Submission to the Home Affairs Selection Committee

Immigration detention inquiry

April 2018

Amnesty International UK is a national section of a global movement of over three million supporters, members and activists. We represent more than 600,000 members, supporters, activists, and active groups across the United Kingdom. Collectively, our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. Our mission is to undertake research and action focused on preventing and ending grave abuses of these rights. We are independent of any government, political ideology, economic interest or religion.

For further information contact:

Steve Symonds

Programme Director – Refugee and Migrant Rights

020 7033 1742

steve.symonds@amnesty.org.uk

Introduction

1. In this submission Amnesty International UK (AIUK) responds to some of the topics in the committee's terms of reference for its inquiry into immigration detention in the UK.

2. AIUK conducted research during 2017 regarding the Home Office's use of its immigration detention powers. This research involved an examination of Home Office detention case files[1] and interviews with detainees, their family members and lawyers.[2] It was conducted following the publication of the 'Shaw Review into the Welfare in Detention of Vulnerable Persons'[3] and the Home Office's subsequent announcement of reforms to its detention policies and practices.[4] The full findings of our research were published in a report in December 2017.[5] AIUK also conducted research in 2016 regarding legal aid and access to legal advice for people in, and at risk of, immigration detention.[6]

3. Among those topics we do not focus on in this submission are 'access to legal advice and representation' and 'interaction with the Home Office and the processing of casework'. However, our research has included consideration and findings in relation to these topics. For example, we were told the following by people we interviewed about their experience of detention:

> "*I spent the first three months in detention going around in circles as I didn't have anyone to help. At first I didn't realise I couldn't get legal aid, but then I started asking around and trying to find a solicitor and realised I couldn't get any help unless I could pay. But I don't know anything about immigration, why would I? I was born in the UK. I've always lived here I've never been anywhere else but here. I didn't realise I wasn't British.*"[7]

> "*I've been given a caseworker and I'm telling you now. …for four months, five months I've never spoken to this lady. Every time I ring up to speak to this lady about my case she's not in… It's like she's hiding; like she don't want to talk to me.* "[8]

---

[1] Obtained from people who were challenging the lawfulness of their detention through judicial review.
[2] Full information about our methodology for this research is provided in our published report.
[3] Home Office/Stephen Shaw, Review into the welfare in detention of vulnerable persons, January 2016, https://www.gov.uk/government/publications/review-into-the-welfare-in-detention-of-vulnerable-persons
[4] Rt Hon James Brokenshire, Immigration Detention: Response to Stephen Shaw's report into the Welfare in Detention of Vulnerable Persons: Written statement – HCWS470, January 2016, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-01-14/HCWS470
[5] Amnesty International, A Matter of Routine: The Use of Immigration Detention in the UK, December 2017, https://www.amnesty.org.uk/resources/matter-routine-use-immigration-detention-uk-0
[6] Amnesty International, Cuts that Hurt: The Impact of Legal Aid Cuts in England on Access to Justice, October 2016, https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf
[7] Amnesty International, Cuts that Hurt: The Impact of Legal Aid Cuts in England on Access to Justice, October 2016, https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf
[8] Amnesty International, A Matter of Routine: The Use of Immigration Detention in the UK, December 2017, https://www.amnesty.org.uk/resources/matter-routine-use-immigration-detention-uk-0

4. Before addressing the topics in the Committee's terms of reference, we make some general observations.

General

5. Home Office use of immigration detention is excessive. International human rights standards require that a presumption against detention should be established by law and the burden of proof to displace it in a given case must rest on the Home Office.[9] Alternatives to detention must be preferred to detention, which must only be used as a last resort, if necessary to control entry or lawfully remove a person from the UK.[10] The principle of non-discrimination requires States to address the unique challenges that women face in detention and to take into account their gender-specific needs.[11] These principles have been long recognised but not given effect in immigration policy and practice, in which the use of detention as a tool of immigration control has become a matter of routine.

