

**SUBMISSION BY MENTAL HEALTH IN IMMIGRATION DETENTION ACTION
GROUP TO JOINT COMMITTEE ON HUMAN RIGHTS CALL FOR EVIDENCE ON
HUMAN RIGHTS JUDGMENTS¹**

1. This submission is made on behalf of the Mental Health in Immigration Detention Action Group (MHIDAG), which is a multi-disciplinary group established to improve Home Office decision making in the context of the immigration detention of the mentally ill and to improve the way in which this group are treated in immigration detention. Further information about the group, including details of its members, is appended. The submission is made in response to the Joint Committee on Human Rights' (JCHR) call for evidence on human rights judgments, announced 17 July 2013.

Summary

2. Since August 2011, there have been four cases where the High Court has found the Home Office to be in breach article 3 of the European Convention on Human Rights (ECHR) as a result of detaining severely mentally ill men at immigration removal centres. It is the view of the MHIDAG that these cases represent the tip of the iceberg, and that there is a crisis in the way that the Home Office is dealing with this group in exercising its immigration functions, particularly its powers of detention. It is MHIDAG's view that the Home Office is routinely failing to comply with its obligations under the ECHR, particularly article 3 (the prohibition against torture and inhuman or degrading treatment), in relation to this group. Further, the Home Office is failing to comply with its duty under article 3 to learn lessons from these cases. It is in the context of the State's duty to learn lessons that we have set out at paragraph 21 below the changes to law, policy or practice that should be made in order to avoid further breaches of the ECHR in relation to this group.

Preliminary

3. As preliminary point, we note that JCHR has asked for submissions in relation to "*[c]ases since July 2011 in which the European Court of Human Rights has found a violation of the European Convention on Human Rights by the UK or where a declaration of incompatibility has been made by a UK court*". In our view, this remit is too narrow and goes against the legislative purpose of the Human Rights Act 1998. The four judgments we refer to below were judgments of the UK High

¹ The Home Affairs Select Committee has considered some of the issues raised in this submission in the context of its scrutiny of the work of what was the UK Border Agency (see its report, "The Work of the UK Border Agency (April-June 2012)" at pp6-9 <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/603/603.pdf>, as well the Government response at pp3-4 <http://www.official-documents.gov.uk/document/cm85/8591/8591.pdf>). In MHIDAG's view, this relatively brief consideration of the issue by the HASC is not relevant to whether the Home Office has made changes to law, policy and/or practice necessary to avoid further breaches of the ECHR in the context of this group; and the Government's response to the HASC's report is clear that the Home Office does not accept that the cases are illustrative of systemic problems. In circumstances where the Home Office does not appear to accept or appreciate that there is a problem, or at least the scale of the problem, it is perhaps unsurprising that it has not made the changes to the law, policy and practice that are necessary to avoid further breaches of the ECHR.

Court and, on the face of it, fall outside of the remit of the JCHR's call for evidence as they did not involve the court making declarations of incompatibility.

4. One of the main purposes of introducing the Human Rights Act 1998 was to "*bring rights home*" so that individuals with a complaint that their human rights have been breached are able to argue their cases before a domestic court rather than having to take their case to Strasbourg. Therefore, in examining the government's compliance with the ECHR, which we understand is the purpose of the JCHR's inquiry, it should matter not whether it is a domestic court or Strasbourg that has found the government to have breached the ECHR. We would accordingly recommend that consideration be given to including "*significant findings of breaches of the ECHR by domestic courts*" in any future call for evidence.

