: the case for ending the immigration detention of pregnant women*[5] . The report documents stillbirths, one followed by a suicide attempt by the mother. One woman cited in the report says

> *I couldn't eat the food which was provided for detainees. I remained there living just on fruit, juices, biscuits, crisps and popcorn for five months… I lost 6kg of my actual weight – it should increase in pregnancy. The doctors and nurses there shouted at me … saying that I was on*

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

[5] See http://www.medicaljustice.org.uk/about/mj-reports/2186-expecting-change-the-case-for-ending-the-immigration-detention-of-pregnant-women-11-06-13.html

hunger strike. I was never on hunger strike: I love my baby so why would I go on hunger strike? "

The report looks at 20 women.

"Eight of the 20 women had previously had live births. In this group, two had also had previous ectopic pregnancies and two had miscarriages. Two women had had previous caesarean sections - one of these was performed to deliver an IUD (intrauterine death) to a woman who had suffered a placental abruption. Of the 12 who had never given birth, five had a history of miscarriages….

Six women reported a history of gynaecological problems….Three women also…each suffering either from HIV, Hepatitis B or Hepatitis C. Other physical health issues included: essential hypertension (2), hyperthyroidism and cellulitis.

…

In all of the 20 women's cases reviewed, medical notes were incomplete. The documents that were typically missing included:

- *Pregnant lady notification forms*
- *Blood results*
- *Scan results*
- *Rule 35 responses*
- *Hospital records*
- *Completed prescription charts*

…

Some journeys from women's homes were up to 200 miles whilst for others who were detained upon arrival in the UK, their travel time could take over 24 hours.

The group studied in the report includes women who only found out that they were pregnant in detention.

Access to midwives was inadequate

One woman who had one visit from a midwife during her 12 weeks in detention had a history of two miscarriages, as well as abuse, trafficking and domestic violence. (Another scheduled appointment with a midwife was cancelled because the midwife was off sick.) In the current pregnancy she had vaginal bleeding shortly before she was detained. During her detention she experienced abdominal pain, further bleeding and pregnancy loss at 20 weeks.

Another woman, who was in detention for 17 weeks had a history of rape, torture, depression, and PTSD. Her pregnancy was complicated by urinary tract infection (UTI), vaginal discharge, Group B Streptococcus, depression, gestational diabetes, abdominal pain and back pain, as well as poor nutrition. She saw a midwife on two occasions only, and there were no missed or cancelled
midwife visits recorded in the notes. A healthy low risk woman receiving routine antenatal care would have had four visits over a similar period. In the 17 weeks she was held in detention, she also did not have any routine scans.

Women did not have direct access to a midwife and according to those we spoke with they could not request a visit from the midwife.

Further case studies are detailed in Chapter 8 of the Report.

The Medical Justice report is not ancient history. This year, Women for Refugee Women produced *Pregnant women behind bars*[6]. In it they write

> *Women for Refugee Women's research has found that women are routinely watched in intimate situations by male guards while detained: 85% of the women we spoke to for our 2015 report I Am Human told us that male guards had seen them while they were naked, on the toilet, in the shower or in bed.*
>
> ***Levels of depression and incidents of self-harm are high in Yarl's Wood.*** *The Prisons Inspectorate report in 2015 found … 72 incidents of self-harm in the previous six months, a huge rise from the previous inspection.*
>
> *There have also been allegations of sexual abuse. In 2014 Serco, the private company that runs Yarl's Wood, admitted to MPs on the Home Affairs Select Committee that over the past seven years it had dismissed 10 staff members as a result of sexual contact with women held there. While the recent Prisons Inspectorate report did not find evidence that abuse was endemic, it emphasised that instances of sexual assault and abuse remain 'an ever-present risk'.*
>
> *Following an undercover investigation into Yarl's Wood by Channel 4 News in March 2015, which filmed staff members calling women held there 'animals' and 'beasties', the Home Office Minister Lord Bates said in the House of Lords: 'I watched that documentary on Channel 4, and quite frankly I was sickened.'*
>
> …
>
> Following the 2015 inspection of Yarl's Wood, the Care Quality Commission (the independent regulator of health and adult social care in England) issued three 'requirement to improve' notices to the private company G4S, the provider of healthcare services there. One of these notices highlighted that 'the antenatal care pathway was not being consistently followed by staff to ensure care and treatment was informed by specialist advice. This posed a risk that women displaying symptoms of the complications of early pregnancy would not receive safe care and treatment.'
>
> *….One pregnant woman who was kept in hospital for three days told us: 'I had three men guarding me. Even when the gynaecologist was doing an examination on me there were male guards in the room watching me. When I went to the toilet they were the ones who took me. When I sat down on the toilet the male guards were there. ….'*

They produce the account of Priya, who was detained

> *I only had one hospital appointment while I was there, for my 20 week scan, and even then I was escorted by officers who took me 40 minutes late for my appointment. I felt frustrated that I wasn't able to speak to the midwife after my scan because there was no time. The officers just took me straight back to Yarl's Wood instead.*

[6] See http://www.refugeewomen.co.uk/2016/wp-content/uploads/2016/03/WRW-briefing-detention-of-pregnant-women.pdf

…; I'm anaemic and my blood pressure is very low. On one occasion I passed out in Yarl's Wood,

…I couldn't eat the food in the canteen; that made me sick too.

…I don't understand why I was treated like that

In summary, there is too much at stake, too many failures, for the Home Office to be allowed to operate a policy which permits the detention of pregnant women, however infrequently. We urge an outright ban on the detention of pregnant women, as recommended by Stephen Shaw.