6. The All-Party Parliamentary Groups on Refugees and Migration (APPG) in reporting on their detention inquiry concluded:

> "*We believe the problems that beset our immigration detention estate occur quite simply because we detain far too many people unnecessarily and for far too long.*"[12]

The Shaw Review argued that the use of immigration detention should be reduced considerably and called for a,

> '*smaller, more focused, strategically planned immigration detention estate'*.[13]

These findings – concerning the excessive number of people detained, the use of detention unnecessarily and the excessive length of time people are detained – are ongoing, as borne out by our research. We urge the Committee to keep in mind this general and overarching concern when considering discrete matters relating to detention.

7. Another general concern that should be kept in mind relates to the consideration of 'vulnerability' in detention. This is frequently discussed in relation to specific personal characteristics that will usually make a person particularly vulnerable to being caused harm by detention. Such characteristics include suffering from mental ill-health, having suffered torture or having been trafficked. They may also relate to a person's gender or sexuality. However, it is vital that detention is recognised as being harmful in and of

---

[9] See eg, UN HRC General Comment 35, at paras 18, 19, 21, 62.
[10] See for example Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, (25 February 2008) A/HRC/7/12 at para 50 [Special Rapporteur on Migrants 2008]; Special Rapporteur on Migrants, 2002, at paras 17, 60, 73; UNHCR Detention Guidelines, Guideline 2, para 14; many and various UN Committee against Torture, Concluding observations reports on state parties; many and various UN Human Rights Committee, Concluding observations reports on state parties; ECHR Art. 5 (1)(f)
[11] OHCHR, Women and Detention, September 2014
[12] APPG on Refugees/APPG on Migration, The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom, March 2015, https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf
[13] Home Office/Stephen Shaw, Review into the welfare in detention of vulnerable persons, January 2016, https://www.gov.uk/government/publications/review-into-the-welfare-in-detention-of-vulnerable-persons

itself. It entails being placed in an unfamiliar and isolating environment, restricting and removing freedom to an extraordinary degree and subjecting the person to a regime that places them in the immediate control of others (some of whom are neither present nor identifiable). For many people subject to immigration detention, this loss of freedom is exacerbated by separation from family and friends, language and other social and cultural barriers, and fear and uncertainty concerning the future, including because immigration detention is without time limit. The harmful uncertainty caused by the lack of a time limit is amplified for many people in detention because others in detention have been detained for many months or years.

8. Thus, while specific characteristics may be identified that are likely to significantly exacerbate the risk that a person is harmed by being detained and the prospect that this harm may occur immediately or more quickly and may be more long-lasting, vulnerability to harm is not solely determined by such characteristics. A person who does not have any specific characteristic may nonetheless be profoundly harmed by detention. Other people may have a specific characteristic but be unable to disclose or establish this.

9. Accordingly, while it is important that the Home Office is attentive to specific characteristics – both before and throughout a person's detention – this in itself is insufficient. In short, neither the wider conclusion of the APPG nor the detailed concerns of Stephen Shaw arising from his review of welfare in detention can be effectively addressed by merely identifying specific characteristics concerning vulnerability and focusing upon these.

The initial process of detention, including the decision to detain and screening for 'vulnerability'

10. All consideration of detention should begin from the premise of detention as a last resort; an exception that the executive is required to justify in the face of a strong presumption of liberty. It should not be seen as a routine or inevitable element of the Home Office's immigration control functions.

