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Briefing note on *R (EH) v SSHD*

1 October 2012

1. In a judgment handed down on 27 September 2012, Mrs Justice Lang DBE, ruled that EH, a survivor of the Rwandan genocide, was unlawfully detained for three months between November 2010 and February 2011 because of the Defendant Secretary of State for the Home Department's failure to apply her policy that those with serious mental illness should only be detained very exceptionally. EH has now been granted leave to remain for a further three years. He has an "upgrade" appeal pending before the First Tier Tribunal in which he seeks refugee status. The Defendant has agreed to pay EH damages in the sum of £35,000.

2. EH was referred to Bhatt Murphy by the charity Medical Justice in February 2011. By then, he had been through the asylum system and his entire account had been disbelieved. He was represented by other solicitors in his initial asylum claim who withdrew from his case the day before his asylum appeal hearing before the Asylum and Immigration Tribunal. The solicitors obtained no medical evidence to corroborate his case. EH was unrepresented at the hearing. The psychiatric evidence Bhatt Murphy later obtained shows that because of the severe trauma he suffered in the Rwandan genocide, he is unable to give coherent evidence of the events that led him to seek asylum in the UK. The immigration judge said that he had "fabricated his entire account".

3. EH was detained for removal on 19 October 2010. He remained in immigration detention until 1 March 2011. He was represented by further solicitors whilst in immigration detention, who attempted to make fresh claims, but again did not obtain medical evidence to corroborate his account and to show that the findings of the Asylum and Immigration Tribunal were unsafe. A doctor working with Medical Justice visited him in December 2011 and alerted UKBA and its contractors to the fact that EH is a genocide survivor and expressed serious concerns that detention and further removal attempts would harm him. The doctor's advice was ignored, with EH remaining in detention for a further two months (it is now accepted, unlawfully).

4. In 1994 EH and his family were the subject of a genocidal attack by an armed Hutu militia. His mother and five siblings were hacked to death with machetes and other weapons. EH was attacked with a mace and a machete and left for dead. The medical evidence obtained by Bhatt Murphy after EH had been released from immigration detention corroborated his account, with the scarring on his body variously described as diagnostic/typical/highly consistent with his account and led, belatedly in June 2012, to the Secretary of State

accepting this aspect of his account. Despite the evidence of torture always being on EH's body, none of the medical staff employed by the UK Border Agency's contractors produced evidence to satisfy the Secretary of State that EH was a victim of torture for the purpose of her policy on detention.

5. Bhatt Murphy were instructed when EH was detained with imminent removal directions. Within days, judicial review proceedings were issued, removal directions were cancelled and UKBA agreed to release EH from detention. In May 2011 EH was granted discretionary leave for one year because of his psychiatric condition. In summary grounds of resistance, the Secretary of State said that it was unarguable that EH had been detained unlawfully for any part of the four month period he was detained. In detailed grounds filed very late in the proceedings, the Secretary of State belatedly conceded that EH should have been released on 29 December 2010 and was unlawfully detained thereafter.

6. The claim was heard over two days on 19-20 July 2012. In her judgment handed down on 27 September 2012, in addition to the period conceded by the Secretary of State, Mrs Justice Lang ruled that EH was unlawfully detained from 16 November 2010 to 24 December 2010[1]; that his right to liberty had been violated contrary to article 5 of the European Convention on Human Rights; and that detention after 29 December 2010 constituted a disproportionate interference with his right to private life under article 8 ECHR.

7. There are significant aspects of Mrs Justice Lang's judgment that are disappointing. After the parties were provided with a draft judgment, the Secretary of State offered to settle EH's case for £35,000. EH made clear throughout that financial compensation was not his primary motivation for pursuing the proceedings. He was shocked at the way he was treated by UKBA and its contractors. However, £35,000 was an offer which EH, reluctantly, agreed to accept due to the risks associated with pursuing an appeal and his desire to put the traumatic circumstances of his immigration detention behind him and attempt to rebuild his life.

8. What follows is the draft grounds of appeal that were prepared which, in our view, had good prospects of succeeding on appeal.

    8.1. **Mental illness policy**. The Judge's approach to the evidence and law was flawed for the following reasons:

        (a) The Judge's conclusion that it was not until 4 November 2010 that D was required to consider her policy ignores the severe episode of PTSD EH suffered on the first day of detention in the police cells on 19 October 2010. This is described by consultant psychiatrist Dr Skogstad in his second report thus:

[1] Though his detention was legally justifiable for that period such that EH was only entitled to nominal damages.

"There is now additional evidence, which was not available to me at the time of my original report, from the custody records (2.1.3 in this report). They indicate that [EH] suffered a state of severe mental disturbance in the police cell, soon after the arrest. This was later described as a panic attack and was probably a severe dissociated state. The acute state led to him being sent to the A&E department of the local hospital. It seems that this state was so severe that it threw up serious questions about his fitness to be detained (2.1.4), which however were not acted on."

