Medical Justice
seeking basic rights for detainees

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Date : 20th January 2014

Medical Justice submission to the UN Working Group on Arbitrary Detention (WAGD) on the Group's development of draft Guiding Principles on the right of anyone deprived of his or her liberty to challenge the legality of the detention in court:

1. Medical Justice is a charity with a particular expertise concerning those subjected to administrative detention in the UK under immigration powers, and how detention affects the health and healthcare of those detained under these powers including those detained having served time in prison, asylum-seekers in the detained fast track system, and those detained for removal from the UK having been refused asylum or on other grounds.

Background

2. The expansion of the use of detention against migrants in the UK highlights the especial vulnerability of migrants to arbitrary detention. Two developments, in particular, have greatly increased the use of immigration detention and led to circumstances in which persons are routinely held arbitrarily and/or otherwise unlawfully.

3. First, in 2000, the UK introduced a detained fast track into its asylum system.[i] This has undergone significant development since its first introduction, and for many years now has entailed the detention of substantial numbers of asylum-seekers from the moment of their first contact with the UK authorities through to the completion of their asylum claim, and if unsuccessful for extended periods beyond. The period of detention during which the asylum claim is considered is in several cases considerably shorter than the remainder of the period of detention, and those detained in the fast track are greatly prejudiced by their detention and the speed of decision-making, initially and in any appeal process, in seeking to give instructions to a legal representative, maintain legal representation, obtain evidence, recover from any traumatic history, and generally advance their asylum claim.[ii] Yet, a dominating factor by which a person may be subjected to the fast track is the availability of bed space in a participating immigration removal centre.[iii]

4. Second, from around 2000, the UK has experienced a substantial growth in its foreign national prisoner population. There are various factors that have contributed to a sharp rise in the number of these prisoners, which has in recent years levelled off and shown some modest decline. Of particular concern are (i) the much expanded use of pre-trial custody in the cases of foreign nationals facing prosecution;[iv] (ii) the criminalisation of asylum-seeking by the introduction of new offences, particularly relating to the use of false travel documentation or the failure to produce such documentation;[v] (iii) the prosecution and imprisonment of victims of trafficking and others coerced into criminal activity such as, in particular, women drugs couriers;[vi] and (iv) an expanded use of post-sentence detention against time served foreign national prisoners,[vii] driven by a political rhetoric that treats all such prisoners as equally and necessarily deserving of deportation regardless of such factors as their partners and their children's relative ties to the UK and to the country to which it is proposed to deport.[viii]

5. The arbitrariness of the latter has been exposed by independent inspectorates, including the Independent Chief Inspector of Borders and Immigration, who reported in October 2011 that *"...the sheer weight of cases resulting in detention is of concern and, in our view, there remains a culture that detention is 'the norm'..."*.[ix]

The political rhetoric has been particularly strong since 2006 when the UK experienced a political crisis following the revelation that 1,013 foreign nationals had been released from prison without the Home Office having considered whether they should be deported. In immediate response to this, large numbers of foreign national ex-prisoners were recalled to prison. However, of 877 (of the original 1,013), whose cases had been resolved by April 2013, more than half (464) were neither removed nor deported.[x]

Submission of the International Detention Coalition to the UN Working Group on Arbitrary Detention, 13 December 2013

6. We generally support the submission made by the International Detention Coalition (IDC). In particular, we fully endorse the IDC Core Position set out at Appendix 1 to the submission, and the conclusions to the submission, which emphasise the importance of the issue of immigration detention to the Working Group's project.

7. We generally endorse the IDC recommendations, but with the following caveats:

    a. At paragraphs 20 and 23 of the recommendations, the IDC calls for automatic judicial review of immigration detention. In 1999, the UK introduced legislation providing for automatic bail hearings for immigration detainees;[xi] but these provisions were never brought into effect. We support automatic bail hearings, but would distinguish these from judicial review. The latter concerns full consideration of the legality of the decision to detain and maintain detention, whereas bail may be granted in circumstances where it is considered a suitable alternative to an otherwise lawful detention. While automatic judicial review may be an appropriate safeguard in jurisdictions where other safeguards, including access to independent and expert legal representation and to an independent court with judicial review powers, are routinely unavailable, we would not support the general adoption of a principle requiring automatic judicial review. Our concern is that were the legality of detention routinely tested before an independent judicial body, at the instance of the detaining authority and at a time prior to the choosing and preparedness of the detainee and his or her legal representative, this may result in a judicial finding of legality that was hard to shift, prejudiced any bail application and was founded upon an inadequate testing of the case for detention.

    b. At paragraph 29 of the recommendations, the IDC identifies "positive practice examples with regard to providing legal aid" in, among others, the UK. Whereas, the provision of legal aid has been an important safeguard in the UK, current developments are extremely regressive in their effects for migrants, including detained migrants. We return to this below.