11. However, this principle is not being applied in practice. The sheer scale of the current detention estate facilitates the use of immigration detention as a matter of routine. Detention is used to the extent that capacity allows.[14] In many instances, the files we examined demonstrated a presumption that the person would be detained, including in recording reasons for detention that, far from being grounded in a presumption of liberty, read like a search for reasons to detain the person. In the case of offenders, for example, Home Office caseworkers sometimes referred to the date the criminal sentence would end as a prisoner's upcoming 'detention date', rather than their 'release date', suggesting a clear predisposition to detain. Overall, in 14 of the 28 relevant files, no acknowledgement of the presumption of liberty appeared in the decision making. In a further six case the presumption of liberty was used as a phrase, but only at the end of a long consideration of the reasons to detain and only in order to then be dismissed. The Home Office has duties to consider the welfare of any children affected by its

[14] See Amnesty International, A Matter of Routine: The Use of Immigration Detention in the UK, December 2017, https://www.amnesty.org.uk/resources/matter-routine-use-immigration-detention-uk-0 p. 19

detention decisions, whose best interests must be treated as a primary consideration.[15] Yet, while the 'welfare' of children was generally referred to in the Home Office case files we reviewed, but there was rarely any effort to treat the child's best interests as a primary consideration.

12. When a detention decision is being made, it is vital that decision makers take all relevant information into account and assess whether it is right and practically possible to remove the person from the UK. Yet in 16 of the 28 cases in our study, the ultimate decision to detain was taken without regard to pertinent information about a person's history, travel documentation, health or family – information that was already in the Home Office's files. There appeared to be a range of reasons for this, including detention caseworkers having difficulties accessing information held by other sub-sections of the Home Office immigration service (such as an asylum processing team), caseworkers simply not studying the file that they had available to them, and confusion being caused by changes in the caseworker assigned to a case or the movement of a someone from one centre to another.[16]

13. The approach to assessing whether a person who is being considered for detention can lawfully and practically be removed from the UK to another country is also a cause of considerable concern. The lack of a travel document is widely recognised as one of the most common obstacles to a person's removal.[17] Without a travel document of some kind, the person cannot be removed, and this should make detention inappropriate unless a document can be obtained and removal implemented within a reasonable time. Yet, the files we reviewed demonstrated a casual attitude on the part of detention decision makers to the lack of a travel document. It was uniformly, wrongly and unreasonably assumed that the redocumentation process would run smoothly. In reality, receiving states refused or failed to redocument particular individuals; individuals did not participate in the redocumentation process (including because they feared return or their health prevented them); and in some cases people's physical and mental health broke down while they were in detention to the point that redocumentation became impossible. Yet, detention decision making frequently persisted with the assumption that travel documents could be readily obtained even when this was contradicted by both the person's circumstances and the Home Office's own past experience.[18]

---

[15] See Borders, Citizenship and Immigration Act 2009, s. 55; and *ZH (Tanzania) v SSHD* [2011] UKSC 4

[16] The failure of caseworkers to take account of information already available to them can have serious consequences. In one instance, a man was detained after failing to comply with his duties to report to the Home Office and he was regarded as an absconder. However, his Home Office file showed that the Home Office knew that the man had missed his reporting event after being found 'by the police, hanging onto some railings near the side of the road. He was confused, disorientated and did not know where he was or how he came to be there.' Despite this clear evidence of serious concerns regarding the man's mental health, his failure to report was cited among the justifications for his detention.

[17] See for example Independent Chief Inspector of Borders and Immigration, Inspection of Emergency Travel Document Process, March 2014, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546968/An-Inspection-of-the-Emergency-Travel-Document-Process-March_2014.pdf; Independent Chief Inspector of Borders and Immigration, An Inspection of Removals, 2014-15, December 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/547681/ICIBI-report-on-Removals-_December_2015.pdf; National Audit Office, Managing and Removing Foreign National Offenders, October 2014, https://www.nao.org.uk/report/managing-and-removing-foreign-national-offenders/

[18] This is a long-standing issue that has been discussed in other inquiries. See footnote 15

