

Access to Justice for immigration detainees post Shaw

1. In January 2016, Stephen Shaw published his review of the welfare in detention of vulnerable persons. His report made over 60 recommendations to the Home Office in order to improve the treatment and identification of vulnerable people in immigration detention. For the first time the culture of disbelief amongst home office staff and the detached nature of decision making was formally acknowledged and criticised.
2. Some of Shaw's recommendations have been acted upon. For example, in July 2016 the Home Office changed their policy on the detention of pregnant women such that detention can only be justified in exceptional circumstances for a maximum of 72 hours or 1 week with the agreement of the minister. It is worth noting that this change in policy was not just the result of the Shaw review but as a result of litigation brought by a Claimant, PA in which she successfully established that her detention as a pregnant woman had been unlawful, and as a result of a lobbying campaign which attracted significant public support.
3. One of the other key recommendations from the Shaw review that was acted upon by the Home Office was the recommendation for the introduction of a new 'adult at risk' concept with a wider definition of those at risk in immigration detention including victims of sexual violence, individuals with mental health issues, pregnant women, those with learning difficulties, those suffering from PTSD and elderly people. A presumption that such people should not be detained was recommended and the Home Office purported to act upon this recommendation by introducing the Adults at Risk policy which came into force in September 2016.
4. In the short time I have, I'm going to focus on the Adults at Risk policy and why, despite it having been introduced in response to the failings identified in the Shaw review, it is still fundamentally failing vulnerable people who are liable to detention. I'm also going to touch upon what I believe to be the other key battlegrounds for people in immigration detention in terms of their access to legal advice and consequently their access to justice.
5. Before this, however, I think it is worth taking stock of some of the positive developments afoot and some of the key legal successes for immigration detainees in recent weeks.

6. The campaign, spearheaded by Liberty, to end indefinite immigration detention and to introduce a 28 day time limit is gathering significant support among members of parliament in the form of an amendment to the Immigration and Social Security Co-ordination (EU withdrawal) bill. The amendment as drafted so far provides for a 28 day time limit for all detainees which is really positive given the concerns in the sector that foreign national offenders may be excluded from any time limit.
7. In the last few days, the Tribunal Procedure Committee announced that it will not introduce procedure rules under which detained appellants have their asylum and immigration appeals processed under accelerated timescales. The risk of procedural unfairness within accelerated timescales was cited as a major concern. This is a fantastic decision and should finally and conclusively hail the end of the government's efforts to introduce another detained fast track system.
8. At the end of last week the High Court decided that the investigation into abuse suffered by detainees at Brook House which was uncovered by the Panorama documentary in 2017, should take the form of a public inquiry such that the 21 staff members of G4S who are implicated in the abuse should be compelled to give evidence and face their accusers.
9. And last month the Court of Appeal ruled that the Home Office policy which allowed them to dispute a child's age on the basis that their appearance and demeanour strongly suggested that they were over 18 was unlawful. This policy had resulted in the unlawful detention of scores of children in recent years.
10. And yet, a lot is clearly still going wrong. By way of an example, during a week long advice surgery that my firm attended at a male immigration removal centre a few months ago, at least 8 of the detainees we met at the advice surgery presented with clear indicators that they were victims of torture and/or trafficking despite the presumption that such people should not be detained.
11. Shaw's follow-up report published in July 2018 did not go so far as his 2016 report in terms of its criticisms of the treatment of vulnerable detainees in detention but did acknowledge that many NGOs and detention centre managers think that the Adults at Risk policy has made matters worse. The Home Affairs Select Committee's inquiry into immigration detention, published in March this year, went a lot further in its criticisms, finding serious problems with almost every element of the immigration detention system. The inquiry specifically found that the Adults at Risk policy was not protecting the vulnerable people it was introduced to protect.
12. Based on my experience of representing clients in detention since the Adults At Risk policy was introduced, I would say that there are three major failings in the way the policy was designed and in the way it is operating:

