ILPA BRIEFING FOR WESTMINSTER HALL DEBATE ON THE DETENTION OF VULNERABLE PERSONS IN THE NAME OF ANNE MCLAUGHLIN MP, TUESDAY14 MARCH 2017

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 organisations, including UK Visas and Immigration's Detention sub-group. ILPA intervened in the legal challenges to the detained fast track and was consulted by the Tribunal Procedure Committee when the government asked it to make rules for an accelerated appeals procedure in detention; a request the Committee subsequently declined. During the passage of the Immigration Act 2016 ILPA worked with other organisations to promote amendments to the Bill to protect immigration detainees, with some success: a time limit on the detention of most (not all) pregnant women in detention and provision for automatic judicial oversight of detention every four months (not yet in force).

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This briefing represents a sample, rather than a comprehensive survey, of our concerns about immigration detention. It covers

- **The notion of 'vulnerable' persons in detention;**
- **Automatic bail hearings and time limits**
- **Immigration detention in the prison estate**
- **Short term holding facilities and pre-departure accommodation;**
- **The detained fast-track**
- **Adults at risk in immigration detention**

Persons are held in immigration detention by administrative fiat, without limit of time. Until Schedule 10 to the Immigration Act 2016, making provision for everyone to have a bail hearing once every four months, is brought into effect immigration detainees will never be brought before a judge to determine the lawfulness of their detention unless they instigate this. Those with immigration rather than asylum cases are not entitled to legal aid for their immigration case, although if they pass means and merits tests they will be entitled to legal aid to challenge their detention. But paying or not, many struggle to secure legal representation, in particular those held in the prison estate following completion of their sentence.

'Vulnerable' persons in detention

When the word 'vulnerable' is used without specifying what a person is vulnerable to, it is most often used as a synonym for 'powerless'. We suggest that all persons in immigration detention are in a situation of relative powerlessness. On 11 January 2017, a third person was found to have died at Morton Hall Immigration Detention Centre. He was a 27-year-old Polish man who was found hanging in his cell. His wife had given birth that day. While, unsurprisingly, there are suggestions of mental health problems, reports do not indicate whether there were any such problems prior to detention. We caution against suggesting that some detainees are 'vulnerable' and others not.

Automatic bail hearings

Powers to set up automatic judicial oversight of detention after 10 and then 38 days had been taken in Part III of the Immigration and Asylum Act 1999.[1] Introducing the provisions, the Rt Hon the Lord Williams of Mostyn described them as providing 'significant additional safeguards' for those held in immigration detention. The provisions were never brought into force and were repealed by the Nationality, Immigration and Asylum Act 2002.[2] Leading opposition from all sides of the House to that repeal, Baroness Anelay of St Johns tried but failed to save the provisions from repeal.[3]

Schedule 10, paragraph 11 to the Immigration Act 2016 makes provision for automatic bail hearings where a person has been detained for four months at a stretch with no bail hearing: whether since their initial entry into detention or since their last bail hearing.

- **We urge MPs to press the government on when automatic bail hearings under the 2016 Act will be brought into force.**

The debates and votes that prompted the government to make provision for automatic bail hearings during the passage of the 2016 Act focused on the question of a time limit for detention and would have required the government to make the case for detention before a tribunal judge after 28 days' detention, at a stretch or in aggregate.[4] The amendment would have required the Secretary of State to persuade the Tribunal that the 'exceptional circumstances' of the case required detention beyond 28 days. The amendment was carried by 187 votes to 170[5]. The automatic bail hearing after four months is the government's compromise response. [6]

Paragraph 11 of Schedule 10 The section is not phrased in terms of the Secretary of State justifying detention and is identical to an elective bail hearing. Nonetheless, given the presumption of temporary admission set out in Chapter 55.1 of the Home Office Enforcement Instructions and Guidance, the Secretary of State will have to defend the decision to detain.

