SUBMISSION OF THE IMMIGRATION LAW PRACTITIONERS' ASSOCIATION TO STEPHEN SHAW'S FURTHER REVIEW INTO IMMIGRATION DETENTION

Introduction

1. ILPA was grateful for the opportunity to meet with Stephen Shaw and his team on 7 November 2017 and is grateful for the opportunity to input into the review to assess the Home Office's response to the earlier report, *Review into the Welfare in Detention of Vulnerable Persons*.

2. This submission is structured as follows:

    a. ILPA's position on immigration detention generally (para 3).
    b. The previous policy framework and other detention policies (4-11).
    c. The Adults at Risk policy framework (12)
    d. The Detention Gatekeeper and detention reviews/case progression panels (13-16).
    e. The AAR policy framework: evidence of practice (17-19)
    f. Conclusions and recommendations on the AAR policy framework (20-21)
    g. Other issues: alternatives and staff culture/abuse of detainees (22-23)

ILPA's position on immigration detention generally

3. ILPA believes that there are fundamental structural problems with the UK's system of immigration detention, which can only be addressed by radical policy changes, including:

    a. A time limit enshrined in primary legislation.
    b. Automatic, regular, judicial oversight of decision-making for all detainees.
    c. Ensuring immigration detainees are not held in prisons or in prison-like conditions.
    d. Ensuring that adequate legal aid is available to challenge both detention and underlying immigration decision making.
    e. Ensuring that contracting arrangements and staff culture do not result in poor practice or abuse of detainees, but instead focus on the welfare of detainees.
    f. Abandoning the "hostile environment" policy.

The previous policy framework and other detention policies

4. In response to the Shaw review ("Shaw 1"), the Government was clear that it intended to improve and build upon the existing policy framework. A key part of measuring this is to compare the terms of new policies with the previous framework, as well as other policies that Adults at Risk (AAR) sits alongside.

5. *Chapter 55 of the Enforcement Instructions and Guidance (EIG 55).* This is the Home Office's general detention policy which, broadly, is how it seeks to guide caseworkers to avoid breaching domestic, ECHR and EU law restrictions on immigration detention. The Supreme Court has held that the rule of law requires that there be detention policies that are published:

"The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements."[1]

6. Furthermore, whilst it is for the Home Office to formulate policies and officials have primary responsibility for applying the policies in practice, the courts have the final say over what the policies mean.[2]

7. Domestically, the *Hardial Singh* principles require that immigration detention must only be used for the purpose of removal, that immigration detention should not be used when it is apparent that removal is not possible within a reasonable period of time, the Home Office must pursue removal with diligence and expedition, and any period of immigration detention must not exceed a period that is unreasonable in all of the circumstances of a case.

8. Chapter 55 includes the following:

   a. A presumption in favour of temporary admission or release and a requirement that alternatives to detention be considered <u>in all cases</u> (55.1.1).

   b. Requirements that detention must be used sparingly and for the shortest period necessary; in particular, the policy recognises that a person with outstanding representations or an appeal may have more incentive to comply with restrictions than a person who is imminently removable (55.1.3).

   c. There are particular provisions relating to criminal casework cases for foreign national offenders (FNOs) (55.1.2, 55.1.3, 55.3.A, 55.3.2), which for example state that substantial weight should be attached to the risks of re-offending and harm and suggests that the likely consequence of having a criminal record that is sufficiently serious to meet the deportation criteria is that there will be a significant risk of absconding. It is stated that notwithstanding the presumption in favour of release, these considerations will in many cases result in a conclusion that the person should be detained.

9. In ILPA's view, if Chapter 55 were applied rigorously by Home Office caseworkers, many migrants who are currently detained would not be detained in the first place, or they would be detained for much shorter periods than they are. The problem is often with how the policy is applied.

10. *EIG 55.10*: this policy provided protection that was additional to the general Chapter 55 policy in the form of a <u>very strong presumption</u> against detention which could only be displaced by <u>very exceptional circumstances</u> to certain categories of migrant presumed to be particularly vulnerable to being adversely affected by detention:

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[1] *Lumba v SSHD* [2011] UKSC 12 at para 34
[2] *R (O) v SSHD* [2016] UKSC 19 at para 28

a. The mentally ill, those with serious medical conditions, the elderly and disabled categories had been diluted by the qualification that they would only benefit from the very strong presumption against detention if their condition could not be satisfactorily managed in detention. Home Office caseworkers often got this wrong, as illustrated by the 5 cases of mentally ill detainees subjected to detention that was inhuman or degrading, in breach of Article 3 ECHR, were referred to in Shaw 1. The courts had held that satisfactory management meant at least keeping a condition stable and that a condition may not be satisfactorily managed if there was treatment available in the community that was not available in detention that may lead to improvement.[3]

b. Those with independent evidence of torture. This was an important policy which if properly applied had the ability to exclude significant numbers of vulnerable migrants from detention. The courts had held there was a relatively modest threshold for meeting the requirement of independent evidence of torture, which a Rule 35(3) report was capable of meeting.[4] Previous assessments of credibility, either by the Home Office or the courts, were irrelevant to the question of whether evidence qualified as independent evidence of torture.[5] Further, whilst "torture" was not defined in Rule 35(3) or EIG 55.10, it had a wider, practical meaning than the technical UNCAT definition, which was designed for a different purpose (*viz* holding states to account in international law for the crime of torture) which was consistent with the purpose of the EIG 55.10 policy, namely to exclude, save for in very exceptional circumstances, groups that were presumed to be particularly vulnerable to being adversely affected by detention.[6]

c. Once evidence was provided to satisfy the Home Office that a detainee fell within one of the categories, the burden shifted to the Home Office to demonstrate that the high threshold of very exceptional circumstances was met. The courts had held that past criminal offending, liability to enforced removal and a refusal to leave voluntarily would not, without more, meet this high threshold – the focus of the balancing exercise was on the risks of re-offending, harm and absconding, or if a very imminent removal was possible.[7]

11. On 12 September 2016 EIG 55.10, DSO 07/2012 on Rule 35 and the *Rule 35* process policy were withdrawn and replaced with a suite of new policies, including the AAR Statutory Guidance (AARSG)[8], AAR Caseworker Guidance (AARCG)[9] and DSO 9/2016.[10]