8. We cannot entirely endorse the main body of the IDC submission for the single reason that we do not have sufficient experience and expertise of use of detention globally. Nonetheless, much of what is said there rings true as to our experience of practice in the UK, in Europe more generally, and of the experiences of migrants, particularly asylum-seekers and refugees, from many of the regions addressed in the submission. However, the reference to "mandatory detention policies" in the UK is worth especial note. Detention is not mandatory in the UK. Indeed, published policy has consistently made this clear as the formal and lawful position. That said, official practice has over recent years come to manifest an informal policy position by which detaining authorities (i.e. the Home Office and its previous immigration agencies) have treated detention of many migrants (particularly those in the detained fast track and certain time served foreign national prisoners) as a necessarily justified and imperative act. Thus, while detention is not mandatory, in practice officials behave as if it is.[xii]

Bingham Centre for the Rule of Law – Immigration Detention and the Rule of Law: Safeguarding Principles

9. We support the safeguarding principles set out by the Bingham Centre for the Rule of Law, and drawn from a range of international and domestic instruments, expert commentary and judicial rulings: http://www.biicl.org/files/6559_immigration_detention_and_the_rol_-_web_version.pdf

Further submissions

10. We wish to highlight the importance of the following principles taken from the Bingham Centre's Safeguarding Principles (SP), with particular reference to our most recent experience of the use of immigration detention in the UK. In selecting certain principles, we do not intend to suggest that others are less than fundamental or of less importance than those selected. Rather, we wish to draw attention to particular experience and concerns, within our specific expertise, in relation to current practice and policy in the UK.

11. We draw attention to principles, which are not immediately restricted to the right of the person to challenge the legality of detention but are immediately related to his or her capacity to do so.

SP4. SPECIAL NEEDS. The prescribed rules must protect vulnerable persons and groups from unsuitable detention and conditions.

12. The importance of this principle has been accentuated in the UK by recent developments in practice and policy. Of especial concern are the following:

    a. Home Office policy on detention includes the identification of certain persons and groups who are normally to be regarded as unsuitable for detention. Among these were persons *"those suffering from serious medical conditions or the mentally ill"* until, in August 2010, the Home Office amended the policy to read *"those suffering from serious medical conditions which cannot be satisfactorily managed within detention* [and] *those suffering from serious mental illness which cannot be satisfactorily managed within detention..."*.[xiii] The policy change did not signal or reflect any change in the provision within immigration removal centres for the identification and managing of serious medical conditions or mental illness. Rather, it appears to have been prompted by successful judicial review of the use of detention against persons in breach of the policy on suitability by reference to the previous text. Serious medical conditions and mental illness were and remain conditions, which cannot be satisfactorily managed within an immigration removal centre. Nonetheless, the policy change reflects or has caused an entrenched and severe attitude in the exercise of detention powers against migrants. Thus, in 2011 and 2012, in at least four separate court rulings, the Home Office was found to have detained mentally ill migrants in breach of the article 3 prohibition on torture, inhuman and degrading treatment or punishment in the 1950 European Convention on Human Rights.[xiv] Several other judicial review claims of unlawful detention have succeeded, including where legal representatives have omitted to make a claim under article 3. The use of immigration detention against those with serious medical and mental health conditions is a matter of grave concern. It reflects other concerns, particularly as regards indefinite detention, to which we return below.