Background and relevant findings from the four High Court cases

5. We begin by setting out the key findings of the Court in the four reported cases.

*R (S) v Secretary of State for the Home Department*²

6. The first individual, known as S, was unlawfully detained between 23 April and 29 September 2010. The High Court found that the circumstances of his detention at Harmondsworth immigration removal centre between 24 April and 4 August 2010 constituted inhuman and degrading treatment in violation of article 3 ECHR. Those circumstances included:
 - (a) Detaining him despite a clear (and documented) history of severe mental illness, and contrary to the clear expert advice of a number of mental health professionals;
 - (b) Serious deterioration in his mental state, with numerous acts of self harm, psychotic symptoms, feelings of acute anguish and distress, and allowing him to reach such a deteriorated state that he lacked capacity to make decisions in his own best interests;
 - (c) The failure to respond to assessments by an in-reach psychiatrist that he was unfit for detention and required urgent compulsory treatment in hospital under the Mental Health Act; and
 - (d) One incident in which officers encountered a naked S being pulled along a corridor by another detainee in view of a crowd of detainees following S making an attempt on his own life.
7. On the Secretary of State's application, permission to appeal was refused and settlement terms were subsequently agreed, with S paid significant damages and legal costs from public funds.

²[2011] EWHC 2120 (Admin) (5 August 2011)

*R (BA) v Secretary of State for the Home Department*³

8. In the second case, the High Court found that a Nigerian man, known as BA, was unlawfully detained between 21 June and 10 October 2011. The Court found that the circumstances of his detention, again at Harmondsworth immigration removal centre, between 4 July and 6 August 2011 constituted inhuman and degrading treatment in breach of article 3 ECHR. The circumstances included:
- (a) Detaining him despite a clear and documented history of severe mental illness and contrary to expert advice that detention would be likely to cause deterioration. The Judge stated that there was “*a deplorable failure, from the outset, by those responsible for BA’s detention to recognise the nature and extent of BA’s illness*”⁴;
 - (b) Serious deterioration in his physical and mental health, including allowing him to reach a state where he was assessed by medical staff as unfit for detention and at one stage on the verge of death;
 - (c) The failure, expeditiously, to make arrangements for his transfer to hospital once he had been assessed by medical staff as requiring urgent transfer to hospital for compulsory treatment under the Mental Health Act; and
 - (d) The failure within the Home Office to ensure that clinical information about his deteriorating condition was accurately communicated to senior officials responsible for deciding whether he should be released. The Judge referred to “*a combination of bureaucratic inertia, and lack of communication and co-ordination between those who were responsible for his welfare*” and described one senior Home Office official’s response, recorded in an email, to plan how to manage press interest should he die, as showing “*callous indifference to BA’s plight*”⁵.
9. The Home Office chose not to pursue an appeal against this decision and settlement terms were agreed, with the Home Office paying significant damages and legal costs from public funds.

*R (HA) v Secretary of State for the Home Department*⁶

10. The third case concerned a Nigerian man, known as HA, a paranoid schizophrenic, who was unlawfully detained between 1 February and 5 July and 5

³2011] EWHC 2748 (Admin) (26 October 2011)

⁴ Judgment, paragraph 236

⁵ Judgment, paragraph 237

⁶[2012] EWHC 979 (Admin) (17 April 2012)

November and 15 December 2010 at Brook House and Harmondsworth immigration removal centres. The Court also found that the Home Office's "*reformulation*" of its policy guidance on the detention of the mentally ill in August 2010 breached its public sector equality duties under the Race Relations Act 1976 and Disability Discrimination Act 1995. The circumstances that led the Court to find that HA suffered inhuman and degrading treatment included:

- (a) Acts which "*violated his own dignity*" (prolonged periods of time in isolation; sleeping on the floor, often naked, in a toilet area; drinking and washing from a toilet; self neglecting, including not eating properly and not washing or changing clothes for prolonged periods; and suffering from insomnia);
- (b) Not receiving appropriate medical treatment for a prolonged period of more than 5 months;
- (c) The use of force on him on several occasions; and
- (d) In the second period of detention, detaining him when the Home Office had been explicitly warned by a psychiatrist that Harmondsworth did not have the medical facilities to treat him should he suffer a relapse and that an aspect of his mental illness was paranoia about detention centre staff.

11. Permission to appeal against this judgment was granted by Mr Justice Singh. Medical Justice and MIND were granted permission to intervene in the Court of Appeal. Shortly before the case was due to be heard in February 2013, when the parties had already expended significant resources in preparing for the hearing, the Secretary of State abandoned her appeal.