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[3] *R (O) v SSHD* [2016] UKSC 19
[4] *D & K v SSHD* [2006] EWHC 980 (Admin) and *AM (Angola)* [2012] EWCA Civ 521
[5] Ibid.
[6] *EO and Others v SSHD* [2013] EWHC 1236 (Admin)
[7] See *Anam v SSHD* [2009] EWHC 2496 (Admin), *AM (Angola) v SSHD* [2012] EWCA Civ 521 and *Das v SSHD* [2014] EWCA Civ 45
[8] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/547519/Adults_at_Risk_August_2016.pdf
[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574970/adults-at-risk-policy-guidance_v2_0.pdf
[10] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574966/dso-09-2016-detention-centre-rule-35_v4_0.pdf

The AAR policy framework

12. In ILPA's view, on its terms, the AAR framework fails to achieve the objective of building upon and improving the previous policy framework:

    a. Victims of torture

    In relation to victims of torture, the Home Office sought to narrow the definition of torture used in the policy and Rule 35(3), which meant that some victims of torture covered by the previous policy fell completely outside of the AAR policy and would not be identified through a Rule 35(3) report. In the *Medical Justice* case[11], the High Court held that this was unlawful, because "torture" in Rule 35(3) had been interpreted by the Court in the *EO* case and using the narrower definition in the AAR policy had the effect of excluding a group of migrants that the available evidence established were particularly vulnerable to harm in detention, which meant that the policy was contrary to the purpose of section 59 Immigration Act 2016 and there was no rational or objective base to support the change.

    Secondly, the Home Office's evidence in *Medical Justice* was explicit in its intention to dispense with the concept of "independent evidence of torture", which had no place in the new framework. The detailed guidance in the *Rule 35 Process* policy, which was intended to reflect the relevant case law, was withdrawn altogether and does not feature at all in the new policies. The AARCG only states that a Rule 35(3) report should usually be treated as level 2 evidence and, as set out below, the immigration factors required to justify detention in a level 2 case, on the face of the policy, are less exacting and have a lower threshold than the requirement for very exceptional circumstances in EIG 55.10.

    The AARSG provides that detainees with a full medico-legal report applying Istanbul Protocol standards from Freedom from Torture or the Helen Bamber Foundation should normally be treated as having level 3 evidence, but these organisations are normally unable to carry out assessments in detention and so this is not an effective safeguard for detainees.

    Moreover, the AARSG states that assessments of credibility can reduce the weight that is be attached to evidence, in contrast to what the courts had found in relation to EIG 55.10, namely that assessments of credibility were irrelevant to whether something qualified as independent evidence of torture (see above).

    These changes to the terms of the policy relating to victims of torture mean that on its terms the AAR framework is less protective than the previous policy under EIG 55.10 that those with independent evidence of torture should not be detained save in very exceptional circumstances.

[11] [2017] EWHC 2461 (Admin)

b. The move away from a categories-based policy

Whilst the indicators of risk in the AAR framework are wider than the categories in EIG 55.10, as explained by the Home Office witnesses in the *Medical Justice* case, the Home Office moved away from a category-based policy to a policy where vulnerability is assessed on a case by case basis on the basis of the available evidence. There was thus a dilution in the protection that the categories provided. The concept of evidence levels was introduced, with only those able to access professional evidence that detention would be likely (i.e. on the balance of probabilities) to cause harm treated at level 3. Whilst the "satisfactory management" criterion was removed from a number of indicators of risk, as recommended by Shaw, the requirement for evidence that detention would probably be harmful is in substance a satisfactory management criterion.

It is convenient to note at this point that Mr Ian Cheeseman, who carried out an audit on existing policies for Shaw 1, recognised the value of a category-based vulnerability policy: "The current formulation of paragraph 55.10 provides a good degree of certainty in that each of the existing criteria involves some kind of measurable threshold. In policy and practical terms such an approach is likely to be far easier to use and to be held accountable against than a vulnerability tool." It is therefore unclear why the Home Office decided to move from a category-based approach to one where vulnerability is assessed on an individual basis.

c. Evidence levels

The terms of the AAR policy afford Home Office caseworkers with greater scope for balancing vulnerability against immigration factors in level 2 cases, and arguably level 3 cases, than the requirement for very exceptional circumstances in EIG 55.10. As stated above, the focus in assessing whether there were very exceptional circumstances under EIG 55.10 was on the risks of re-offending and harm, the risk of absconding and whether removal would take place in a very short period of time.

In level 2 cases, the AARCG states that detention may be justified where either: (1) the date of removal is fixed and is within a reasonable timescale and the individual has failed to comply with voluntary return opportunities; (2) "they present a level of public protection concerns that would justify detention", "for example if they meet the definition of 'foreign criminal'" (usually, a sentence of 12 months or more), or (3) there are negative indicators of non-compliance which suggests that the individual is highly unlikely to be removable unless detained.

It is plain that on its terms this is a significantly lower threshold than the very exceptional circumstances under EIG 55.10. The starkest example is the explicit policy that detention of an AAR with level 2 evidence can be justified where a detainee has committed a criminal offence which was punished with a sentence of 12 months or more. Under EIG 55.10, there would need in addition to be a risk of re-offending and harm for detention to be justified.[12] Furthermore, previous breaches of immigration law, a refusal to leave voluntarily and previous breaches

[12] See, for example, *OE*'s case discussed at paras 133-158 of *EO v SSHD* [2013] EWHC 1236 (Admin)

of conditions fall to be treated as negative indicators of non-compliance that may justify detention, whereas these factors would not have qualified as very exceptional circumstances under EIG 55.10.[13]

In level 3 cases, the AARCG states that detention may be justified if the detainee has in the past been subject to a 4 year or more custodial sentence or presents "a current public protection concern". However, as stated, under EIG 55.10 the fact of a previous criminal conviction would not qualify as a very exceptional circumstance, there would in addition need to be a risk of re-offending and harm.[14]

d. Gaps in Rule 35

The courts have repeatedly emphasised the central importance of the Rule 34/35 process in identifying and leading to the release of vulnerable detainees, most recently in the *Medical Justice* case. The other main safeguard historically has been the policy concession that those who are assessed by Freedom from Torture or the Helen Bamber Foundation as having claims of torture or ill-treatment that require further clinical investigation should have decision making on their claims for international protection halted, with release usually following this due to the impact of this on the prospects of removal. Medical Justice also has a limited capacity to provide medico-legal reports. However, these organisations have very limited capacity and are no substitute for an effective mechanism in the detention system for promptly identifying and releasing vulnerable detainees.