Automatic judicial oversight will not be for all. It does not apply to those detained pending deportation (paragraph 11(1)(a)). Nor does it apply to cases before the Special Immigration Appeals Commission, despite its being a specialist court of record presided over by a High Court judge and set up to hear national security cases (paragraph 11(6)(a)). Nor does the section apply where a person waives, in writing, their right to the hearing (paragraph 11(6)(a)). Yet it is those detained on completion of their criminal sentence who are often detained for the longest periods and, given the political pressures to keep them locked up, stand most in need of a tribunal consider to review their detention.

- **MPs should urge the government to bring forward legislation to extend automatic judicial oversight to all cases.**

[1] Sections 44 to 50. See Hansard HC Deb 22 February 1999 col 39 per the Rt Hon Jack Straw MP and HL Deb 29 June 1999, col178, and 19 July 1999 col. 725 per the Rt Hon the Lord Williams of Mostyn.
[2] Schedule 9. See Official Report, Commons, Standing Committee E, 14 May 2002; col. 256 per Angela Eagle MP.
[3] HL Deb 17 July 2002, vol 637 cols 1257-305
[4] See in particular Amendment 84 in the names of Lord Ramsbotham, Lord Rosser, Baroness Hamwee and Lord Roberts of Llandudno debated at HL deb, 15 March 2017, col 1787 (15 March 2016).
[5] Hansard, HL col 1804 (15 March 2016).
[6] Hansard, HC Vol 608 (25 April 2016) and (9 May 2016).

Immigration detention in the prison estate

As of September 2016, 558 persons were held under Immigration Act powers in prisons.[7] No figures are published showing how long immigration detainees are held in prisons, or on what happens when they leave detention, and whether they are removed or released.

In February 2017, the charity Bail for Immigration Detainees published *Mind the Gap: Immigration Advice for Detainees in Prisons.*[8] It finds that almost half the detainees surveyed were only told of their detention under Immigration Act powers on the day they expected to be released following completion of their prison sentence. It found that fewer than a quarter of the 18 immigration detainees in prison surveyed have access to an immigration solicitor. Fewer than 5% can access any independent immigration advice.

- **MPs should urge the government to end detention under Immigration Act powers in the prison estate. Pending this, express provision must be made to ensure that such persons can access legal advice.**

Short term holding facilities and pre-departure accommodation

In his review of immigration detention, Stephen Shaw CBE paid special attention to the problems of short-term holding facilities and to the dreadful conditions in some of them. His concerns led him to urge that a discussion draft of the short term holding facility rules be published as a matter of urgency.[9] Short-term holding facilities are the only part of the detention estate in which unaccompanied children can be held, for up to 24 hours.[10] While regulations providing for the contracting out of short-term holding facilities were made in 2002[11] 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[12]. In 2009 the Home Office consulted on another draft of the rules[13].

[7] Source: Ministry of Justice (JSAS/FOI 108670).
[8] Available at http://www.biduk.org/sites/default/files/media/docs/Mind%20the%20Gap_1.pdf
[9] Review into the welfare in detention of vulnerable persons: A report to the Home Office by Stephen Shaw, January 2016 at: https://www.gov.uk/government/publications/review-into-the-welfare-in-detention-of-vulnerable-persons, Executive Summary paragraph 9.
[10] Immigration Act 2014, s 5 amending Schedule 2 to the Immigration Act 1971.
[11] The Immigration (Short-term Holding Facilities) Regulations 2002 (SI 2002/2538).
[12] Immigration: the short-term holding facility rules, draft statutory instrument, January 2006, at www.ilpa.org.uk/resources.php/14494/home-office-draft-short-term-holding-facilities-rules-2006. See also ILPA's response to the consultation on the draft rules, 13 February 2006 at http://www.ilpa.org.uk/resource/14493/response-to-home-office-consultation-on-draft-short-term-holding-facilities-rules and Barbara Nicholson, Senior Policy Officer, Home Office to Elizabeth White, ILPA of 7 August 2006 responding to ILPA's comments on the consultation at: www.ilpa.org.uk/resources.php/1889/home-office-to-ilpa-of-7-august-2006-re-draft-short-term-holding-facility-sthf-rules
[13] See Barbara Nicholson, Detention Services Policy Unit, UK Border Agency to Steve Symonds, ILPA, re further consultation on the draft short-term holding facility rules, 20 February 2009, www.ilpa.org.uk/resources.php/20183/uk-border-agency-ukba-to-ilpa-re-further-consultation-on-the-draft-short-term-holding-facility-sthf- and ILPA's further response of 11 June 2009, at: 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- and the 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-