    b. A longstanding and ongoing concern is the failure of formal safeguards to identify persons unsuitable for detention before and/or during detention.[xv] A starting point is that the use of detention as a matter of routine in relation to asylum claimants, and from the moment of their initial identification and/or claim, is unsafe. Many victims of torture or trafficking, and other traumatised individuals, will not disclose histories or conditions relevant to their unsuitability for detention to third parties, including but not limited to officials, before having established a degree of trust and confidence, which may take considerable time to nurture. While efforts can and should be made to ease the disclosure of such important information, it is vital that

whatever efforts are made no assumption is made, still less acted upon, that disclosure can and should be made at such an early stage. Consequences of such a flawed approach include the detention of highly traumatised persons, which may do considerable additional damage to their mental health while aggravating impediments to their making a disclosure or generally providing their history in connection with their asylum or other claim; and the putative justification of adverse credibility findings based on the original failure to disclose. Moreover, safeguards adopted in the UK whereby health practitioners may draw the attention of detaining authorities to evidence that an immigration detainee has a history of torture or other physical or mental illness rendering his or her detention inappropriate have proved inadequate for a number of reasons[xvi] resulting in high numbers of vulnerable, including survivors of torture and severely mentally and physically ill people being detained[xvii][xviii]We return to this latter point below.

13. The right to challenge arbitrary detention must be founded upon express and public principle of the limits of detention's suitability and lawful use. This must include express and public recognition of those with special needs – both in recognition of their heightened incapacity to bring a challenge to detention and as providing a more ready basis upon which such a challenge may be brought where such persons have, despite their special needs, been detained.

SP17. MAXIMUM. *The duration of detention must be within a prescribed applicable maximum duration, only invoked where justified.*

14. Unlike many European countries, the UK has no legal maximum for the duration of immigration detention. The use of immigration detention has been, and continues to be, used against migrants for periods of many months and years. Time served foreign national prisoners, in particular, have been subjected to such lengthy periods of detention in prison and/or an immigration removal centre in substantial numbers and in some instances for periods far in excess of their prison sentence.[xix]

15. The consequences of such long periods of detention are gravely exacerbated by the indefinite nature of the detention. Those detained may have no control or possible sense of the potential length or ending of their detention. This has seriously adverse effects upon mental health. It is clear that immigration detention in the UK is now in many cases both causing and aggravating serious mental illness. The indefinite nature of this detention is a major factor in this.[xx]

16. A legal maximum period of detention is a necessary adjunct to the right to challenge the legality of detention, not least because of the appalling mental health consequences of indefinite and protracted detention which themselves undermine a detainees' capacity to seek and maintain legal and other assistance to challenge detention.[xxi]

SP19. CONTACT. *Detainees must always be able to communicate with the outside world, legal representatives and relevant agencies.*

17. We draw particular attention to the importance of contact with independent medical experts. This must include the right of private access of the expert to the detainee at the detainee's request. It is our experience that the provision of healthcare in detention, while necessary, can become institutionalised such that health practitioners employed within an immigration removal centre may be unwilling to expose failure to address their concerns or other harmful practice, susceptible to adopting scepticism of other authorities as to the needs and reliability of detainees and likely to moderate their own behaviour and understanding of their opportunities to raise concerns relating to the health and welfare of detainees.[xxii] Moreover, employed health practitioners may be subject to formal or informal sanction by which 'interfering' practice may be discouraged. At times, we have experienced the obstruction and refusal of entry of an independent medical expert to an immigration removal centre. Access by independent medical experts may be vital to providing support or independent oversight in relation to practice by employed healthcare professionals.

18. Particularly in relation to certain persons and groups inherently unsuitable for detention, where health needs are not being met in detention or in the case of detention that is the cause of mental illness or its

aggravation; access by independent medical experts may be of especial importance to the evidencing and bringing of an effective legal challenge.[xxiii]

SP23. JUDICIAL REVIEW.

19. Practice in the UK emphasises the need to distinguish the opportunity to seek bail from the opportunity to challenge the legality of detention by way of judicial review. Both are important. The former should provide a very quick and easy means to seeking independent judicial (or other independent authority) review of the possibility of bail as an alternative to detention. As indicated previously, we support an automatic system by which bail is considered. The latter should provide a timeous opportunity to challenge the legality of detention, including to secure release and compensation (see SP25 of the Bingham Centre's principles).

20. The right to seek bail is not an adequate remedy in respect of unlawful detention. This is so for individual and systemic reasons. Bail in and of itself provides no remedy for the harm caused by unlawful detention. Moreover, while the legality of detention may be a relevant consideration in respect of bail (that detention appears unlawful ought to provide strong presumptive grounds for a decision to grant bail), it should not be confused with a ruling or review of legality. It is not necessary that detention be unlawful for bail to be appropriate, and any approach which tended to merge the two considerations would risk that the use of bail as a quick and easy remedy to securing an alternative to detention failed on two counts – firstly, that use of bail as an alternative is reduced by the incorporation of an illegality threshold; secondly, that bail ceased to provide a quick or easy remedy in cases where questions of legality proved to be complex and contested. The opportunity of bail is also inadequate as regards systemic misuse of detention, since the release on bail of a detainee without test of or sanction for any illegality provides no incentive for a detaining authority to review or revise its policy and practice.