One of the long-standing reasons that Rule 34/35 have not been effective is that insufficient resources are allocated to this fundamentally important process. This was identified as long ago as the *D & K* case[15], and continues to be a problem, as demonstrated by the long waiting lists operated by IRCs for Rule 35 assessments, which should as mandated by Rule 34 take place within 24 hours of arriving at an IRC. In *Medical Justice* the Home Office witnesses explained that one of the main reasons for the attempted narrowing of the definition of torture in Rule 35(3) was to reduce the numbers of reports, due to perceived abuse of the process and consequent pressure on the system.

Rule 35(1) is the mechanism for level 3 evidence, but the threshold for a Rule 35(1) report is high and it is difficult for IRC doctors to reach a firm conclusion that detention will probably be injurious to health – normally IRC doctors are only able to say that detention risks injury to health.

In *Medical Justice*, Ouseley J observed that a Rule 35(1) report has a "significantly [higher threshold] than that required for a Rule 35(3) report, which

[13] See *AM (Angola) v SSHD* [2012] EWCA Civ 521 at paras 34 and 35, where AM had falsely obtained a visitor's visa, had refused voluntary return and lodged late challenges to removal, had been disbelieved in the asylum process and had failed to report on a number of occasions.
[14] See *BA v SSHD* [2011] EWHC 2748 (Admin) where a 10 year sentence of the importation of Class A drugs was held not to qualify as very exceptional circumstances. At para 182 the judge stated: "…since what is being balanced are the factors in favour, and against, the detention of a person who may be unsuitable for detention, the policy must mean that the assessment of risk is to be done on an individual basis, and not by reference to what Mr Kellar referred to as, in effect, "an instruction" to detain those who have committed serious offences."
[15] [2006] EWHC 980 (Admin)

focuses on the existence of an indicator rather than direct evidence of injurious effect on health. It is not aimed at the question of particular vulnerability to harm in detention, though it will cut across it…"

Rule 35 does not allow for level 2 evidence to be provided for other indicators of risk (i.e. detainees with mental health conditions, including PTSD; victims of sexual or gender based violence or victims of trafficking or modern slavery that do not qualify as torture; detainees with serious physical disabilities; detainees with other serious physical health conditions; detainees who are 70 years or older; trans or intersex detainees; and detainees who fall within the catch-all).

The Home Office did not implement the recommendation that Rule 35 should apply to detainees held in prisons, and so there is no mechanism for identifying detainees particularly vulnerable to harm held in prisons.

e. Alternative reporting mechanisms

In the *Medical Justice* case, the Home Office did not seek to argue that alternative mechanisms, such as IS91RA Part Cs, are equivalent to or a substitute for the Rule 35 process. In any event, Ouseley J held that alternative reporting mechanisms do not make up for the gaps in Rule 35, for example stating that Part Cs are "more a source of release than a trigger for thought about suitability for detention and weighing countervailing factors" (para 166).

For completeness, Part Cs and other alternative reporting mechanisms are inferior to the Rule 35 process because:

i. They can be sent by anybody, including healthcare staff who are not doctors, IRC custodial staff and Home Office staff. Rule 35 reports, if not written by an IRC doctor, must be approved and sent on the instruction of a doctor.

ii. The Rule 35 templates are structured so as to capture the information needed by Home Office caseworkers to attach weight to a Rule 35 report. In contrast, the IS91 RA Part C form contains an open invitation to record anything that is relevant to a detainee's risk status and is used to communicate risk issues that do not relate to vulnerability (e.g. risk to others, aborted removals because of obstructive behaviour).

iii. It can be seen, therefore, that the quality of information in an IS91 RA Part C form is likely to be inferior and that, as a consequence, Home Office caseworkers are likely to attach less weight to it. For example, merely reporting a detainee's claim to have been a victim of torture would fall to be treated as level 1 evidence, whereas a doctor's reasoned opinion based on clinical assessment and observation, using the structure of the Rule 35(3) template, that a detainee may be a victim of torture will be at least level 2 evidence.

iv. Rule 35 reports must be copied to detainees and Rule 35 responses must be copied to detainees and IRC doctors. DSO 8/2016 does not provide for

IS91 RA Part C forms to be copied to detainees and whilst detention must be reviewed, there is no requirement if detention is maintained to serve a response setting out the caseworker's reasons. This makes it difficult if not impossible for detainees to challenge erroneous decisions and means that doctors are not aware if their concerns have been addressed (the Rule 35 process allows doctors to escalate their concerns if they consider that caseworkers have not addressed them in the Rule 35 response).

f. The presumption against detention

ILPA is concerned that it is unclear from the terms of the AAR policy how it provides significantly greater protection to the general policy in EIG 55 and under the *Hardial Singh* principles.

Whilst the AARSG states that the presumption against the detention of an AAR "sits alongside the general presumption of liberty" (presumably in Chapter 55), it is only expressed as a presumption against detention, whereas the courts had made clear that EIG 55.10 contained a very strong presumption against detention.

Similarly, one of the "main principles" in the AARSG (p2) is that for the purpose of removal, "individuals can be detained if there is a realistic prospect of removal within a reasonable timescale", but this is simply to state the protection provided by the *Hardial Singh* principles that applies to all detainees.

g. The detention of foreign national offenders (FNOs)

ILPA also has concerns that the AAR policy guides Home Office caseworkers to find that evidence of vulnerability is outweighed where a detainee has been found to meet the deportation criteria (FNOs – broadly, a sentence of 12 months or more or where the SSHD has determined that deportation is conducive to the public good). For example, on the first main page of the AARCG, it states: "If the evidence suggests that the length of detention is likely to have a deleterious effect on the individual, they should not be detained unless there are public interest concerns which outweigh any risk identified. *For this purpose, the public interest in the deportation of foreign national offenders (FNOs) will generally outweigh a risk of harm to the detainee*" (emphasis added). Further, as set out above, in level 3 evidence cases, a conviction of four years or more is one of the two circumstances where detention may be justified, without there apparently being a requirement for a risk of future re-offending or harm.

