11 October 2010

Dee Bourke
Director of Central Operations and Performance
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By email: Dee.Bourke3@homeoffice.gsi.gov.uk

Dear Dee

1. We write with regard to amendments made to Chapter 55.10 of the Secretary of State's policy on detention, the Enforcement Instructions and Guidance ("EIG"), on 26 August 2010.

2. These amendments have been made without notice to or consultation with us and were first brought to our attention by one of our members on 17 September 2010.

3. ILPA is concerned that:

   (a) The changes have been made without notice to or consultation with us and/or other relevant stakeholders;

   (b) These changes appear to have been made without any Equality Impact Assessment(s) having been carried out;

   (c) The changes would appear significantly to widen the Secretary of State's policy on detention in respect of the groups that it is stated that Chapter 55.10 is designed to protect; and

   (d) The amended policy does not contain adequate safeguards thereby increasing the risk that individuals will be detained arbitrarily, unlawfully and/or in breach of their Convention rights, particularly the mentally unwell.

4. Appended to this letter is the policy prior to the changes made on 26 August 2010 ("Enforcement Instructions and Guidance Version 9") and the policy as it appears on the UK Border Agency website thereafter and as at today's date ("Enforcement Instructions and Guidance Version 10").

5. We note that the following changes have been made (for convenience we have highlighted in bold the words added to Enforcement Instructions and Guidance Version 9 as they appear in Enforcement Instructions and Guidance Version 10):

(a) The addition of: "**There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention**."

(b) The change from "the elderly, especially where supervision is required" to "the elderly, especially where **significant or constant** supervision is required **which cannot be satisfactorily managed within detention**;

(c) The change from "those suffering from serious medical conditions" to "those suffering from serious medical conditions **which cannot be satisfactorily managed within detention**";

(d) The change from "the mentally ill – in CCD cases, please contact the specialist Mentally Disordered Offender Team" to "**those suffering serious mental illness which cannot be satisfactorily managed within detention (**in CCD cases, please contact the specialist Mentally Disordered Offender Team**). 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**"; and

(e) The change from "people with serious disabilities" to "people with serious disabilities **which cannot be satisfactorily managed within detention**".

6. ILPA would at this stage invite the UK Border Agency's explanation for the changes that have been made, in particular:

(a) The reason for the changes;

(b) Any consultation that was carried out prior to the changes and/or why the changes have been made without notice to or consultation with us or other relevant stakeholders;

(c) Please provide us with any Equality Impact Assessment(s) carried out;

(d) What "satisfactorily managed" means, and whether standards of care and treatment have been agreed with relevant contractors and other parties responsible for the care of immigration detainees who are elderly, suffering from serious medical conditions, the mentally ill and/or have serious disabilities;

(e) Whether and if so what guidance has been issued to ensure that there is effective communication between those responsible for the supervision and care of these detainees and UK Border Agency caseworkers tasked with deciding whether their needs are being "satisfactorily managed";

(f) Whether and if so what guidance has been issued to ensure UK Border Agency caseworkers understand what "satisfactorily managed" means in this context; and

(g) Whether and if so what additional facilities and/or resources have been made available to immigration removal centres and/or other places used to accommodate immigration detainees for the provision of treatment and care for

these groups in order to ensure that they can be "satisfactorily managed" within detention.

Particular issues with regard to the detention of the mentally unwell

7. We are particularly concerned at the change in the UK Border Agency policy with respect to the detention of the mentally unwell. It is the experience of ILPA members that UK Border Agency caseworkers routinely ignore or fail adequately to have regard to this very important aspect of the policy.

8. Four cases reported this year serve to illustrate this:

   (a) OM (Algeria) v SSHD [2010] EWHC 65 concerned a mentally ill man who had been detained since 13 September 2006. The first time the UKBA caseworker purported to engage with the policy at 55.10 was in response to an Order made by the Court. The Judge found at [39] and [40] that even in that review the UKBA caseworker had not properly engaged with the requirements of the policy.