14. Immigration detention powers are used far too freely, resulting in unjustifiable decisions based on routine responses. This causes people subjected to detention real harm and is also wasteful for the Home Office. For example, Ms N had been a lawful resident of the UK for over 10 years when her application to extend her leave to remain was rejected. Despite her decade of compliance, officials recorded her absconding risk as 'untested' and she was detained. Ms N was held in detention for two weeks, before leaving the UK voluntarily. In other cases the consequences were more serious. Mr S was a refused asylum seeker with chronic paranoid schizophrenia and depression. He was held under immigration powers for over 18 months while various unsuccessful attempts were made to provide him with travel documents and remove him. During that period he became increasingly delusional and intermittently mute, and his personal hygiene collapsed. His file is a picture of confusion: some officials regarded him as having serious mental illness, while others regarded him as 'blatantly non-compliant' and suggested he was engaging in a 'dirty protest'. He was transferred between IRCs and psychiatric institutions. Any progress made in hospital was reversed when he returned to detention. A Home Office file review, undertaken while he was in hospital, warned that significant further deterioration was likely if he was returned to a detention centre. It noted that such a deterioration could touch on Article 3 of the ECHR, the absolute right not to be subject to inhuman or degrading treatment. Nevertheless, he was sent back to a detention centre. This final period in detention was quickly terminated after a consultant psychiatrist described his re-detention as 'reckless' and 'cavalier'.

The treatment of 'vulnerable' persons subject to immigration detention, particularly the effectiveness of the Rule 35 process and the Adults at Risk policy

15. In his first review, Stephen Shaw found that the Home Office's policies and practices for the identification and removal of individuals considered to be particularly vulnerable were insufficient, resulting in many people who in policy terms were considered 'unsuitable for detention' remaining detained.[19] In response the Home Office introduced the 'Adults at Risk Policy',[20] which was intended to move officials' focus from whether the person detained fitted a particular defined category of vulnerability, towards a more general assessment of the risk of harm that detention posed the person.

16. In common with many other observers, our research found that this change has meant that Home Office decision makers now seem to be more willing to accept that people are 'adults at risk', but are not necessarily any more willing to release them.

17. This pattern was repeatedly borne out in our sample. In one of the more extreme cases, someone detained was acknowledged to be at Level 3 risk of harm (the highest in the policy where detention itself is harming, or is likely to harm, her, him or them) but his detention was maintained. The mix of reasons given for this were that he had a criminal record, he had been rude to Home Office staff, he had refused to apply for an emergency

[19] Home Office/Stephen Shaw, Review into the welfare in detention of vulnerable persons, January 2016, https://www.gov.uk/government/publications/review-into-the-welfare-in-detention-of-vulnerable-persons
[20] Home Office, Adults at Risk in Immigration Detention, https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention

travel document (when he was pursuing a legal claim to remain in the UK) and that if he was released:

> *this action can lead to a negative view of the Home Office by the general public who may see the department as failing in its duty to protect them [from] violent criminals and therefore there is a high risk of harm to the public.*[21]

18. This case was relatively unusual in our research to the extent that in most instances where the Home Office accepted the risk as Level 3 it was possible to secure the detainee's release. However, where professional evidence that the detainee was at risk existed (Level 2 in the policy), for example because they were a victim of torture, detention was routinely maintained. For example, our sample included three cases in which women were accepted as having been subject to rape and other gender-based violence but detention was maintained under the policy. A similar approach was taken in men's cases. In the case of Mr J, Home Office officials conceded that he was a victim of torture: he had been trafficked to the UK to work in a cannabis factory, and had been beaten, stabbed, slashed with a knife, locked up and deprived of food by his traffickers. However, officials decided that he should remain in detention. The mix of reasons given was that he had failed to report to the Home Office when required; he had been arrested by the police for the cannabis offence (at the cannabis factory where, the Home Office accepted, there was evidence he was tortured); and that,

> *"whilst it is noted that you have stated that you have encountered physical torture, the doctor has diagnosed no serious physical or mental health conditions that are likely to inhibit your ability to cope within the detained environment."*

19. Thus although the ARP was intended to reduce the number of particularly vulnerable adults detained, it is in practice being used to find new ways to justify the continued routine use of detention.