13. Firstly, it fails people before they have even been detained. There remains no adequate screening for vulnerabilities prior to the decision to detain. In this sense I think the policy has set itself up to fail. The policy puts the onus on the person to self-declare their vulnerabilities without even knowing that the Home Office is contemplating detention in the first place. This issue was identified by the Parliamentary Inquiry which recommended face to face screening before someone is detained such that people are given a fair opportunity to bring any experiences or conditions that might make them unsuitable for detention to the Home Office's attention before it is too late.
14. Secondly, the mechanisms by which vulnerabilities are meant to be identified once someone finds themselves in detention are not functioning adequately. We are seeing all sorts of problems with these processes which vary from one detention centre to another, such as failures by healthcare to organise an assessment by a doctor within 24 hours of arrival in accordance with rule 34 of the detention centre rules; significant delays (often of at least 3 weeks) in detainees being offered appointments for a rule 35 assessment; and failures by the Home Office to pick up on indicators of risk in their interactions with detainees.
15. Thirdly, the level of protection for victims of torture in particular has effectively been lowered by the introduction of the Adults At Risk policy. Whereas once, those with independent evidence of torture could only be detained in exceptional circumstances, now, those who have survived torture are categorised according to the standard of evidence that they have been able to adduce. Level 1 being a self declaration of vulnerability; level 2 being professional evidence which supports the torture claim and level 3 being professional evidence that detention is likely to be injurious to the detainee. Given the difficulties in accessing legal representation and medical evidence to support a person's claim most victims of torture, at best manage, to obtain level 2 evidence in the form of a rule 35 report. Under the policy, an immigration officer is now permitted to balance the presumption that the detainee should be released against immigration factors which are said to weigh in favour of detention, such that only those with level 3 evidence benefit from the same or similar standard of protection as under the old chapter 55.10 policy.
16. These issues with the Adults at Risk policy fundamentally undermine its stated intention to reduce the number of vulnerable people being detained. They also underline the fact that access to timely, good quality legal representation is absolutely essential for anyone detained under immigration powers given that the onus rests so heavily on the individual to adduce evidence of their vulnerability at all stages of the detention process.
17. Aside from the Adults at Risk policy there are various other key challenges that immigration detainees still face in respect of their access to legal advice and therefore their access to justice.

18. The use of the prison estate for immigration detention is a big issue in terms of access to justice as there is no provision for legal advice surgeries within prisons in the same way as there is in immigration detention centres. In fact this problem even starts when someone is still serving their custodial sentence as the home office frequently serves notices of a person's liability to deportation and asks for representations as to why deportation would breach their human rights before the end of the custodial sentence. This is at a time when the prisoner has little or no access to immigration advice.
19. The Home Office's removal window policy which permits the home office to remove people without further notice once the removal window has opened is another major issue in terms of access to justice. A challenge brought by Medical Justice is being heard in the High Court this week, interim relief in the form of the suspension of the removal windows policy having already been granted earlier this year. The policy has potentially resulted in numerous unlawful removals from the UK on account of a detainee's inability to access appropriate legal advice before removal takes place.
20. Bail accommodation is another grave cause for concern. Following the removal of bail accommodation under section 4(1)(c) of the Immigration and Asylum Act 1999, those detainees who are not eligible for any other type of asylum support are being held in detention for longer because they cannot obtain an address. Under the new schedule 10 provision for accommodation, an address will not be provided unless a decision to grant bail has already been made. In some cases, people are being released to street homelessness potentially in breach of their rights under Article 3.
21. Lastly, the introduction of automatic bail where someone has remained in detention for 4 months was clearly positive in terms of increasing the judicial oversight of detention, but does not in practice appear to be working effectively, with a lack of access to legal representation at automatic bail hearings being a key issue.
22. To sum up, there remains many significant challenges in terms of access to justice for detainees. The unlawful deprivation of liberty is sadly extremely common. In my experience the Home Office continues to settle claims for compensation for unlawful detention without agreeing to make an apology and apparently without taking the opportunity to learn any lessons from the litigation that we bring.
23. It is promising to note that the Home Office is in the process of reviewing the Adults at risk policy. However, in my view the failings of the policy in its current form are so significant that they beg the question as to whether the Home Office's stated intention – that being to reduce the number of vulnerable people in detention - was in fact a genuine one. What remains clear is that the role of the lawyer before, during and after detention remains absolutely key in order to protect the most basic and fundamental rights of those detained under immigration powers in this country.