   (b) In T (Zimbabwe) v SSHD [2010] EWHC 668 the first time the UKBA caseworker purported to engage with the policy at 55.10 was on 20 January 2010 "the first day of the hearing of this case" and at [73] "none of the progress reports or the detention reports during the claimant's detention of almost ten months even considered the appropriateness of detention in the light of the claimant's mental illness, let alone the evidence in the reports of Dr Sbaiti and Dr Katona relating to torture."

   (c) In MC (Algeria) v SSHD [2010] EWCA Civ 347 the Judge found that the UKBA caseworker failed to apply the policy at 55.10 from January 2009 until the week before the date of the hearing.

   (d) AA (Nigeria)) v SSHD [2010] EWHC 2265 concerned a mentally ill man who had been detained since 25 September 2009. The first time the UKBA caseworker engaged with the policy was 20 April 2010, "drawn up in the shadow of the present judicial review and must be discounted for that reason".

9. It was, importantly, established in MC at [42] that the policy at 55.10 should be read by reference to the definition of "mental disorder" in the Mental Health Act 1983 (as amended in 2007) ("MHA"):

   "Whatever the position may have been prior to the coming into force of the 2007 Act, I have no doubt that the Defendant's policy advice in Chapter 55 of the EIG does not distinguish between mental illness and personality disorder, such that it applies to those persons whose mental disorder is the former but not to those persons whose mental disorder is the latter. The policy is administered by officials who are not medically trained, and who would not have the expertise to distinguish between those who suffer from a mental illness and those who suffer from a personality disorder. The policy is expressed in general terms: "Does the subject have a history of physical or mental ill health?" Is the detainee one of "those suffering from serious medical conditions or the mentally ill?". When the policy is considered in the context of the relevant statutory framework, references to those who are mentally ill are

references to those who suffer from mental disorder as defined in the amended 1983 Act."

To the extent that the changes made on 26 August 2010 represent a departure from what the Court clarified in MC we would invite the Agency's explanation and justification for this, given the concerns expressed by the Court as to UK Border Agency caseworkers not being "medically trained" and the fact that the term "serious mental illness" does not have a statutory definition with the consequence that the amended policy invites UK Border Agency caseworkers to make a clinical judgement as to whether a detainee's mental illness is sufficiently serious as to engage the policy. Furthermore, the next limb of the policy ("which cannot be satisfactorily managed in detention") again invites a clinical judgement from decision makers who are not medically trained.

10. We are furthermore concerned that the amended policy does not define in what "very exceptional circumstances" the mentally unwell people may be detained. Clear guidance on this aspect of the policy was provided by Cranston J in Anam v Secretary of State for Home Department [2009] EWHC 2496 at [51] and [55] which has been followed in subsequent cases (including in particular by the same Judge in AA). For convenience we set out here the Judge's guidance from Anam in full:

Paragraph 55.10 provides that those mentally ill are normally considered suitable for detention in only "very exceptional circumstances". To my mind the existence of very exceptional circumstances demands both a quantitative and qualitative judgment. Were this provision to stand in isolation in the policy the power to detain the mentally ill could only be used infrequently, and the circumstances would have to have a quality about them which distinguished them from the circumstances where the power is frequently used. Otherwise effect would not be given to the requirement that the circumstances not simply be exceptional but very exceptional.
[…]
The upshot of all this is that although a person's mental illness means a strong presumption in favour of release will operate, there are other factors which go into the balance in a decision to detain under the policy. The phrase needs to be construed in the context of the policy providing guidance for the detention of all those liable to removal, not just foreign national prisoners. It seems to me that there is a general spectrum which near one end has those with mental illness who should be detained only in "very exceptional circumstances" along it – the average asylum seeker with a presumption of release – and near the other end has high risk terrorists who are detained on national security grounds. To be factored in, in individual cases, are matters such as the risk of further offending or public harm and the risk of absconding. When the person has been convicted of a serious offence substantial weight must be given to these factors. In effect paragraph 55.10 demands that, with mental illness, the balance of those factors has to be substantial indeed for detention to be justified."