One of the key motivations for the new policy framework was to avoid further breaches of article 3 ECHR. However, 4 of the 4 cases referred to in Shaw 1 concerned FNOs, with one of the claimants (BA) having received a 10-year prison sentence. It appears that all four of these detainees would fall to be detained under the AAR policy, and so ILPA has no confidence that the policy significantly reduces or eliminates the risk of further such cases.

The Detention Gatekeeper and detention review/case progression panels

13. The purpose of the Detention Gatekeeper (DG) is to screen out those who are particularly vulnerable to harm in detention before they enter detention. However, it is

an entirely internal process, with the DG reliant on information provided by the Home Office casework team. Representations from the detainee or his/her legal representative are not invited and the DG consideration is usually before a Rule 34 assessment and Rule 35 report. The Home Office casework team may not provide medical records or reports that are sitting on the Home Office's files. The DG consideration, and its effectiveness as a screening mechanism, will be limited by the quality of the information and evidence available. Unless the Home Office casework team already have medical records or a medical report, it is likely that the DG will at most have level 1/self-declaration evidence, which will be afforded very limited weight.

14. A further concern is that in Criminal Casework cases, the DG only has an advisory role, and can be overruled if a Director rejections a recommendation that a detainee should not be detained or should be released.

15. Detention review/case progression panels have been introduced in an attempt to meet the recommendation that there should be more independent oversight of decision-making, and in order to ensure the detention does not continue longer than is necessary. However, these panels are entirely made up of Home Office officials and there is no opportunity for detainees or their representatives to provide evidence and oral or written representations. It is ILPA members' experience that like ordinary detention reviews, decisions are often made on an incorrect understanding of the factual situation.

16. In relation to both initial decisions to detain and reviews, two recent cases have also highlighted concerns over those who lack mental capacity. Firstly there is a lacuna in the system as unrepresented detainees who lack capacity are not assisted in making representations about their detention.[16] Secondly there can be a failure to properly enquire into capacity when deciding whether to detain.[17]

The AAR policy framework: evidence of practice

17. ILPA is able to provide anecdotal evidence of practice to support the concerns set out above. Our ability to provide more extensive evidence of practice is partly limited by the requirement for members' to obtain specific client consent to information about their cases being shared publicly. We request that the investigation team looks for evidence relevant to the concerns set out above as part of the investigation process. We also note that Medical Justice's evidence also supports the concerns set out above, including in relation to the Rule 35 statistics, which for example show a significant dip in the % of detainees with a Rule 35 report being released.[18]

18. HMIP recently published its report following an unannounced inspection of Yarl's Wood IRC in June 2017. Some of the findings provide support for concerns we have set out above:

    a. "Home Office records indicated that 107 detainees had been assessed to be at risk under its adults at risk policy. Fifty were self-assessed at level 1 of the policy (self report), 56 were assessed at level 2 because there was evidence of risk and

[16] *R (VC) v SSHD* [2016] EWHC at [160]
[17] *R (MDA) v SSHD* [2017] EWHC 2132 (Admin) at [168]
[18] From 39% for Q2 2016, the last quarter before AAR was implemented, to 24.5% in Q1 2017 and 21.9% in Q2 2017.

one detainee was assessed the highest level 3 because there was evidence that detention was likely to cause her harm." (para 1.33) This supports ILPA's concern that the requirement for level 3 evidence imposes a high threshold.

b. "…we were concerned that, in many of the cases we reviewed, detention of vulnerable detainees was maintained despite the acceptance of professional evidence of torture" (S2, p14). This supports ILPA's concern that the AAR policy weakens the protections for victims of torture.

c. "One case that we examined in our casework sample concerned the detainee assessed at level 3 of the adults at risk policy because there was professional medical evidence that a period of detention was likely to cause harm. Two recent Rule 35 reports had been submitted for this detainee. In both cases, doctors noted numerous scars consistent with torture and psychological symptoms characteristic of post-traumatic stress disorder (PTSD). The response to the first report took eight weeks to finalise and the second five weeks. Both reports were considered by the internal review panel, independent of the decision-making team. On both occasions the panel recommended release but were overruled by a senior Home Office official. We were also concerned to find two Rule 35 responses where the Home Office had refused, without explanation, to accept that rape came within the legal definition of torture." (para 1.78) This supports ILPA's concern that AAR provides too much scope for the Home Office to balance vulnerability and justify continued detention so that even the most vulnerable detainees are not being protected; and that even where case progression panels are picking up errors in Home Office decisions, they may be overruled.

d. "The adults at risk policy was intended to reduce the detention of vulnerable people and the duration of their detention. It was therefore a concern that almost one in five detainees were assessed to be at the higher levels of risk (see paragraph 1.34). The percentage of detainees released after a Rule 35 report was higher than at the previous inspection, but in recent months the percentage released had fallen sharply. The Rule 35 sample indicated that women were being detained despite professional evidence of torture, rape and trafficking, and in greater numbers than we have seen at previous inspections." This supports ILPA's concerns that at risk detainees are not being screened out by the Detention Gatekeeper; that Rule 35 reports are not leading to release; and that AAR is not preventing the detention of victims of torture and other serious physical, psychological or sexual violence.

e. "There were unacceptable delays in the Rule 35 process. The quality of reports was generally poor. They were vague, lacked detail and did not adequately address symptoms of post-traumatic stress disorder. In some cases the Home Office refused without explanation to accept rape as torture. Detention had been maintained in most cases that we looked at without addressing the exceptional circumstances for doing so. In several cases, detention was maintained despite the acceptance of professional evidence of torture." (p18)

19. The following case studies also support ILPA's concerns set out above:

a. *SR has discretionary leave to remain in the UK, granted because of the likely to deterioration in his mental health if removed to Sri Lanka. He has a history of torture and suffers from serious mental illness. He is a long-standing client of Freedom from Torture.*

SR brought earlier civil proceedings in respect of a 6 month period of immigration detention following a prison sentence. He relied upon the fact that his account of torture had been accepted by the First-tier Tribunal and detailed medical evidence in support of his claim that his detention was contrary to the policy that those with independent evidence of torture and the seriously mentally ill should not normally be detained. The claim was settled by the Home Office on a confidential basis.

Following that first period of detention, the First-tier Tribunal considered SR's case again and allowed his appeal on Article 3 grounds. His account of torture in Sri Lanka was accepted.