Barriers to release from detention

20. The committee has already received some evidence regarding practical barriers to release from detention, particularly relating to housing issues, probation assessments and access to bail. These are important considerations and our organisation is particularly concerned that they are likely to be exacerbated by recent changes to the provision of bail addresses made when Schedule 10 of the Immigration Act 2016 was brought into effect at the start of 2018.[22]

21. Our research, however, focused on the barriers to release from detention produced by Home Office officials' attitude and conduct in relation to use of detention powers. In

[21] This is not the first case where this phrasing regarding embarrassment for the Home Office as a justification for detention was used. Justifications for detention often come in template-form and are passed from case to case. See Mohammed, R (On the Application of) v Secretary of State for the Home Department [2016] EWHC 447 (Admin) (03 March 2016) para 3.

[22] See the Immigration Act 2016 (Commencement No. 7 and Transitional Provisions) Regulations, December 2017, http://www.legislation.gov.uk/uksi/2017/1241/made

many cases, once detention has commenced, it is maintained as a matter of default or convenience. Reasons given for maintaining detention are often based on strained reasoning and unrealistic assessments of the prospect of removing someone from the UK. Detention is often maintained unless release cannot be avoided – reversing the appropriate position of detention as the last resort.

22. Long-term detention continued due, firstly, to unrealistic and ultimately fruitless quests for detainees to be issued with emergency travel documents so that they could be removed from the country. Time after time, both the files and our interviews demonstrated an unwillingness to recognise when it would be impossible to obtain such a travel document, or that the process was likely to take so long that detention would last an unreasonable time.

23. Mr L, for example, came to the UK as the child of a refugee. Over the years he was subjected to parental abuse and developed serious mental health problems. He was ultimately sent to prison for robbery and was then targeted for deportation. He was held in an immigration detention centre for nearly two years while repeated attempts were made to obtain new travel documents. However, the severity of his mental illness, which at times manifested itself in grandiose and paranoid delusions and serious self-harm requiring hospitalisation, meant that he was unable to participate in the process. Immigration officials repeatedly made appointments with embassy officials for him that were then either broken or cancelled as a result of his illness. Forms were either half-completed or rejected. He was eventually transferred to an acute inpatient psychiatric unit.

24. The imminence of a someone's removal from the UK is commonly overstated. In 11 of the files we examined, continued detention was authorised on the basis of an unjustifiable assertion that the person would soon be removed. Sometimes this was based on unsupported speculation that a person's outstanding applications for leave to remain could be certified as 'clearly unfounded'. Sometimes it disregarded the existence of a test case that would inevitably delay the person's removal. Sometimes the estimate of how soon a person could be removed ignored the fact that they had claimed asylum.

25. Another recurring argument from officials for maintaining detention was that, having been detained, 'the subject is fully aware of our intention to remove him' and that there was therefore a serious risk that they would abscond if released. This argument was used to justify detention in 12 of the cases in our sample. This in effect makes detention self-justifying and self-perpetuating. Once a person is detained, the argument goes, it must continue because the person has already been detained and is therefore likely to abscond if they are let out. It is not at all clear how someone could overcome such reasoning.

26. Reasoning used in determining the best interests of children affected by detention was particularly concerning. Officials' conduct and reasoning indicated that little regard was paid to the duty to give primary consideration to children's best interests. For example, a mother was detained and her child put into social services' care. Home Office caseworkers then justified continued detention of the mother on the grounds that she was not the primary carer of the child and was therefore not entitled to lawful

residence.[23] Again, in such instances detention becomes self-justifying. In other cases, the Home Office attempted to oppose bail by arguing that reuniting a parent with their child was unnecessary. One detainee told us of a tribunal bail hearing where the Home Office opposed his release and the detainee's elderly mother was standing surety,

> *"They asked my mother if it was OK for her – my mother is 72 by the way – if it was OK for her to take over the care of my son. And she said it was going to be quite difficult because she's quite old. My son's really young*."