21. The UK has recently severely curtailed its provision of legal aid,[xxiv] and the Government intends that further curtailment of legal aid be introduced in relation to its access by those not lawfully present and with at least 12 months' lawful residence.[xxv] This raises particular concerns for migrant detainees, whose legal status will ordinarily be one of unlawful presence by reason of the circumstances material to their detention. Further curtailment of legal aid in relation to judicial review proceedings is intended, particularly so as to introduce considerable financial risks for legal representatives contemplating accepting instructions to bring a judicial review challenge against a public authority – including a challenge to immigration detention.[xxvi]

22. The importance of judicial review, and access to judicial review, is thus of especial importance in relation to the constraint of arbitrary and other unlawful detention.

SP24: LEGAL REPRESENTATION. *Every detainee is entitled to prompt, continuing, adequate legal assistance, state-funded if unaffordable.*

23. We emphasise this purely for its relevance to the preceding principle and the matters we discuss in relation to that.

SP25: COMPENSATION. *Everyone unlawfully detained is entitled to adequate compensation reflecting the violation of their rights.*

24. We emphasise this purely for its relevance to principle SP23 (above) and the matters we discuss in relation to that.

Conclusion

25. As recognised by the IDC in their submission, and emphasised by the Bingham Centre's principles and supporting material, the use of detention against migrants is a matter of considerable concern. While we have not sought to review all relevant principles for the purpose of ensuring the right to challenge the legality of arbitrary or other unlawful detention by migrants (or others), we have here highlighted texts

which do so and provided some insight into current policy and practice in the UK with especial relevance to the Working Group's project.

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[i] The history of the detained fast track is set out in the Immigration Law Practitioners' Association, *The Detained Fast Track Process: A Best Practice Guide*, 2008, which is available at http://www.ilpa.org.uk/pages/publications.html
[ii] UNHCR has issued two critical reports on the detained fast track – *Quality Initiative Project, Fifth Report to the Minister*, March 2008; and *Quality Integration Project report*, August 2010. More recently, in 2012, UNHCR described the fast track as "inhumane", see http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=4f45f76d8