In February and March 2016 SR was arrested for ABH and received a 12 month prison sentence. He was detained after his sentence ended in the prison where he served his sentence from 2 August-7 September 2016 when he was released on bail by the First-tier Tribunal. During the course of his prison sentence, his counsellor from Freedom from Torture raised concerns about SR's mental health with both prison healthcare and the Home Office. His solicitors also made representations in relation to further proposed deportation proceedings.

The Detention Gatekeeper considered SR's case but was not provided with the previous Tribunal determinations or the extensive medical evidence in relation to SR's history of torture and serious mental illness. Nevertheless, the DG stated that detention was not appropriate because SR's appeal had been allowed on Article 3 grounds and there had been no further deportation decision and any further decision would carry a right of appeal. The DG also stated that it was likely that SR would fall to be released under the Rule 35 process. A CCD manager asserted that it might be possible to certify a further deportation decision, an assessment which was flawed and which the DG disagreed with. There was then a delay whilst a release referral was submitted to a CCD Director. During this period of delay, a Home Office caseworker asked prison healthcare if there was a Rule 35 report, without apparently being aware that Rule 35 does not apply in prisons. The CCD Director eventually considered the case on 5 September 2016, more than a month after detention started, deciding to maintain detention primarily on the basis that a deportation decision "may be only two weeks away" and that "While it would be surprising to me if we thought that decision was not to be appealable (given his earlier allowed appeal), the notes suggest that that remains a possible outcome. So, we could have a decision within two weeks with no right of appeal. I do not think the suggestion of torture going back a decade should override the potential proximity of deportation in the judgment of whether we maintain at this stage."

On 7 September 2016 the FTT granted bail with reporting conditions but no electronic monitoring. The Home Office has since confirmed that no further deportation action will be taken.

This case illustrates the problems with the Detention Gatekeeper process: key documentation was not made available, but on the basis of the limited information available, the DG stated that SR should not be detained, which was effectively overruled by CCD whose decision making was fundamentally flawed. It also illustrates the problem with holding vulnerable detainees in prisons without operating the Rule 34/35 process.

b. *JXL and SN brought individual claims challenging their detention which were linked with the Medical Justice claim referred to above. Both gave accounts gender-based violence and trafficking. Both received Rule 35(3) reports, which were refused on the basis that their experiences did not qualify as torture under the UNCAT definition. Both Rule 35(3) reports included evidence that their mental health was deteriorating:*
   - *in JXL's case, in response to the question on the form about impact of detention, the report stated "poor sleep, depression, intrusive thoughts", that she was engaging with the mental health team and was on night sedation and that if released her sleep and mood were likely to increase and she could receive specialist input from organisations that support victims of domestic violence;*
   - *in SN's, the report stated that she was under the care of the mental health team, she had poor sleep and nightmares (which could have been signs of PTSD) and was suicidal.*

   Early on in the judicial review proceedings, the Home Office conceded that the Rule 35(3) reports should have been treated as level 2 evidence and that JXL and SN should have been treated as at risk because they had a history of gender-based violence. However, the Home Office position is that they would have been detained even if the reports had been recognised as level 2 evidence, because of the balancing of immigration factors. Neither JXL or SN had any history of criminal offending and they were not imminently removable because of outstanding trafficking and asylum claims. The Rule 35(3) reports would have qualified as independent evidence of torture under EIG 55.10 and the immigration factors relied upon by the Home Office, there being no risk of re-offending or harm, removal not being imminent and the risk of absconding being at most medium, would not have qualified as very exceptional circumstances under EIG 55.10.

c. *KK is a Tamil from Sri Lanka who gives an account of torture which has been disputed (he has a fresh claim under consideration and now has a detailed medico-legal report from Freedom from Torture). He was detained at Brook House from 1 March-4 April 2017. On 22 December 2015 his solicitors submitted further representations, including a detailed psychiatric report in which the psychiatrist expressed the opinion that KK suffered from major depressive disorder and PTSD, with the psychiatrist of the opinion that the PTSD was caused by detention and torture in Sri Lanka. Further representations were refused on 25 July 2016. On 4 January 2017 KK presented at an urgent care centre having taken an overdose.*

KK was detained on 1 March 2017 without there being any evidence that the psychiatric report submitted as part of his further representations had been considered under the AAR policy. On 2 March 2017, his solicitors wrote to the Home Office raising their concerns about his mental health and risk of suicide and that he was not suitable for detention.

On 2 and 3 March 2017 reports were completed under section 48 of the Mental Health Act 1983. There was however no Rule 35 assessment or report. On 7 March 2017 2 staff nurses from Langley Green Hospital attended KK and decided that he was unsuitable for admission to that unit.

On 14 March 2017 he was seen by a Medical Justice doctor for an assessment with a view to the preparation of a full medico-legal report in relation to his history of torture and mental health. He was too unwell to participate in the assessment and it had to be abandoned.

On 16 March 2017 he was seen again by the in-reach psychiatrist, who concluded that the IRC was "a less than ideal placement for him as he needs intensive trauma therapy. Ideally he should be bailed and receive psychological therapy in the community."

On 17 March 2017 the Home Office (National Removals Command) refused temporary admission on the basis that KK's health was being "managed" by Brook House and further representations were under consideration by "the relevant department in the Home Office".

On the night of 18/19 March 2017 KK was found with a ligature around his neck in the process of attempting suicide.

On 3 April 2017 a Rule 35(1) report was submitted to the Home Office. In the report, the IRC doctor assessed KK and agreed with the assessment made by the in-reach psychiatrist, namely that KK had a diagnosis of severe PTSD. He copied the psychiatrist's notes from computer entries dated 23 March 2017 and 30 March 2017 into the section entitled "relevant clinical information". These entries post-dated KK's attempted suicide and noted that he could not bring himself to talk about the trauma that he was the victim of. They further noted that he needed specific trauma therapy which could not be provided at Brook House and he was therefore not fit to be there. Under section 5, the doctor noted that detention was having a "continued deterioration in mental health without appropriate management." It was stated that resources at Brook House had been exhausted and the psychiatrist was unable to offer any further help. The risks to KK's health were assessed as likely to become serious within "possibly weeks" and if released from detention, "specialist treatment can be offered outside in the community". The doctor made a further comment that "At the time of this report the patient is not engaging fully with myself as he is withdrawn. He has engaged with me in the past and so this may be highlighting a deterioration." On 4 April 2017 KK was released by the Home Office.