*R (D) v Secretary of State for the Home Department*⁷

12. In the fourth case, D, a severely mentally ill man diagnosed with paranoid schizophrenia, challenged his detention under immigration powers between February 2011 and April 2012, when he was released on bail. The court found that, whilst there was nothing in the way the claimant had been treated as to be characterised as "degrading", between February and November 2011, when he was detained at Brook House and Harmondsworth, D suffered "inhuman" treatment in breach of article 3 due to:

- (a) The absence of proper psychiatric treatment at Brook House and Harmondsworth exacerbated D's mental suffering. It was "premeditated" in the sense that those with responsibility for his well-being at the two centres persisted in a medical regime for him which involved neglect, particularly in relation to ensuring he took anti-psychotic medication and denying him

⁷ [2012] EWHC 2501 (Admin) (20 August 2012)

access to a psychiatrist, and recourse to segregation which was in effect a disciplinary sanction and unsuitable for a person with his condition.⁸

- (b) The undisputed expert evidence that D's mental state deteriorated as a direct result of his mental health needs not having been met, in particular the fact he had deteriorated to the extent that he lacked capacity to participated in his immigration case.⁹

Settled, concluded and ongoing cases

13. MHIDAG members have acted in a significant number of cases which raise similar issues to the four reported cases referred to above which were settled in return for payment of substantial damages and legal costs from public funds. We are also aware of other similar cases dealt with by other lawyers which have been settled by the Home Office in return for payment of substantial damages and legal costs from public funds.
14. MHIDAG's members are also dealing with a number of ongoing cases concerning the detention of severely mentally ill people at immigration removal centres, which raise similar issues to the above cases. Again, we are also aware that other lawyers are acting in similar cases. In our view, it is likely that a significant proportion of these ongoing cases will be settled by the Home Office with substantial damages and legal costs being paid out of public funds.
15. Finally, MHIDAG is concerned that there will be yet further cases where the individuals concerned have suffered similar treatment to the individuals in the cases referred to above, but have for whatever reason been unable to access adequate legal representation in order to pursue their cases.
16. There are, therefore, a significant number of cases the Home Office is aware of but which are effectively hidden from public scrutiny. MHIDAG is concerned that as a result of the cases not being brought before the court, and in the absence of satisfactory alternative investigative mechanisms, there will be little or no independent scrutiny of these cases, with the result that culpable and discreditable conduct by the Home Office, which more often than not is what leads the Home Office to compromise claims, will not be brought to light; dangerous practices and procedures which led to the failures in these cases will not be rectified; and important lessons will not be learned.

Concerns expressed by HMCIP, IMBs and NGOs

17. In preparing this submission, we have considered extensive material, including recent reports from the Her Majesty's Chief Inspector of Prisons (as well as the corresponding Home Office Service Improvement Plans), Independent Monitoring

⁸ Judgment, para 175

⁹ Judgment, para 176

Boards as well as NGOs, such as Medical Justice and Bail for Immigration Detainees. In our view, this extensive material demonstrates the following:

- (a) Prior to about 2006, it was the practice of immigration officers, and others tasked with responsibility for authorising detention under immigration powers, to only authorise the detention of the seriously mentally ill in very exceptional circumstances, and only then for short periods.
- (b) Since 2006, detention of this group has become routine, particularly foreign national prisoners, and the length of time this group are detained has increased exponentially.
- (c) The reports note that, on the face of it, policy states that the mentally ill should only be detained in very exceptional circumstances, but what these organisations see in practice contrasts starkly with the terms of the policy.
- (d) Home Office caseworkers consistently fail to take into account evidence of mental illness in detention reviews. They also depart from clinical advice from expert medical practitioners without any basis for doing so, for example with regard to fitness to detain, often substituting their own non-expert view for that of an expert doctor.
- (e) The treatment available to the seriously mentally ill in the IRC estate is inadequate, both in terms of the quantity and quality of provision. There is particular deficiency with regard to the availability of psychological treatment.
- (f) There have been and are significant delays in the transfer of seriously mentally ill people for treatment in hospital under the Mental Health Act 1983. These delays arise from delays in assessment and lack of bed spaces in local NHS facilities, who Home Office and its contractors have not consulted with prior to increasing the detention of this group and, for example, prior to doubling the capacity of Harmondsworth in June 2010. There is some evidence that the position in this respect has worsened for detainees at Harmondsworth and Colnbrook since the re-structuring of the NHS in April 2013.
- (g) Force and removal from association are routinely used inappropriately against this group. There are repeated references in the reports to seriously mentally ill people who are unable to advocate on their own behalf languishing in segregation accommodation for lengthy periods of time.
- (h) Recommendations for change have been repeatedly made with little or no evidence of improvement on the part of the Home Office and its contractors.