[iii] This was apparent from the start given the extraordinary facts concerning Dr Saadi, whose challenge to the initial iteration of the detained fast track was successful but not insofar as the systemic challenge to the process as then operated by the UK (*Case of Saadi v UK* 13229/03 [2008] ECHR 80, 29 January 2008). Among the many indications that this remains the case are the absence of reasons given and inadequacy of policy criteria for decisions to induct an asylum-seeker into the process, as commented upon by UNHCR in its reports, *op cit*
[iv] Over ten years to 2009, the number of untried foreign nationals in the UK held on remand rose by 136%, compared to a fall of 28% in the number of British nationals held untried.
[v] The use of pre-trial custody in these cases has been one of the factors leading to asylum-seekers pleading guilty despite their having a statutory defence, and many cases are now coming before the courts seeking and obtaining a quashing of earlier convictions, see e.g. *R v Mateta & Ors* [2013] EWCA Crim 1372.
[vi] Prison Reform Trust, *Now Way Out*, January 2012
[vii] During the w/c 25 November 2013, 959 prisoners were recorded as being time served and held under immigration powers. This does not include time served prisoners who had been transferred to an immigration removal centre.
[viii] See e.g. Bail for Immigration Detainees, *Fractured Childhoods: the separation of families by immigration detention*, April 2013.
[ix] *A thematic inspection of how the UK Border Agency manages foreign national prisoners*, October 2011
[x] Letter from Sarah Rapson, Interim Director General, UK Visas and Immigration Section, and Dave Wood, Interim Director General, Immigration Enforcement Directorate, to the Chair of the Home Affairs Committee, 10 July 2013, reproduced as annex to Home Affairs Select Committee, *The Work of the UK Border Agency (January – March 2013)*, Eighth Report of Session 2013-14, HC 616, November 2013.
[xi] Immigration and Asylum Act 1999, Part III
[xii] The findings of the Independent Chief Inspector of Borders and Immigration in *A thematic inspection of how the UK Border Agency manages foreign national prisoners*, October 2011 certainly supports this conclusion. The failure to obtain or consider plainly relevant material for any decision to detain found in such reports as those of Bail for Immigration Detainees *op cit*, and the joint report of HM Inspectorate of Prisons and Independent Chief Inspector of Borders and Immigration, *The effectiveness and impact of immigration detention casework*, December 2012, among others, confirm this conclusion.
[xiii] The relevant policy is contained in the Enforcement Instructions and Guidance, Chapter 55, Detention and Temporary Release.
[xiv] See *R (HA(Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979 (admin); *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin); and *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin), R (D) v Secretary of State of State for the Home Department (2012) EWHC 2501 (Admin).
[xv] UNHCR *op cit* has identified this concern. Others to do so include the Independent Chief Inspector of Borders and Immigration in his *A thematic inspection of the Detained Fast Track*, February 2012.
[xvi] This has been raised frequently by NGOs as well as inspectorates, for examples in the HM Prison Inspectorate's Annual report from 2012: *"..the process intended to provide safeguards to detainees who were not fit to be detained, or had experience of torture, did not appear to be effective"* - HM Inspector of Prisons Annual Report 2011-12 on www.justice.gov.uk/publications/corporatereports/ hmi-prisons/hmip-annual-report-2011-12.
[xvii] *"...67% of detainees said they had health problems, with 53% describing mental health problems, such as depression, stress and anxiety. Those held for more than six months were much more likely to describe such symptoms.....The Rule 35 process did not provide the necessary safeguards for vulnerable detainees"* - HM Inspector of Prisons & Independent Chief Inspector of Borders and Immigration. The effectiveness and impact of immigration detention casework 2012. ISBN: 978-1-84099-578-7
[xviii] *"Medical evidence that a detainee's mental health is being adversely affected by continued detention should trigger a prompt review of detention by the UKBA caseworker, which takes account of the Immigration Directorate Instructions that only in exceptional circumstances should mentally ill persons be detained. The detainee should be informed of the basis and outcome of this review. (3.36)* ***Not achieved.*** *"*- HM Inspector of Prisons Report on an

unannounced full follow-up inspection of Harmondsworthimmigration removal Centre 14-25 Nov 2011, on www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removalcentre-inspections/harmondsworth

[xix] Cases are frequently identified in reports of HM Chief Inspector of Prisons and annual reports of Independent Monitoring Boards concerning time served individuals held in prison for many months and in excess of a year; and London Detainee Support Group, *Detained lives: the real cost of indefinite immigration detention*, January 2009 has highlighted several cases.

[xx] Many organisations have commented upon this including Nacro, *Foreign national offenders, mental health and the criminal justice system*, 2010; London Detainee Support Group, *Detained lives: the real cost of indefinite immigration detention*, January 2009; the Royal College of Psychiatrists *Position Statement on detention of people with mental disorders in Immigration Removal Centres*, 2013; and (though not in the context of UK and immigration) Physicists for Human Rights *Submission to the Human Rights Committee During its Consideration of the Fourth Periodic Report of the United States*, September 2013

[xxi] A longstanding concern in relation to the maximum principle has been that its adoption may encourage the use of detention to the maximum. While that concern remains a serious one, the experience in the UK of lengthy, indefinite detention strongly suggests a legal maximum should be adopted and that this should be of relatively short length.

[xxii] Such concerns are among the various matters highlighted in our *Mental Health in Immigration Detention Action Group: Initial Report 2013*, available at http://www.medicaljustice.org.uk/images/stories/reports/MHIDAGreportR.pdf

[xxiii] In 2009, we were driven to initiate judicial review proceedings against the Secretary of State for the Home Department in relation to this. The Secretary of State conceded the matter without the need for a judicial ruling.

[xxiv] The Legal Aid, Sentencing and Punishment of Offenders 2012 removes legal aid provision for wide areas of civil and immigration law.

[xxv] See Ministry of Justice, *Transforming Legal Aid: Next Steps*, September 2013

[xxvi] See Ministry of Justice, *Judicial Review: Proposals for further reform*, September 2013; and response of Medical Justice to consultation questions 19 & 20, available at http://www.medicaljustice.org.uk/images/stories/reports/JRconsultationResponseMedicalJustice.pdf