KK's case highlights the failure to take into account evidence of vulnerability when deciding to detain, the failure to carry out a Rule 34/35 assessment within

24 hours of detention (even though section 48 reports were prepared) and the failure to respond to evidence of deterioration, with the result that detention was continued until KK had deteriorated and become unfit for detention.

d. *A female client who had received a positive conclusive grounds decision as a victim of human trafficking, was detained by the Home Office on the basis that she fell outside the Adults at Risk policy. A GCID note justifying her detention stated "I note the Adults at risk policy refers to potential victims of trafficking during the reflection period, so this would not now be a factor as that period has passed and an overall decision given".*

AAR refers to the Competent Authority guidance states that potential victims of trafficking with positive reasonable grounds decisions should not normally be detained pending their conclusive grounds decision, but does not specifically state that victims of trafficking with a conclusive grounds decision should not be detained, despite this obviously being the intention. This supports ILPA's view that a category-based policy with comprehensive categories of vulnerability is likely to be more effective than a policy which requires caseworkers to assess vulnerability on a case by case basis, which increases the risk of inconsistent or erroneous decisions like this.

e. *A 16 year old child who was facing removal under Dublin III was detained by the Home Office after the detention Gate Keeper treated an age assessment by a local authority as Merton compliant, when there was no reasonable way it could have been regarded as such. The age assessment was lacking in even the most basic requirements for a lawful age assessment and had assessed the child purely on physical appearance to be between 21 and 23. There is medical evidence to demonstrate that detention has caused depressive disorder. The child's age was accepted following the threat of litigation and after the Local Authority agreed to assess age again.*

This case raises concerns about the effectiveness of the Detention Gatekeeper.

f. *The Home Office was put on notice that there were serious concerns about a client's mental and physical health, and that the client was a victim of torture. The client was suffering from fainting and seizures after falling from a lorry and injuring his head on route to the UK. No Rule 34/35 assessment was carried out for 2 months whilst detained at Morton Hall IRC. It was only after the client was transferred to Harmondsworth IRC that a Rule 35 report was produced. Even then, detention was maintained, despite the fact that it was accepted that the client was a victim of torture and that further investigation was required into his health condition before a view could be taken on the risks associated with attempted removal.*

This case raises concern about delays in Rule 34/35 assessments, which the DCR mandate within 24 hours of arriving at an IRC, particularly at Morton Hall, and the Home Office maintaining the detention of torture victims who would have been entitled to release under EIG 55.10.

g. *The Claimant is a Tunisian national who has been in the UK for 27 years. He suffers from a serious mental illness. He formerly held indefinite leave to remain. He committed a number of criminal offences. Deportation proceedings were initiated against him by the Defendant and a Deportation Order was signed on 10 July 2008. He was detained by the Home Office under immigration powers on two previous occasions from 23 July 2009 to 25 May 2010 (Period 1) and from 31 July 2012 to 10 October 2013 (Period 2). The reason for those prolonged detentions was essentially that the Home Office was unable to remove the C owing to a lack of a travel document. Those two detentions form the basis of his claim for false imprisonment in the Queen's Bench Division. Detailed psychiatric evidence gathered and served on the Home Office's solicitors in the course of that claim not only confirmed the diagnosis of serious mental illness for this man but also that the previous detentions had caused him significant harm in the form of a deterioration of his condition and the development of a new condition (namely Post Traumatic Stress Disorder). The psychiatric evidence was also served directly on the Home Office in the course of correspondence regarding the C's tag and curfew. The Home Office also had records on file of the C's mental health issues which were noted in the previous detention.*

The C was detained for a third time between 16 March 2017 to 24 May 2017 (Period 3). This was done upon reporting and without notice. He did not have his medication with him. He was held in a police station for 2 nights and then moved to an IRC. He did not get a replacement prescription for 6 days in total.

The Home Office denied that they had had sight of the psychiatric evidence at all prior to the detention. It is plain that the evidence was served on the Home Office directly as well as to their solicitors but no proper record of that was made. The Detention Gatekeeper and the Caseworker did not acknowledge the existence of it at all in the initial detention decision making.

However once the psychiatric evidence was served again in the course of pre action correspondence shortly after his detention the Home Office accepted that it was Level 3 evidence. He had been served with removal directions for 5 April 2017 shortly after his detention and so the Home Office asserted that this short timeframe towards removal meant that his detention was justified despite the Level 3 evidence. However once those directions were suspended on 31 March 2017 (following the C's application to revoke his Deportation Order) they maintained his detention. The application to revoke contained an updated report by the same psychiatrist as before dated 29 March 2017 which confirmed that his mental health was deteriorating in detention with new symptoms being recorded and a recurrence of some previously experienced symptoms and her finding that further deterioration was likely in the event detention was maintained. The detention was maintained on the basis that he presented a significant public protection concern on account of his having been convicted of serious criminal offences in the past. That was despite the fact that a decision and appeal on the application to revoke was likely to take months.

The C was moved to Brook House IRC on 1 April 2017 and reports that the atmosphere there was much more difficult to cope with than at Morton Hall IRC.

Further, the psychiatric reports were served on the health care providers in Morton Hall IRC and Brook House IRC and neither made a Rule 35 report.

Finally, the C was prevented from making a bail application on account of the failure of NASS to make a timely decision on his section 4 application, which was submitted on the first day of his detention. That was despite the fact that the C had been living in NASS accommodation on and off for 7 years.

The claim commenced as a judicial review in the Administrative Court on 26 April 2017. An application for interim relief was made at a hearing on 18 May 2017, permission was granted and the Claimant's release was ordered within 7 days. The Home Office agreed to provide a NASS address and those grounds were not pursued. He was released from detention on 24 May 2017. He is now pursuing a damages claim in respect of this third period of detention.

