Issues arising from the detention of migrants – a practitioner's perspective:

Introduction:

1. This paper accompanies a presentation and discussion to be provided at the Independent Monitoring Board Chairs' Study Day on Thursday, 30th October.

2. The paper is not intended as a comprehensive documentation of practitioners' or detainee's concerns. Instead it provides an introduction to some of the more substantial, regular or current concerns which arise and are within the experience of ILPA. It is noted that the Government have in July 2008 published a draft version of the Immigration Bill[1] they intend to introduce to Parliament next year. Since this Bill will cover all areas of immigration law, including detention, this paper also gives some brief consideration to the provisions in the draft Bill on detention.

3. Although not all immigration detainees will be asylum-seekers, much of this paper focuses on the situation of those who have claimed asylum.

Access to legal advice and representation:

4. A key concern is that detention seriously impedes a detainee's access to legal advice and representation.

5. To some degree this is inevitable. Someone who is detained is not free to attend at a lawyer's office. He or she may have limited access to telephone calls, and may be restricted as to the information available to him or her regarding lawyers. However,

[1] The draft (partial) Immigration and Citizenship Bill was published on 14 July 2008 and is available, along with various documents including *Making Change Stick: an introduction to the Immigration and Citizenship Bill* at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/

current and recent developments have significantly extended the problems regarding access to legal advice and representation.

6. A substantial problem arises from the legal aid limitation on lawyers' travel and wait times for visiting someone in detention (or prison). Legal aid no longer covers the full travel and wait time of the lawyer. This means that some detainees find that their lawyers do not visit them in detention more than once or twice (if at all) because to undertake a visit the lawyer must be prepared to effectively lose money or subsidise legal aid. Lawyers may similarly be reluctant to take or make telephone calls. This causes several problems:

   a. Good legal representation relies upon the establishment of a relationship of trust and confidence between lawyer and client. Without such a relationship there is a risk that the client does not fully disclose information to the lawyer. However, without full disclosure the lawyer cannot ensure that the individual's case is properly put forward. In some cases the lack of trust and confidence on the part of the client may lead him or her to take 'advice' from friends or other detainees. It may also lead to the breakdown of the relationship with his or her lawyer.

   b. Asylum cases, in particular, often turn on the quality of the evidence presented to the decision-maker (whether at the UK Border Agency or Asylum and Immigration Tribunal). Crucial evidence will be the evidence of the individual asylum-seeker. However, if the lawyer does not, or is not able to, spend sufficient time to take detailed instructions, any statement presented by the asylum-seeker is likely to lack detail. In the worst cases, it may even be prepared in a fairly standardized fashion. To the decision-maker, the quality of the evidence will appear to reflect the quality of the claim. However, in some cases, the quality of the evidence may in fact merely reflect the limited time the lawyer has spent taking instructions.

c. Difficulties in obtaining complete, accurate and detailed instructions may also affect whether legal representation continues or is withdrawn. Lawyers doing legal aid work are required to make assessments of the merits of the cases they are working on. For instance, if a client's case has an insufficient prospect of success at the appeal stage[2], a lawyer will be unable to continue to do the work on legal aid. Unless the client is prepared to pay, or the lawyer to work *pro bono*, the client will cease to have legal representation.

d. In view of the limited time the lawyer may have, he or she will likely feel the need to concentrate on the substantive claim (e.g. the asylum claim). However, detainees will often have many other concerns. Firstly, a detainee is likely to be especially anxious about his or her detention and wish to obtain bail. Secondly, detainees may have a range of health concerns that need attending to, and a detainee may expect or be relying on a lawyer to pursue these matters (or indeed other concerns in relation to conditions in detention). Thirdly, a detainee may have myriad concerns about matters outside detention – e.g. what is happening to his or her property or family members. These are all understandably pressing matters for the detainee. Many lawyers may simply be unable to attend to these matters in the time available or because (with many of these issues, legal aid may not be available), while knowing that the detainee may have nobody else to address these. If the lawyer is unable or unwilling to address these or similar matters, the chances are that from the detainee's perspective the client-lawyer relationship does not look particularly good and difficulties previously highlighted concerning that relationship may be compounded.

[2] The merits test is essentially that an appeal must have a better than 50% chance of success or the merits must be borderline or unclear, otherwise legal aid will usually not be avaialble for an asylum appeal.