ANNEX B TO LORD BATES' LETTER OF 1 MARCH 2016: DETAINING INDIVIDUALS FOR THE PURPOSES OF IMMIGRATION CONTROL – CONSIDERATION OF RISK ISSUES

Background

Chapter 55.10 of the Enforcement Instructions and Guidance lists groups of individuals who are normally considered for immigration detention in only very exceptional circumstances. They are:

- Unaccompanied children and young persons under the age of 18.
- 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. .
- Those suffering from serious medical conditions which cannot be satisfactorily managed within detention.
- Those suffering from serious mental illness which cannot be satisfactorily managed within detention
- 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.

In the report of his review into the welfare in detention of vulnerable persons, Stephen Shaw recommended a number of additions and amendments to this list, namely:

- A presumption against detention for victims of rape and other sexual or gender-based violence (including victims of female genital mutilation).
- An absolute exclusion from detention for pregnant women.
- The removal of the words "which cannot be satisfactorily managed in detention" from the reference to individuals suffering from serious mental illness.
- A presumption against detention for those with a diagnosis of Post-Traumatic Stress Disorder.
- A presumption against detention for those with Learning Difficulties.
- A presumption against detention for transsexual people.

- A specific upper age limit in respect of elderly people.
- A further clause to reflect the dynamic nature of vulnerability and thus encompass "persons otherwise identified as being sufficiently vulnerable that their continued detention would be injurious to their welfare".

In the Government's response to the Stephen Shaw report, in the Written Ministerial Statement of 14 January 2016, it was stated that:

"… the Government accept Mr Shaw's recommendations to adopt a wider definition of those at risk, including victims of sexual violence, individuals with mental health issues, pregnant women, those with learning difficulties, post-traumatic stress disorder and elderly people, and to recognise the dynamic nature of vulnerabilities. It will introduce a new "adult at risk" concept into decision-making on immigration detention with a clear presumption that people who are at risk should not be detained, building on the existing legal framework. This will strengthen the approach to those whose care and support needs make it particularly likely that they would suffer disproportionate detriment from being detained, and will therefore be considered generally unsuitable for immigration detention unless there is compelling evidence that other factors which relate to immigration abuse and the integrity of the immigration system, such as matters of criminality, compliance history and the imminence of removal, are of such significance as to outweigh the vulnerability factors. Each case will be considered on its individual facts, supported by a new vulnerable persons team."

It went on to say that:

"The Government expect these reforms (the adults at risk policy, a more detailed mental health needs assessment in immigration removal centres, and a new approach to the case management of those detained)*, and broader changes in legislation, policy and operational approaches, to lead to a reduction in the number of those detained, and the duration of detention before removal, in turn improving the welfare of those detained."*

Overview of the adults at risk policy

A new approach has been developed in respect of adults at risk. This approach will allow for all of the groups of individuals currently listed in the policy, along with the groups recommended for addition by Mr Shaw, to be regarded as being "at risk" for the purposes of the policy, and for their cases to be considered in the light of whatever information and evidence is available in respect of their "at risk" status. This means that the scope of the policy is broader than before, in terms of the range of individuals unsuitable for detention because they are vulnerable; in combination with other initiatives designed to improve the management of cases, including oversight of the cases by a new vulnerable persons team, this will mean that the processes for safeguarding against the detention of vulnerable people will be stronger than before.

We have committed to publishing the adults at risk policy by May 2016.

DRAFT: Principles of the policy

The principles of the new "adults at risk" approach are being developed and will set this new approach within the wider context of the overall principles of detention:

- The intention is that fewer vulnerable people will be detained and that, where detention becomes necessary, it will be for a shorter period than at present.

- Individuals should leave the UK when they are required to by law. The Government expects individuals to leave the UK before the expiry of any valid leave they may have, and to comply with any requirement or instruction to leave the UK.

- For the purposes of removal, individuals can be detained if there is a realistic prospect of removal within a reasonable timescale and if it is believed that the individual would not be likely to be removable without the use of detention.

- Detention will not be appropriate if an individual is considered to be at risk unless and until there are overriding immigration considerations.

- In each case, the evidence of risk to the individual should be considered against any immigration and criminality factors to establish whether these factors outweigh the risk.

- The greater the weight of evidence in support of the contention that the individual is at risk, the more compelling the immigration and criminality factors need to be in order to justify detention.

- The policy applies only to adults (individuals who are 18 years of age and older). It does not apply to children.

DRAFT Implementation approach

In each case in which an individual declares that they are at risk (for the purposes of this policy) or in which there is documentary evidence suggesting that that is the case, a safeguarding approach (with support of a vulnerable persons team) will be introduced to assess the level of risk (from low to high). The level will be based on the type and quality of the evidence available.

The starting point will be that an "at risk" individual should not be detained. An assessment will be made of whether compelling immigration considerations, starting with the imminence of removal, but also taking into account compliance history and likelihood of absconding, and risk to the public, outweigh the risk level, based on guidance provided to decision makers and safeguarding teams. Until the immigration considerations outweigh the at risk factors, the individual should not be detained. The higher the level of risk, the less likely it is that an individual will be detained because the level that the immigration considerations would need to reach in order to justify detention rises concomitantly. Individuals at the highest level of risk would be detained only in cases in which there is a highly compelling justification on immigration control grounds. Pregnant women will be automatically considered to be amongst those regarded as being at the highest level of risk.