On 30 April 2012,[14] Dr Julian Huppert MP asked why the rules had yet to be published. The then Minister, Damian Green MP, replied that '*The Short-term Holding Facility Rules remain under development at present'*[15]. 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 replied that the rules had yet to be finalised and that there was no fixed date for their publication.[16]

On 3 March 2014, during the passage of the Immigration Bill, Lord Taylor of Holbeach gave Lord Avebury 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.[17]

On 23 July 2014, the Home Office informed ILPA that Lord Taylor of Holbeach had written to Lord Avebury to say that the rules would not be introduced until after the summer recess. In a written answer of 24 October 2014 to a question by Lord Avebury on conditions in the short term holding facilities at Heathrow, the Rt Hon Lord Bates for the government indicated that rules on short-term holding facilities remained pending.[18]

The matter was raised during Committee stage of the Bill which became the Immigration Act 2016 where heavy reliance was placed on the Shaw report.[19] By the time that debate took place, the Home Office would have had in its possession the 9 March 2016 report from HM Inspectorate of Prisons on the conditions at Dover,[20] the account in which of the 'unacceptable' conditions in the Longport Freight Shed was subsequently to receive considerable media coverage.[21] Whether the prospect of the publication of that report acted as a spur or not, draft short term holding facilities rules were published a mere 17 days later.[22] The new draft rules bear signs of haste; they largely resemble the draft published in 2009. The period for consultation on the draft rules ended in April 2016[23] but at the time of writing no rules have been published. Lord Ramsbotham asked a parliamentary question on the topic on 5 September and received the discourteous response that the rules would be published 'in due course'.[24]

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[14] Hansard HC, col 1086W.
[15] Hansard, Written Answers, 30 April 2012, column 1086W at: http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120430/text/120430w0001.htm#120430180000026
[16] http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/131030w0001.htm
[17] Hansard HL, col 1140 (03 March 2014).
[18] Hansard, Written Answer HL2190 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2014-10-20/HL2190
[19] Hansard HL col 1679-1698 (1 February 2016).
[20] Report on an unannounced inspection of the short-term holding facilities at Longport freight shed, Dover Seaport and Frontier House (7 September, 1-2 and 5-6 October 2015), HM Inspectorate of Prisons, 9 March 2016 https://www.justiceinspectorates.gov.uk/hmiprisons/inspections/longport-freight-shed-dover-seaport-and-frontier-house/
[21] Channel migrants detained in freight shed, Dominic Casciani, BBC, 8 March 2016, at: http://www.bbc.co.uk/news/uk-35750968
[22] Simon Barrett, Removals, Home Office Enforcement and Detention Policy, Illegal Migration, Identity Security and Enforcement letter (no named recipient) re consultation on Short Term Holding Facility Rules, 18 February 2016 http://data.parliament.uk/DepositedPapers/Files/DEP2016-0190/Annex_C_-_Letter_re_Short_Term_Holding_Facility_Rules_Consultation.pdf; the Short-term Holding Facility Rules 2016, draft statutory instrument, 18 February 2016 http://data.parliament.uk/DepositedPapers/Files/DEP2016-0190/Annex_D_-_Short_Term_Holding_Facility_Rules_for_consultation.pdf; Draft Short-term Holding Facility Rules 2016: Summary of provisions, Home Office, 18 February 2016 http://data.parliament.uk/DepositedPapers/Files/DEP2016-0190/Annex_E_-Short_Term_Holding_Facility_Rules_-_summary_of_provisions.pdf
[23] See ILPA comments to Home Office on the draft rules for Short Term Holding Facilities, 14 April 2016 at: http://www.ilpa.org.uk/resource/32078/ilpa-comments-to-home-office-on-the-draft-rules-for-short-term-holding-facilities-sthfs-14-april-201
[24] Hansard, HL Written Question HL1512 (16 September 2016).