7. The Detained Fast Track operating at Yarl's Wood and Harmondsworth[3] is a particular concern because of the sheer speed of the process[4]. Many individuals find themselves rushed through appeal processes[5] without any legal representation, despite the fact that a substantial number of those in the fast track will continue to be detained for weeks and months beyond the completion of the appeal process. This may be because there is insufficient merit in their appeal. It may be because there has been insufficient time for the lawyer to advise, take instructions, research and present the case – so what is known of the case looks to have insufficient merit, but in fact the case is not yet properly or fully known.

8. In some instances, this may lead to further representations and fresh claims at the end of the process. However, the earlier withdrawal of legal aid and dismissed appeal will likely be significant hurdles to overcome before obtaining further legal advice or representation.

Removal decisions:

9. For many detainees the immediate and critical issue will be removal. Several individuals will have been detained at the end of an asylum process and only at a time when the UK Border Agency is ready to remove the individual. The detainee may have been arrested during a raid on their residence or place of work, or picked up when reporting to an immigration office.

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[3] The Detained Fast Track also operates at Oakington. However, there are fundamental differences with the fast track at Oakington; and whereas there are concerns as to the speed and suitability of that process, the speed of the processes at Yarl's Wood (for women) and Harmondsworth (for men) is much faster.

[4] This process generally follows this timetable: day 1 arrival in IRC, day 2 interview with duty solicitor followed by interview by UK Border Agency, day 3 asylum decision, day 5 last day to submit appeal, day 9 appeal hearing, day 11 appeal decision, day 13 last day to seek reconsideration of appeal, day 15 decision on reconsideration application, day 17 (if reconsideration ordered) reconsideration hearing, day 18 reconsideration decision. For fuller detail, see ILPA *The Detained Fast Track Porcess: a best practice guide*.

[5] See fn. 4. The appeal part of the process is everything from day 5 onwards.

10. A difficulty in these cases is the limited notice that is given in many cases of the individual's removal. Notice may include no more than two working days[6]. However, at the point of arrest and during transfer to an Immigration Removal Centre, the detainee may not be able to contact his or her lawyer. Of course, some people in this situation may not have a lawyer.

11. Although some detainees may have no good reasons to challenge the decision to remove, others will have. In some cases, outstanding applications (e.g. a fresh claim) have not been addressed. In other cases, there may be substantial new matters that ought to be considered. In order to prevent a removal, an injunction may be sought from the High Court. However, the court, following discussions with the predecessors of the UK Border Agency, introduced tighter procedures in 2007 at the same time as the minimum period for giving notice of removal was reduced.

12. It is likely to be very difficult to obtain legal advice in this time if the detainee does not already have a lawyer who is active on the case. A further hurdle is that many people are detained without their case papers. Even if the detainee is able to make contact with a lawyer, the lawyer will not be able to fully consider the case unless he or she can see the full case papers. Some individuals have never retained their papers, but even those who have may not have the papers in detention and may have no means of getting access to where the papers are kept. The lawyer needs to know what decisions have previously been made and on what evidence. On the one hand, without new evidence it is usually not possible to challenge a previous decision. On the other, sometimes the papers reveal important and helpful findings of fact which themselves indicate why removal is unlawful.

[6] The September 2007 ILPA information sheet 'Removals and Judicial Review' provides further information on the applicable minimum notice period.

13. Without good legal advice, the detainee simply may be unable to assess whether he or she has a legitimate challenge to the lawfulness of the removal; and it is likely in most cases that he or she will not want to go. In some cases, detainees (or their friends or family) may be persuaded to pay substantial sums of money for judicial review proceedings to be lodged. However, the cost of lodging proceedings with the court may only be the first step. The lawyer who has lodged proceedings may demand further and substantial fees in order to continue the case – fees the detainee may be unable to pay. In significant numbers of cases, detainees may find themselves without legal representation in complex judicial review proceedings which they may not fully understand.

14. The UK Border Agency, and its predecessors[7], has frequently complained in the past that its attempts to remove people are unnecessarily frustrated by hopeless judicial review applications. This complaint is what led to the discussions between the High Court and the predecessors of the UK Border Agency and the changes to the court's and Agency's procedures mentioned here. Although it is clear that judicial review can frustrate removal, and some judicial review proceedings do not have merit, neither the Home Office, the Legal Services Commission nor the courts are able to identify the proportion of those cases, which are said to be hopeless, that are legal aid cases, privately funded cases or cases being brought by individuals with no legal representation. Moreover, while substantial numbers of judicial reviews that are instigated do not result in a court ruling in favour of the claimant, in significant numbers of cases this is because the UK Border Agency concedes the case without the need for a court ruling. It is also the case that last minute injunctions are obtained where the review that

[7] The UK Border Agency was established in April 2008. It replaced the Border and Immigration Agency, which itself had replaced the Immigration and Nationality Directorate only 12 monthe previously.

follows leads to a grant of status for the individual. In other cases, individuals have been removed unlawfully and the courts have ordered steps to be taken to enable individuals to return. However, this may not always be possible.