It is the experience of ILPA members that UK Border Agency officials, and Criminal Casework Directorate caseworkers in particular, interpret the policy to mean that in any case where deportation action is being taken the "very exceptional" circumstances test will be met. But what is clear from the guidance in Anam is that the policy requires a much more nuanced approach: where a mentally unwell detainee has no convictions (eg an asylum seeker) or less serious criminal

convictions and/or is not a prolific offender, the "very exceptional" circumstances test is unlikely to be met such that detention or continued detention beyond a short period prior to removal would be unlawful.

11. Furthermore, care from community psychiatric services would go some way to meeting these concerns, as was explicitly recognised by the Secretary of State in her response to a Part 18 request for further information in MC:

> …the detention of Mentally Disordered Offenders is considered in line with the Defendant's policy of detaining those with mental illness, as set out at [EIG 55]. Further, in deciding whether to detain a Mentally Disordered Offender, the Defendant takes into account: a) the fact that when a Mentally Disordered Offender is released into the community, there is a detailed care plan in place to minimise risk to the Mentally Disordered Offender and others, and b) detention runs the risk of causing a Mentally Disordered Offender's condition to deteriorate.

12. Concerns as to risk of absconding can in many cases be met by appropriate conditions of release, including frequent reporting, tagging and a curfew (including, if necessary, a split curfew, as was imposed by the High Court in a recent case of one of our members[1]). Such a package of measures provides a clear alternative to detention, which would be in line with the policy to use detention as a "last resort" and only in "very exceptional circumstances" for this group.

13. The case of AA demonstrates that UK Border Agency caseworkers are unwilling or unable to release in criminal casework cases. AA was convicted of an offence of dishonesty: he was a destitute failed asylum seeker from Nigeria and he made a false representation to an immigration officer to obtain NASS support. He received a sentence of 12 months' imprisonment and was detained from 25 September 2009 until shortly before his judicial review was heard on 20 July 2010. AA was seriously mentally unwell and was consistently assessed as a high suicide risk. Internal UK Border Agency emails disclosed in the course of the proceedings revealed disquiet at AA's continued detention at HMP Chelmsford. One email stated, "I do not think we can justify continued detention" and another "We must get him out of HMP ASAP." On 26 April 2010 a consultant psychiatrist emailed the UK Border Agency and stated that AA's mental state was not such as to require transfer under section 48 of the Mental Health Act 1983 but recommended that AA be transferred to an immigration removal centre. Another UK Border Agency email reported that it was impossible to find a space in an immigration removal centre because of the large number of mentally ill detainees in the immigration detention estate.

14. In summary grounds filed in mid May 2010, the Secretary of State had stated she was willing in principle to release AA into the community. On 18 May 2010 Lin Homer, the Chief Executive of the UK Border Agency refused to authorise AA's release and the Treasury Solicitor was compelled to write to the Court apologising for the error contained in the summary grounds. In the context of the psychiatric evidence in that case and the nature of AA's conviction, it is difficult to envisage in what circumstances UK Border Agency officials will release mentally unwell foreign national prisoners who meet the deportation criteria; it would appear to us that the

[1] S v SSHD, CO/8140/2010, where a curfew of 6pm-6am and 12-1pm was imposed.

Agency's approach is to *release* or *not detain* such people in "very exceptional circumstances" – i.e. the converse to the Agency's published policy.