Rules for 'pre-departure accommodation' in which families with children are held have never been published, not even in draft. The 'Cedars' pre-departure accommodation has been closed and families with children are now detained in a dedicated part of Tinsely House Immigration Removal Centre. This makes the need for dedicated rules all the more urgent.

MPs are urged to press the Minister on

- **When rules for short term holding facilities will be brought into force**
- **When rules for pre-departure accommodation for detention of families will be published for consultation and the intended timeline for bringing them into force.**

The detained fast track

The detained fast track for asylum cases was suspended12 following a series of judgments that it carried an unacceptable risk of unfairness, including that the fast-track procedure rules were *ultra vires* the powers of the Tribunal Procedure Committee, which has the power to make procedural rules ensuring that justice be done and that the tribunal system is fair.[25] By "allowing one party to the appeal to put the other at serious procedural disadvantage without sufficient judicial supervision", the rules were not securing these objectives and the Committee was acting out with its powers.[26] Persons seeking asylum nonetheless continue to be detained in what is described as "detained asylum casework" or the "detained slow track"

Pressed, very hard, by the Home Office, the independent Tribunal Procedure Committee, which makes rules for tribunals, including, following a battle with the Home Office,[27] the Immigration and Asylum chambers, consulted on whether it should make rules for appeals in a new detained fast track. It concluded that it should not and Mr Justice Langstaff wrote to the Home Office to this effect on 12 February 2016, detailing what further evidence the Committee would expect to see before it reconsidered the question. Such evidence has not been forthcoming.

The Ministry of Justice consultation bears a striking resemblance to the submissions the Home Office put before the Committee. It purports to be to 'gather additional evidence to help Government formulate policy and…to be able to assist the T[ribunal] P[rocedure] C[ommittee] by providing a considered Government Policy position which has taken consultation responses into account.'16 But one of the questions is

> *Do you agree that the Government should take power in primary legislation to introduce and vary time limits for different types of immigration and asylum appeals?*

In other words, do you agree that the Government should continue to17 arrogate to itself the role of the independent Tribunal Procedure Committee? This is consultation as threat.

- **MPs should require the government to defer to the independent committee charged with making rules for the Tribunal and not to attempt to coerce it into making rules that it does not consider appropriate or justified.**
- **MPs should require that new contracts for legal aid and the accompanying specifications, to be let from April 2018 and tendered for this year, make no reference to the detained fast track.** If an accelerated asylum procedure in detention is reintroduced then a schedule to the contracts could be introduced.

[25] *Detention Action v Secretary of State for the Home Department* [2014] EWCA Civ 1634; *R (Detention Action v First-Tier Tribunal) (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin) (12 June 2015). See also *R(JM) et ors* (CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015)

[26] *R(Detention Action v First-Tier Tribunal) (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin) (12 June 2015).

[27] Consultation: Immigration Appeals: Fair Decisions, Faster Justice UK Border Agency 21 January 2009.

Adults at risk in immigration detention

Five times in the last few years the Home Office has been found guilty of a breach of Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman or degrading treatment or punishment, for its treatment of those with mental health problems in immigration detention.[28] The cases are covered in an annex to the Shaw review. It is not possible to know how many more cases have settled or are pending because the Home Office requires gagging clauses in its agreements to pay compensation. Nonetheless, the Home Office 2015-2016 annual report and accounts identify payments of £2.2 million in cases of unlawful detention and also identify 18 ex-gratia cases totalling £1.7 million, and 50 compensation payments totalling £900,000, which may or may not be related to immigration detention. Paragraph 15 of the Home Office 2015-2016 annual report and accounts identifies claims for unlawful detention (alongside for unfair dismissal) and that six million has been set aside in respect of litigation in which the Home Office is involved,