This case illustrates that even where, in the unusual situation where level 3 evidence is on the Home Office file prior to detention that (1) it was not considered at all (and was not looked for) and (2) when it was considered after the commencement of detention, and when the RDs were cancelled, the 'significant public protection' concern within the policy was employed to trump it, even where there was fresh evidence of immediate and future harm, where removal was months away, and where the absconding risk was demonstrably low. The 'significant public protection' concern phraseology is vague and allows the Home Office employ it in any case where there has been criminality.

h. *The Claimant is a Nigerian national who has two children, one of whom is a British citizen. She is a Zambrano carer to that child. Her second child was born to her husband, a Nigerian national. She was detained under immigration powers from 03.11.16 – 01.03.17 during which time she was separated from her two children who were in the care of the local authority solely as a result of the detention.*

Ms O and her husband were convicted of offences related to a fraud with Ms O's offences being connected to the handling of the criminal proceeds. She was sentenced to 24 months in prison and served 12. During that sentence her children were initially with her at a mother and baby unit in the prison until, for reasons outside of her control Ms O could no longer have them with her there, at which point they were (voluntarily) placed into foster care.

Ms O had a strong history of compliance with reporting to the Home Office and with the terms of her criminal bail. She was lawfully resident throughout her time in the UK, and had most recently to the index events (and prior to the conviction) made an application for recognition of her derivative right to reside which succeeded on appeal. She was also assessed by probation as presenting a low risk of both re offending and causing public harm in the event of re offending.

During the prison term the Home Office took a decision to revoke the derivative right of residence. Ms O appealed successfully. The Home Office was granted permission to appeal by the UT and the full hearing was pending when they detained her under immigration powers. The Home Office was well aware that

the children were in care solely because their mother was in custody. Further it was very unclear what the Home Office's plan was for the future of the children, as no decision on deportation was even under consideration at this time (the issue of Ms O's status under EU law being unresolved) and they had not articulated whether they thought Ms O should be deported at all never mind with or without her children. There was no evidence on the file that the Home Office had referred the case to their internal advisor, the Office of the Children's Champion, or had made contact with the local authority, ahead of the decision to detain (as required by the policy in these circumstances). The local authority made contact with the Home Office following the detention explaining they were hoping to reunite the family following Ms O's prison term. The Home Office did not reply. The LA complained about the situation several times. In December 2016 they drew the Home Office's attention to the harm that can be done by separating children from their parents and voiced their 'great concern' that the family was not being reunited.

During the detention Ms O suffered from nightmares, flashbacks and deteriorating mood. She had problems sleeping and eating. She was given medication and diagnosed with a major depressive disorder. She reported to the health care staff her distress at being separated from her young children for an indefinite period of time. She also told them that she had suffered significant sexual abuse as a child in Nigeria. She had started having flashbacks about those experiences in detention. No Rule 35 report was made with the healthcare staff in YW asserting that childhood sexual abuse falls outside the scope of the Rule 35 process.

At Ms O's appeal the Judge found in her favour. He was unimpressed with the Home Office's 'catch 22' submissions which relied on Ms O not currently being able to be the day to day primary carer for her British citizen child, which was solely because of the decision to detain her. The Home Office's justification for the detention was similarly, that she was not a primary carer and therefore not entitled to Zambrano status. The appeal was allowed on 8 February 2017. The Home Office still did not release her. She applied for bail and the hearing was listed for 1 March 2017. The Home Office agreed to release her and bail was withdrawn. Her husband was granted bail. They were both released and shortly thereafter her children were returned to her care.

Ms O is now bringing a claim for unlawful detention arguing breaches of Hardial Singh principles, Articles 5 and 8 ECHR (including a damages claim for the children under Art 8 EHCR), breaches of policy regarding separating parents from children, breaches of the Rule 35 / AAR policy, breaches of section 55 BCIA 2009 and breach of policy in respect of EU nationals and breaches of EU law.

i. *The Claimant is a Jamaican national who has three British citizen children, two of whom are minors, one of which has sickle cell anaemia. She has lived in the UK for 27 years. She is the sole primary carer for her children. She was detained on two occasions under immigration powers from 12.08.16–20.10.16 and from 25.10.16-26.07.17 during which time she was separated from her two children for whom she was responsible. The siblings had to be separated in order to find*

suitable care arrangements for them, the younger boy going to his father and the older to his sister.

Ms P had indefinite leave to remain but following a history of minor offending she was convicted of offences attracting a 15 month sentence (for fraud and money laundering offences). She served 7.5 months and was then detained whilst the Home Office considered whether to deport her. She was released on bail by the FTT after about 6 weeks. During the currency of that grant of bail (and prior to the primary condition of bail being fulfilled) the Home Office arrested and re-detained her from her home for removal on 25 October 2016. They did this in front of her young son who suffers from sickle cell. Soon after he suffered a serious deterioration in his health it is said as a result of this distressing situation.

The Home Office did not bring her before the Tribunal or a Justice of the Peace as required in cases where they re-detain a person on bail. Removal directions were stopped by way of a judicial review (in which she represented herself) which challenged the refusal of Ms P's human rights claim (which had been certified). Permission was refused. A further set of removal directions was ultimately cancelled.

Ms P reported low mood and distress to the healthcare staff. Her children were finding it very difficult to cope without her and vice-versa. The location of YW made it difficult for them to visit regularly. Ms P also reported to healthcare staff a prolonged and detailed history of abuse in childhood. A Rule 35 report which indicated scarring, was supportive of Ms P's account and noted the mental health symptoms she was experiencing, was made but did not result in her release. It was accepted as 'Level 2' evidence. The Home Office pointed to the fact that the Rule 35 report did not stipulate that her distress was solely caused by detention.

A fresh claim was submitted for Ms P on 9 June 2017. The Supreme Court in Kiarie and Byndloss v SSHD on 14 June 2017 found the 'deport first, appeal later' regime was unlawful in a wide variety of cases (which were on all fours with this one). Release was not forthcoming and Ms P applied for bail which was granted on 24 July 2017. She was released on 26 July 2017 and continues to await the outcome of her fresh claim. She is once again living with and caring for her children.

j. LK

A medical expert assessed the detainee as level 3 under the Adults at Risk Guidance due to mental health needs. He had been poorly served by healthcare up to that point: with delays in carrying out psychiatric assessment, and then failure to make a R35 report. After considering the expert report for 5 days, GLD said that the SSHD agreed to release. But release then took a further 5 days as someone else in the Home Office later assessed him as level 2 and blocked release, before the solicitor threatened habeas corpus and SSHD released.

k. MS

This is an example of UKVI not taking into account the needs of a family member (disabled British partner) when making the decision to detain an EU national. He

arrived in UK in 2007 and worked in construction and received a number of low level offences (described as 'not serious' in a subsequent FTT decision allowing his deportation appeal). He has low level mental health needs and is a survivor of physical abuse as a child. He met and started a relationship with British Citizen with a high level of physical and mental health care needs, receiving disability living allowance etc and became her full time carer. He was first detained in May 2015 but has since been detained on 2 further occasions, most recently on 9 November 2016. There is no evidence of the decision maker adequately taking into account the impact of his detention on his partner, despite her explaining her dependency on him in a detailed witness statement and in solicitor's correspondence.

l. MDA

The Official Solicitor has authorised disclosure of the details of this example of a client's lack of mental capacity not being taken into account and a lack of knowledge re how to discharge from detention to community care provision, resulting in prolonged detention, 15 months in total, during which time no attempts were made to remove him to Somalia.