15. The Judge found AA's detention to be unlawful from the outset. He importantly found (and again this does not appear in the Enforcement Instructions and Guidance Version 10) by way of explanation of "very exceptional circumstances", that a risk that a person poses to him or herself cannot be used to justify detention as it falls outside the statutory purpose of Immigration Act detention – see [15]:

    In my view, the Secretary of State's attempt to justify detention by reference to the claimant's own well-being must fail, whether as an exceptional circumstance or otherwise. The use of immigration detention to protect a person from themselves, however laudable, is an improper purpose. The purpose of the power of immigration detention, as established in Hardial Singh and subsequent authorities, is the purpose of removal. The power cannot be used to detain a person to prevent, as in this case, a person's suicide. In any event, it is unnecessary to use immigration detention for this purpose since there are alternative statutory schemes available under section 48 of the Mental Health Act 1948 or under the Mental Health Act 1983.

16. This makes clear the position under the relevant legislation which you will appreciate takes precedence over any policy published by the Secretary of State. On the same note, for detention decisions to be lawful they must, in addition to complying with policy, comply with common law Hardial Singh principles. The reported cases demonstrate that the courts would find the detention of the mentally unwell unlawful unless the circumstances were very exceptional on Hardial Singh principles[2] - ie unlawful independently of what the Secretary of State's policy says.

17. The next issue that causes us concern is the failure of the policy to explain in what circumstances the detention of mentally unwell people may breach their Convention rights. It is well established that the detention of the mentally unwell may breach their rights under Articles 3, 5 and 8 ECHR[3]. As the Agency will appreciate, detention in breach of Articles 3 and 5 will render detention unlawful irrespective of factors in favour of detention.

18. We are particularly concerned as to the lack of guidance generally to UK Border Agency caseworkers on transfers under section 48 of the Mental Health Act. This contrasts with the position in the prison context[4]. We are also concerned that the policy does not expressly refer caseworkers to the multi agency guidance on transfers under sections 47 and 48 of the Mental Health Act 1983, entitled "Transfer of prisoners to and from hospital under sections 47 and 48 of the Mental Health Act 1983" at p13, which clearly states that once a detainee has been assessed as requiring transfer UK Border Agency caseworkers should give consideration to granting the detainee temporary admission (no doubt because if a detainee is so

[2] See in particular the judgment of Sir Michael Harrison in T above at [73]: "In my judgment, it would need very compelling circumstances indeed to justify the claimant's continued detention in the light of that evidence. That is, no doubt, why Chapter 55.10 of the EIG provides that the detention of the mentally ill, or of those where there is independent evidence of torture, is normally considered suitable in only "very exceptional circumstances"."

[3] Aerts v Belgium [1998] EHRR 777 and Bensaid v UK [2001] 33 EHRR 205.

[4] Detailed guidance is contained in PSO 50/2007.

mentally unwell as to require transfer it is likely that he or she should be released under the policy):

Immigration Act Detainees

For those detained under the Immigration Act, Border Immigration Agency (BIA) case-workers will need to be approached by the Healthcare Manager initially for a decision on whether Temporary Admission is appropriate. Admission may be by Sections 2 / 3 if the case-worker decides on Temporary Admission. Where continued detention is required transfer will be by Section 48. If Section 48 is used it is imperative that the Borders Immigration Agency case-worker is informed by the Healthcare Manager and that there is good subsequent communication between the case-worker and the patients' RMO. If the BIA case-worker decides that a person admitted under Section 48 is no longer to be detained, it is important that the psychiatrist involved is given notice, so that he/she can consider whether Section 2 / 3 is required. Once ready for discharge from hospital the individual will be liable to be re-detained in the removal centre. It will be important for the receiving team to request an invitation to attend the Section 117 aftercare plan meeting or if unable to attend at the minimum request copies of the aftercare plan in accordance with the Care Programme Approach.