- **MPs should press the government on how much it has paid, to settle or by way of compensation ordered by the courts, in connection with persons who have been held in immigration detention.**

Statutory guidance on adults at risk in immigration detention was supposed to be the government's response to the Shaw review and its production was indeed overseen by one of the Home Office officials who had been seconded to the Shaw Review, Mr Ian Cheeseman. Guidance was published as *Adults at risk in immigration detention: draft policy* on 26 May 2016. A revised version was laid before parliament on 21 July 2016.[29] This guidance came into effect on 12 September 2016. The Home Office issued a gloss on the statutory guidance as part of its Enforcement Guidance and Instructions, also entitled: *Adults at Risk in immigration Detention.*[30]

The statutory guidance states:

> *The clear presumption is that detention will not be appropriate if a person is considered to be 'at risk'. However, it will not mean that no one at risk will ever be detained. Instead, detention will only become appropriate at the point at which immigration control considerations outweigh this presumption.*

This is arguably less protective in its approach than the former Home Office Enforcement Instructions and Guidance on *Detention and Temporary Release* paragraph 55.10 which used to contain its own list of those

There are three levels of evidence of risk in the guidance. A person's own testimony gets them to the first level of evidence. Professional evidence that a person may be an adult at risk gets a person to the second level. Professional evidence that the person is at risk and that detention will cause harm gets a person to the highest level. As to the immigration factors to be weighed against risk, these are length of time in detention, public protection and 'compliance issues'.

[28] *R (BA) v SSHD* [2011] EWHC 2748 (Admin); *R (HA) v SSHD* [2012] EWHC 979 (Admin); *R (D) v SSHD* [2012] EWHC 2501; *R (MD) v SSHD* [2014] EWHC 2249 (Admin).

[29] See https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention

[30] Home Office, Enforcement Instructions and Guidance, *Adults at Risk in Immigration Detention,* v1, 9 September 2016, at https://www.gov.uk/government/publications/offender-management Chapter 55.10 of the Enforcement Instructions and Guidance refers to it as a new chapter 55b of the Enforcement Instructions and Guidance, but this chapter reference has not yet been given on the relevant guidance and it does not appear in the index to the Enforcement Instructions and Guidance at this point.

The statutory guidance does not provide guidance as to how to weigh evidence of risk against immigration factors, although it purports to do so. The casework guidance includes a 'guide rather than a prescriptive template' on balancing risks against immigration control.

Under the previous Home Office approach, contained in former paragraph 55.10 of its Enforcement Instructions and Guidance to demonstrate that there were very exceptional circumstances to justify detention, suggesting that the level of protection is reduced with the 'balancing' approach in the new guidance. The reference to public protection appears broader and more general than the references to the risks of reoffending and of harm identified in paragraph 55.10 as very exceptional circumstances which could justify detention. The casework guidance gives examples of criminal history, security risk, and a decision to deport for the public good. These are broader than the question of whether there will be a risk of re-offending or harm to the public, the former test identified in Chapter 55 of the Enforcement Instructions and Guidance, and identified as one which should normally be assessed by the National Offender Management Service.

The UN Convention against Torture definition of torture is adopted in the guidance which focuses on the torture having been carried out by a State or State like entity, rather than the level of suffering inflicted. This is narrower than the definition that was used in the former paragraph 55.10 of the Enforcement Instructions and guidance and upheld as the correct one in *R (EO, RA, CE, OE & RAN) v SSHD* [2013] EWHC 1236 (Admin). The restricted definition of torture has been challenged and the case is pending before the courts. Pending its being heard the court has required the Home Office to revert to the wider definition of torture.

- **The *Adults at Risk* guidance, far from implementing Stephen Shaw CBE's calls for greater protection of persons in immigration detention has been used to make it easier to lock persons up in immigration detention. MPs should call for new statutory guidance to be laid in draft before parliament and debated.**