Long-term and indefinite detention:

15. The UK Border Agency policy on detention states that:

> "*…there* [is] *a presumption in favour of temporary admission or release and that, wherever possible, we* [will] *use alternatives to detention…*
>
> "*…the presumption in favour of temporary admission or temporary release does not apply where the deportation criteria are met. Instead, the person will normally be detained, provided detention is, and continues to be, lawful…*
>
> "*Other than in CCD* [Criminal Casework Directorate – these will be deportation cases] *cases where there is a presumption in favour of detention, detention must be used sparingly, and for the shortest period necessary…*"

16. A particularly frustrating aspect of immigration detention is that in most cases it will be for an indefinite period – i.e. the person detained will simply not know for how long his or her detention may last; and in many cases may have no control or influence over this.

17. Detention can sometimes become lengthy because the UK Border Agency experiences difficulty in obtaining travel documentation on which a person can be removed. However, at the beginning of this year, the High Court dealt with a case where four Algerians had been detained for periods in excess of 12 months[8]. Although it was said that there were problems in obtaining travel documentation, and that the individual detainees had not cooperated with the attempts to obtain documentation, the facts of the case disclosed

[8] *A & Ors v SSHD* [2008] EWHC 142 (Admin)

that periods of several weeks or months had gone by without what was then the Border and Immigration Agency taking any action to deal with the situation. Ultimately, the Agency had no suggestion as to any step either it or the individuals could take to progress the matter. Despite this, detention had continued for over a year and the Agency continued to contest the claimants' case for their release before the court.

18. No doubt a significant reason for the reluctance to release the four Algerians was their criminal and immigration histories. The current approach to those who have been convicted and sentenced to periods of imprisonment in the UK is in several respects a reaction to the Government's embarrassment in April 2006 regarding the release of several foreign national prisoners, having completed their sentences, without considering whether they should be deported. Apart from the resignation of the then Home Secretary and the declaration by his successor that what was then the Immigration and Nationality Directorate was "*not fit for purpose*", this resulted in substantial numbers of foreign national prisoners being recalled to prison, a substantial number of immigration detainees being transferred from prisons to Immigration Removal Centres, the introduction of a presumption of deportation in the Immigration Rules, the introduction of a presumption of detention, the introduction of targets for annual numbers of deportations and the introduction of a mandatory deportation regime for certain foreign national criminals.

19. In July 2008[9], the UK Border Agency presented evidence to the Home Affairs Select Committee regarding the 1,013 individuals who had been identified as having been released from prison without consideration of deportation. The information presented discloses that of these 1,013 cases, the UK Border Agency had concluded

[9] Letter of 23 July 2008 from Lin Homer, Chief Executive of the UK Border Agency to the Home Affairs Select Committee.

consideration of 697 (69%). Of these 697, it had been decided that deportation was not appropriate in 389 cases (56%). It is not known whether this breakdown will reflect the result of inquiry into the remaining 316 cases, or how many of the 389 cases involved the person being recalled to prison or subject to immigration detention or the length of any detention. However, what is known raises a serious question as to whether large numbers of people have served significant periods of immigration detention in prison or an Immigration Removal Centre for no better reason than Home Office panic at the embarrassing revelation in April 2006.

20. The mandatory deportation regime (often referred to as "*automatic deportation*") was partially introduced in August 2008. It remains to be seen how this operates in practice. However, one of the substantial concerns with this regime arises from the provisions relating to detention and the timing of the making of deportation orders. The regime allows for a person to continue to be detained, under immigration powers, after his or her prison sentence has been completed. This can be for any period during which the UK Border Agency is considering whether to make a deportation order or indeed considering whether the mandatory deportation regime does or does not apply[10]. The deportation order may be made "*at a time chosen by the Secretary of State*"[11], which provision reveals nothing other than that detention may be prolonged and indefinite even for the period between completion of sentence and the decision whether or not to deport.