19. The amended policy guides caseworkers to the conclusion that detention should be maintained pending transfer and we are extremely concerned about this. If a UK Border Agency caseworker grants temporary admission the psychiatrist will determine whether the detainee should be detained under section 2 or 3, which has a much stricter test of necessity in respect of detention, and the psychiatrist would in addition be able to determine what the most appropriate context is for the detainee's care, including treatment as a voluntary inpatient in accordance with section 131 of the Mental Health Act 1983 or treatment in the community in accordance section 117 of the Mental Health Act 1983. In addition, even if detained under sections 2 or 3, the psychiatrist would have the freedom to grant home leave etc if it is in the detainee's interests[5]. The psychiatrist is required to take into account the risk a detainee poses to himself and/or others as part of the assessment under sections 2 or 3.

20. Finally, the policy available to UK Border Agency caseworkers does not adequately articulate the nature of the Secretary of State's duties with regard to immigration detainees who require or may require transfer under the MHA. This was explained by the Court in D v SSHD [2004] EWHC 2857[6] at [33], again making clear that the retention of a mentally unwell detainee in detention may breach his or her Convention rights:

"In my judgment, once the prison service have **reasonable grounds to believe that a prisoner requires treatment** in a mental hospital in which he may be detained, the Home Secretary is under a **duty expeditiously to take reasonable steps to obtain appropriate medical advice**, and **if that advice confirms the need for transfer to a hospital, to take reasonable steps within a reasonable time to effect that transfer**. In many cases, the medical advice as to the appropriateness of a transfer will serve as the reports required by section 47. The steps that are

[5] In contrast to the position under section 48, where the psychiatrist will be prevented from granting home leave etc as a result of the restriction order imposed pursuant to section 49.
[6] A decision in the context of section 47, but the same principles apply in respect of section 48.

reasonable will depend on the circumstances, including the apparent risk to the health of the prisoner if no transfer is effected. Inappropriate retention of a prisoner in a prison or YOI may infringe his rights under Article 8. If the consequences for the prisoner are sufficiently severe, his inappropriate retention in a prison may go so far as to bring about a breach of Article 3, in which case the state is under an absolute duty to prevent or bring to an end his inhumane treatment."

21. We observe that for the Secretary of State to comply with her duties in this regard, there would need to be effective communication between detention and healthcare staff and UK Border Agency caseworkers, communication which, in the experience of ILPA members is lacking. If the Secretary of State is not a party to information known to detention centre and/or healthcare staff which would constitute “reasonable grounds” and expeditious steps are not taken to obtain appropriate medical advice and arrange transfer if so advised then the Secretary of State will be in breach of her statutory duties and if the consequences for the detainee are sufficiently severe such as to breach Articles 3, 5 and/or 8 she will be in breach of her duty under section 7 of the Human Rights Act 1998.

Conclusion

22. We should be happy to meet with you in order to discuss the above and any other issues arising from the change in the policy.

23. We look forward to receiving your response to the points we have made above, in particular at paragraph 6 and the points we have made with regard to your policy on the detention of the mentally unwell.

Yours sincerely

Alison Harvey
General Secretary
ILPA

APPENDIX 1

VERSION 9 (pre 26 August 2010)

55.10. Persons considered unsuitable for detention

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated Immigration accommodation or elsewhere. Others are unsuitable for Immigration detention accommodation because their detention requires particular security, care and control. In CCD cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention.

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated Immigration detention accommodation or elsewhere:

- unaccompanied children and young persons under the age of 18 (but see 55.9.3 above);
- the elderly, especially where supervision is required;
- 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 or the mentally ill - in CCD cases, please contact the specialist Mentally Disordered Offender Team;
- those where there is independent evidence that they have been tortured;
- people with serious disabilities;
- persons identified by the Competent Authorities as victims of trafficking (as set out in Chapter 9).

VERSION 10 (post 26 August 2010)

55.10. Persons considered unsuitable for detention

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.

In CCD cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:

- 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

- those suffering serious mental illness which cannot be satisfactorily managed within detention (in CCD cases, please contact the specialist Mentally Disordered Offender Team). 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 (as set out in Chapter 9).