27. Our file sample also contained two cases in which the notion of a child's best interests was used to justify continued detention. In these cases, both involving the detention of mothers separated from their children, the detention reviewer cast doubt on the mother's capacity to care for or provide an appropriate environment for her child. The suggestion was that continued detention was justified because it would not be in the best interests of the child to live with their mother.

28. Such assertions are extremely serious. Yet in these two cases there was no considered and informed assessment of the issues and the child's best interests. In one of the cases, a Home Office caseworker had recommended the woman's release after the local Social Services department had requested it in the interests of the children. But detention continued, partly on the basis of a Home Office lawyer's doubts about 'the suitability and ability' of the woman to be the primary carer to her children. In the other case, proceedings in the Family Court (the proper forum to decide whether the mother really was unsuitable as a primary carer) were impeded and delayed by the Home Office decision to keep her in detention.[24]

29. The use of arguments such as these exemplify the general trend that once someone is in detention, Home Office decision makers are committed to finding reasons to keep people detained rather than making a fair assessment of whether to release them.

Whether detention should be time-limited and how such a process might be applied in practice

30. A universally applicable statutory time limit is necessary, both for the welfare of people detained and as a driver for the fundamental institutional reform that is required in the Home Office's use of its detention powers.

31. Changes to Home Office published policies and ministerial statements of intent have proved insufficient to end the routine reliance on detention as a tool of immigration control. However, changes to the legal framework, such as the introduction of time

[23] Under EU law, a third-country national parent has rights to lawful residence in a member state if they can prove that they are the primary carer of an EU citizen child who would have to leave the EU with them if they were removed from the EU (a so-called Zambrano carer, after the lead European Court of Justice case that determined the issue).

[24] It was later decided that she was in fact fit to be reunited with her child.

limits for the detention of children, families and pregnant women have significantly reduced the immigration detention of these groups of people.[25]

32. Immigration detention is an administrative exercise. Time limits ought to be short. To end the practice whereby detention powers are used excessively, time limits must be short enough to constitute an effective constraint on the Home Office's use of these powers. The time limit measures already in place provide a model to show that such a system is possible; that it can focus the use of detention powers and avoid the harmful consequences of routine indefinite detention for detainees and their families of the administrative convenience of immigration officials.

Conclusion and Recommendations

33. The UK has international human rights obligations to ensure that in any given case, immigration detention is necessary, proportionate and used only as a last resort. As our organisation wrote in 2009, globally,

> *'The routine or automatic use of detention... violates both the spirit and frequently the letter of states' international human rights obligations*.'[26]

The routine use of detention in the UK does exactly this.

34. The Home Office must significantly reduce its use of immigration detention, ensuring that far fewer people are detained and that anyone who is detained, is held for a far shorter time. The Home Office has the authority to end its decision makers' routine reliance on detention. However, as discussed above, past experience indicates that further changes to Home Office published policy are likely to be insufficient.

Recommendation 1: The immigration detention estate should be further reduced. In recent years, three IRCs have closed and more should follow.

Recommendation 2: A universally applicable statutory time limit for detention should be introduced; short enough to constitute an effective constraint on the use of detention.

Recommendation 3: Universal automatic judicial oversight of detention should be implemented. This could be done by replacing the automatic bail provisions of the Immigration Act 2016[27] with those passed in the Immigration and Asylum Act 1999.[28]

Recommendation 4: Decision makers must make greater efforts to take into consideration the full context of a person's case and give it appropriate weight. This is particularly important in cases involving children, where the Home Office has pre-existing legal duties to treat children's best interests as a primary consideration.

---

[25] See eg, Immigration Quarterly Statistics, How Many People are Detained or Returned, February 2018, https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/how-many-people-are-detained-or-returned

[26] Amnesty International, Irregular Migrants And Asylum-Seekers: Alternatives To Immigration Detention, April 2009, www.amnesty.org/en/documents/pol33/001/2009/en/

[27] See Immigration Act 2016, Schedule 10, para 11

[28] See Immigration and Asylum Act 1999, s.44