21. It is not only those convicted in the UK who face lengthy and indefinite detention, though it is likely these cases that include the starkest examples. It is also noteworthy just what criminality may lead to such detention. The Government has recently revealed that

[10] Section 36(1), UK Borders Act 2007
[11] Section 34(1), UK Borders Act 2007

as at 29 September 2008 there were 36 Zimbabwean nationals[12] in immigration detention despite the ongoing suspension on removals to Zimbabwe[13]. The Government pointed out that each of these 36 Zimbabwean nationals had criminal convictions in the UK. However, it is understood that some of these convictions are for no more than immigration offences. It is to be noted that the Government and the courts take immigration offences very seriously; and it is also the case that from almost all perspectives some immigration offices may, at least, be said to be more serious than others. On the other hand, there is no lawful means of travel or entry to the UK for almost all refugees or others in search of sanctuary. Such measures, which have significantly increased in recent years, as visa restrictions, carriers' liability and juxtaposed controls, mean that for many refugees and others in search of sanctuary there is no option but to breach immigration laws[14], often having put themselves into the hands of people smugglers.

22. In some instances, prolonged and indefinite detention may lead to serious deterioration in a detainee's health, particularly mental health[15]. In some instances, the cause of prolonged detention is particularly difficult to understand – e.g. where an individual has

[12] See the answer of Lord West of Spithead, Parliamentary Under-Secretary of State to Lord Hylton at Hansard HL 20 October 2008 : Column WA88

[13] Removals to Zimbabwe were first suspended in January 2002. That suspension was lifted in November 2004 until June 2005 when cases before the High Court, relying on evidence that returnees had been brutalized, sought to challenge the safety of any removal of asylum-seekers to Zimbabwe. The issue remains outstanding in cases before both the Court of Appeal and the Asylum and Immigration Tribunal.

[14] Indeed, Article 31 of the 1951 UN Convention relating to the Status of Refugees expressly provides for protection against prosecution of refugees for immigration offences where seeking sanctuary has necessitated a breach of immigration laws. The UK adopted an incomplete version of this defence by section 31, Immigration and Asylum Act 1999. However, the defence is in many cases ineffective – partly because many individuals do not receive accurate advice on the defence, partly because many individuals may be advised that advancing the defence rather than a guilty plea may result in their being held on remand for longer than any eventual sentence, partly because individuals face prosecution before their asylum claims have been considered and the criminal trial does not provide an appropriate fora for assessing their claims for asylum and partly because section 31 does not adequately reproduce the Article 31 defence.

[15] See e.g. Amnesty International UK *Seeking Asylum is not a Crime: detention of people who have sought asylum*, June 2005; Fazel M & Silove D (2006) *Detention of Refugees*, BMJ 332: 251-252.

agreed to voluntary departure and presented the UK Border Agency with his or her passport.

The draft (partial) Immigration and Citizenship Bill:

23. In brief, there are several aspects of the draft Bill which seem set, if ultimately adopted, to increase concerns in relation to immigration detention, including:

    a. The draft Bill includes powers to require captains of ships, trains and aircraft to detain people on board[16]. There are serious concerns as to the safety of these powers.

    b. The draft Bill includes power to detain people at any place of the Secretary of State's choosing, and under the authority of whomsoever the Secretary of State may delegate the power[17]. This too, on its face, raises the prospect of people being detained at unsuitable places or under the authority of persons unsuitable to carry out such powers.

    c. The draft Bill would continue the mandatory deportation regime[18], with similar provisions to those discussed here coupled with a statutory presumption of detention[19].

    d. The draft Bill would subordinate the Asylum and Immigration Tribunal (AIT) to the UK Border Agency in significant respects concerning the question of immigration and bail. It includes provision for circumstances in which the AIT would require the permission of the UK Border Agency to grant bail to a detainee[20].

[16] Clauses 54 & 56
[17] Clause 59
[18] Clauses 37(2)(b), 37(9), 39, 51 & 55(2)
[19] Clause 55(4)
[20] Clause 62(2)(c)

e. The draft Bill requires that any recognizance (whether from the individual or his or her sureties) must be deposited with the Secretary of State[21]. This may create a substantial barrier to detainees obtaining bail, since a surety may be very reluctant to part with any significant sum of cash for an indefinite and possibly lengthy period.

24. ILPA has commented upon the draft Bill in submissions to the Home Affairs Committee; and will shortly be providing submissions to the Joint Committee on Human Rights. The former is available on the ILPA website (www.ilpa.org.uk) in the Submissions section and the latter will be made available there also. Briefings on the Bill will be available in the Briefings section. Shorter information sheets on discrete aspects of the Bill, and other immigration-related matters, are available in the Info Service section.

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[21] Clause 64