MS v UK

18. For how the European Court of Human Rights' approach delays in transferring severely mentally ill people to appropriate therapeutic environments for treatment, we refer to the recent decision in *M.S. v UK* (2012) 55 EHRR 23. In the early hours of 6 December 2004 police in Birmingham were called out to deal with MS, who was behaving in an agitated and disturbed manner. He had attacked his aunt, who had serious and extensive injuries to her face and upper body inflicted by him. At 4.20am the police detained him under section 136 of the Mental Health Act 1983, which confers a power to detain "in a place of safety" for up to 72 hours for the purpose of examination by psychiatric medical practitioners and making any necessary arrangements for their treatment or care. He remained in police custody until 7.27am on 9 December 2004 (i.e. he was detained for a total of 75 hours, just over three days), when he was escorted, in handcuffs, to a secure mental health unit. He displayed extremely disturbed and violent behaviour at the police station. On admission to the psychiatric unit, it took eight members of nursing staff to restrain him. Over the following days he received medication which showed sustained improvement. It was found by the court that no one was at fault for the delay in transferring MS to a psychiatric unit: due to his disturbed behaviour - it had been difficult to locate a suitable facility.

19. At para 39 the court emphasised the special vulnerability of the mentally ill whenever they are detained by state authorities ("*...As the Court has stated in its case-law under this provision of the Convention, the mentally ill are in a position of particular vulnerability, and clear issues of respect for their fundamental human dignity arise whenever such persons are detained by the authorities...*") Although there had been no intention by the authorities to treat MS in a manner incompatible with article 3, the fact he was detained in a police cell meant that no psychiatric treatment could be provided to him (para 41). The court found that the conditions MS was detained in were an affront to human dignity and constituted degrading treatment in breach of article 3, see paras 44-45:
 - (a) MS was in a state of "*great vulnerability*" throughout the time he was at the police station. He descended into an "*abject condition*" in his cell. Each of the medical professionals who examined him agreed that he was in "*dire need*" of psychiatric treatment in hospital. This situation "*diminished excessively his fundamental human dignity*". It was of some significance that what happened to MS failed to respect both best medical practice in England as well as the maximum time-limit set by Parliament for detention under section 136 (72 hours). Through the 75 hour period he was "*entirely under the authority and control of the State*" which meant that the authorities were under an obligation to safeguard his dignity and were responsible under the Convention for the treatment he experienced. (para 44)

- (b) The Court accepted that the efforts made to help MS were genuine. The situation essentially arose out of difficulties of co-ordination by the authorities when suddenly confronted with an urgent mental health case. Notwithstanding this and the fact that there was no intention to humiliate or debase MS, the Court found that conditions MS was detained in were an affront to human dignity and constituted degrading treatment. (para 45)

20. MS serves to illustrate the very high duty of care the authorities owe to mentally ill people in custody, a duty which in our view it is clear that the Home Office is routinely failing to comply with.