C was detained on 30/10/15 and at all material times lacked capacity to make decisions but this was not identified by SSHD (and the failure to investigate capacity is recorded in a judicial review decision MDA v SSHD CO6377/2016). His psychiatric diagnosis is mixed but he has been in care or psychiatric hospital or prison since he came to the UK as a child. He is now 23. In March 2016, he was transferred from Morton Hall to Harmondsworth IRC where he was repeatedly segregated and on occasions, seen by a psychiatrist and assessed for transfer to hospital, but not transferred. In September the new adults at risk policy was introduced. After this, MDA was removed from association following an assault on staff and held in segregation continuously for a month to manage his challenging behaviour. He was then transferred to Brook House in October 2016. Staff at Brook House could not manage his behaviour and so he was repeatedly placed in segregation 'for his own safety' under Rule 40 e.g. because, as is recorded in the UKVI notes, he had defecated, refused to clean himself and felt threatened by the other detainees. This led to deterioration of his mental health. UKVI records from early in 2016 show he was not released because s4 accommodation was not suitable and there was no release address. The Brook House staff stated they could not request a Care Act assessment of the local Social Services authority, so he remained in detention until the intervention of newly instructed solicitors. Following a judicial review of his detention with an interim order for release, he was released into a low secure psychiatric unit under s.2, and then s.3 of the Mental Health Act in February 2017. He remains in psychiatric care under the MHA.

m. BB

The client is an EU national with a history of mental illness. He entered the UK in 2006 and worked in service industry / freelance. He was arrested in Feb 2017 and detained at Verne IRC, removal directions were set for 16 Feb but were cancelled because he was too mentally unwell to be removed. A rule 35 report described manic episodes with psychotic features / paranoid delusions and the SSHD wrote to the client on 30 March 2017 saying that as a result he would be

released from detention. In fact he was not released and due to the lack of a mental health bed he was not transferred to hospital, but was detained at the Verne until 15 May 2017 when he was transferred to hospital under s.48 MHA where he remained until 21 July 2017 and was then returned to detention with depot injections to stabilise him. He refused to take his depot injections and was eventually released from the Verne on 17 August 2017.

Conclusion and recommendations on the AAR framework

20. ILPA believes that the AAR framework is fundamentally flawed, does not meet the objective of building upon improving the previous policy framework and does not significantly reduce the risk of further breaches of Article 3 ECHR.

21. The Home Office is required to review and re-issue the AARSG in response to the *Medical Justice* judgment. In ILPA's view, it should use that opportunity to:

    a. Return to a policy with categories presumed to be particularly vulnerable to harm in detention, with an effective catch-all covering those identified as otherwise particularly vulnerable to harm in detention.
    b. Replace the "torture" and "victims of sexual or gender based violence" categories with a more inclusive category modelled on the UNCHR detention guidelines, namely victims of torture or other serious, physical, psychological, sexual or gender based violence or ill-treatment.[19]
    c. Dispense with evidence levels, save that a self-declaration should trigger further investigation into the claimed vulnerability.
    d. Restore the threshold of "very exceptional circumstances" to justify the detention of this identified as particularly vulnerable to harm in detention.
    e. Replace or redraft Rule 35 so that it mirrors the policy, so that IRC clinicians are required to report clinical concerns that a detainee falls within one of the presumptive categories, or is otherwise concerned that the detainee is particularly vulnerable to harm in detention.
    f. Ensure that the Rule 35 mechanism is applied in all facilities holding immigration detainees, including prisons.
    g. Ensure that mechanisms such as the Detention Gatekeeper and Case Progression Panels apply to immigration detainees held in prisons.
    h. Introduce a requirement for decision makers to consider how decisions to detain impact upon vulnerable third parties, such as the children of separated parents.
    i. Ensure that there are mechanisms in place to ensure that the operation of the policy can be effectively monitored, independently.
    j. ILPA also agrees with the UK Gay and Lesbian Immigration Group that lesbian, bisexual and gay (LGB) detainees are particularly vulnerable to harm in immigration detention and should be recognised as an at risk category.

Other issues

22. Alternatives. In ILPA's view, alternatives to detention should, as Chapter 55 states, be used where ever possible. The Home Office already has powers to allow people subject to immigration control to live in the community at liberty, if necessary with conditions

[19] See *UNHCR Detention Guidelines 2012* Guideline 9.1
http://www.unhcr.org/uk/publications/legal/505b10ee9/unhcr-detention-guidelines.html

as to residence and requirements to report. There are also powers to provide accommodation and support to those who are unable to support themselves.

23. The introduction of any further system of alternatives to detention should not come at the expense of migrants having a fair opportunity to challenge adverse immigration decisions, for example through the use of fast track processes. Furthermore, in ILPA's view the Government's "hostile environment" policy is an obstacle to the development of a system of alternatives that is both effective and humane.[20] Finally, alternatives should be used for all people currently subject to immigration detention, including immigration offenders and FNOs, the groups that are most at risk of prolonged detention.

24. Staff culture and abuse of detainees. This continues to be an issue of very significant concern, as illustrated by the shocking recent Panorama footage from Brook House. As well as the immediate causes for this behaviour (including poor management and staff who are ill-equipped to manage detainees), in ILPA's view the review should look at broader issues that contribute to the abuse of detainees, including whether Government arrangements for contracting incentivise poor practice and whether other aspects of Government policy or practice contribute to a discourse that demonises migrants, including through the "hostile environment policy".

[20] See also the recent Chief Inspector of Borders and Immigration Report, *An inspection of the Home Office's management of non-detained Foreign National Offenders* at paras 7.34-7.37.