How law, policy or practice should be changed

21. In order to avoid unacceptable risks of breaches of the Convention arising from the immigration detention of the mentally ill, MHIDAG makes the following submissions on how law, policy or practice in this area should be changed:

- (a) The Home Office should not detain people who have been unwell enough to be sectioned under the Mental Health Act, or where there is evidence that detention would lead to them becoming so unwell.
- (b) The Home Office should not detain people when to do so is likely to mean that they lack capacity to participate in their immigration case.
- (c) The Home Office should not detain people who have been subject to torture or other serious trauma whose mental health is likely to be especially adversely affected by detention.
- (d) Mentally ill people should be excluded from the detained fast track process and their asylum claims dealt with in the community.
- (e) If detainees do become so unwell that they need to be treated in hospital, there should be clear protocols in place to ensure that they are transferred out of detention within timescales that comply with the law and that detainees are treated in accordance with the “least restriction” principle under the Mental Health Act (usually as a voluntary or community patient).
- (f) An independent panel of experts should be established to consider the detention of any mentally ill immigration detainee whose recommendations must have binding effect.
- (g) The statutory restriction on bail at para 30(2) to schedule 2 of the Immigration Act 1971¹⁰ should be repealed.

¹⁰ “...the Tribunal shall not be obliged to release an appellant if it appears to the Tribunal... that the appellant is suffering from mental disorder and that his continued detention is necessary in his own interests or for the protection of any other person...”

- (h) Segregation of immigration detainees should be conditional upon a medical assessment of mental health, and involve regular multidisciplinary reviews, and should never be used as way of managing mentally ill detainees. Similar safeguards should be in place in relation to the use of force on mentally ill detainees.
- (i) The Home Office should ensure that proper assessments are carried out under Rule 34 of the Detention Centre Rules 2001 (medical assessments on admission to detention), including ensuring that previous medical records are made available, proper reports under Rule 35 of the Detention Centre Rules 2001 (obligation on detention centre doctors to report concerns to the Home Office about victims of torture and those likely to be injuriously affected by detention) are prepared and that Home Office responses comply with policy and law. Equivalent mechanisms should be established for any immigration detainees held in prisons.
- (j) There should be mental health awareness training for all staff working in detention centres and all Home Office officials responsible for casework concerning people in immigration detention.
- (k) There should be protocols to ensure that there is proper liaison between healthcare services in detention centres and outside healthcare services, in particular for when detainees are released.

Appendix: further information about the Mental Health in Immigration Detention Action Group

The Mental Health and Immigration Detention Action Group (MHIDAG) was set up in response to profound and on-going concerns about the ill-treatment of immigration detainees with mental health problems. It is a voluntary and unfunded group with a membership of lawyers, health professionals, ex-detainees and NGO workers. The group is chaired by Dr Hilary Pickles, who has significant experience working in health policy as a doctor and for the Department of Health. The other members of the group are:

1. Professor Cornelius Katona, Consultant Psychiatrist, Royal College of Psychiatrists and Helen Bamber Foundation
2. Emma Mlotshwa, coordinator, Medical Justice
3. Theresa Schleicher, casework manager, Medical Justice
4. Natasha Tsangarides, research, Medical Justice
5. Michelle Warner-Borrow, finance and administration, Medical Justice
6. Ali Fiddy, head of Legal Unit, Mind
7. Dr Adeline Trude, Bail for Immigration Detainees
8. Martha Spurrier, barrister, Doughty Street Chambers
9. Stephanie Harrison QC, barrister, Garden Court Chambers
10. Sue Willman, partner, Deighton Pierce Glynn Solicitors
11. Hamish Arnott, partner, Bhatt Murphy Solicitors
12. Jed Pennington, solicitor, Bhatt Murphy Solicitors
13. Camilla Graham-Wood, solicitor, Birnberg Peirce and Partners Solicitors
14. Khuluza Mlotshwa, ex-detainee and law student
15. Aisha Kabejja, ex-detainee and student

The group's terms of reference are as follows:

The Mental Health and Immigration Detention Action Group (MHIDAG) is a voluntary and unfunded group with a membership of lawyers, health professionals, ex-detainees and NGO workers.

The MHIDAG:

- *is seriously concerned about the mental health of those held under Immigration Powers;*
- *considers that aspects of the current detention and healthcare policy and their current implementation are detrimental to the mental health of immigration detainees; and*
- *and will be marshalling evidence and submissions to influence a change for the better for both individual detainees and detainees as a whole.*

The MHIDAG will do its work through collaborative discussion and information exchange and through influencing external bodies.