(b) The evidence showed that this was an "acute" episode and required emergency medical intervention: there is no or no adequate basis for distinguishing it from the 4 November 2010 episode and, accordingly, the Judge's reasoning at [149] that this required D to consider her policy should be read across to this earlier incident. There is some evidence that D was on notice of this incident and, in any event, on the Judge's analysis (see in particular [152]) D should be fixed with notice of this incident for the purposes of this claim.

(c) The Judge found that EH's mental illness was "escalating" at [138]. However, she found that Dr Lomax was of the opinion that it could be "satisfactorily managed" in detention (with the aid of medication and counselling). It was only by late December, when EH had reached a very deteriorated state, on the Judge's analysis, that he was entitled to release. This approach is inconsistent with the positive duty under article 3, which is a preventative obligation, and the construction adopted in light of that duty by Elisabeth Laing QC in *R (BA) v SSHD* [2011] EWHC 2748 (Admin) at [183]-[185].

(d) The Judge repeatedly suggests that a person will only be entitled to release under the policy if a doctor states in terms that he is not medically fit to be detained. She does not explain or seek to explain what this means. Without clear guidance on what fitness for detention means, such a construction is inconsistent with the positive duty under article 3, and creates unacceptable risks of unlawful decision making by D's officials.

8.2. **Independent evidence of torture**. The Judge's approach to the evidence and law is flawed for the following reasons:

(a) The Judge states at [161] that EH "appears not have claimed to be a victim of torture" at the initial screening carried out by a nurse at Brook House on 20 October 2010. She does not mention, or give reasons for rejecting, EH's unchallenged witness evidence that he understood that the purpose of the examination was to check he was ok (and not to alert UKBA to reasons why he may be unsuitable for detention, cf *R (RT) v SSHD* [2011] EWHC 1792

(Admin) at [32]), that the interview was in English, that he did not recall being asked whether he had been tortured and that he had difficulty communicating with the nurse (V1/226). Similarly, the Judge does not mention, or give reasons for rejecting, EH's unchallenged witness evidence that he had difficulty communicating with Dr Sherpao, again because the consultation was in English (V1/226). The evidence before the Court was that EH has poor English and is a "poor historian" (Dr Lomax).

(b) The Judge's approach at [166]-[167] is erroneous. The Judge accepts that the response to the Rule 35(3) report was flawed because EH had in fact mentioned the genocidal attack in his initial asylum claim. However, she goes on to find that the result would have been the same because D was entitled to prefer the determination of an Immigration Judge to the nurse's report. That falls into the error of conflating "evidence" and "proof" warned against by Rix LJ in *R (AM) v SSHD* [2012] EWCA Civ 521. It also suggests D had a causation defence, of the type rejected by the Supreme Court in *Lumba*. D's response to the Rule 35(3) report plainly was erroneous in the *Lumba* sense.

(c) Further, on the Judge's analysis, D was not required to make further enquiries before rejecting the Rule 35(3) report (such as writing to the healthcare department asking for an assessment to be carried out by a doctor capable of assessing and reporting on indicia of torture, as the courts have repeatedly made clear must be employed in IRCs). At [169] the Judge finds that consultant psychiatrist Dr Lomax's entry dated 4 November 2010 in EH's medical records did not constitute independent evidence of torture. She states that "Dr Lomax was not giving evidence of the truth of the Claimant's allegations". Dr Lomax assessed EH after an acute episode. There is no evidence he was asked whether he believed EH's account and/or whether EH's symptoms of PTSD were consistent with his account of being a genocide survivor. No doubt Dr Lomax was not asked, and did not address, these questions because D did not make enquiries after rejecting Nurse Godfrey's Rule 35(3) report. Dr Lomax did however diagnose PTSD, which is evidence capable of constituting independent evidence of an account of torture.

(d) D's officers should have made further enquiries in response to the Rule 35(3) report if they did not accept that it constituted independent evidence of torture. Those enquiries would have revealed the following, which it is submitted constituted independent evidence of torture within the terms of the policy:

- The contents of the police custody record, which noted scarring ("It appears he has been attacked in his home country with a machete and has scars on his head in

consequence (Genocide)…") and described the acute episode of PTSD on the night of 19-20 October 2010;

- The 27 October 2010 assessment of the medical officer, which noted "machete injury to head", PTSD, flashbacks and nightmares;

- The 27 October 2010 assessment of the registered mental nurse, which noted EH to be suffering from an anxiety attack, flashbacks, tearfulness and, significantly, whose "impression" was "very frightened man, experiencing flash back of genocide in Rwanda, he claims to have been tortured by the Tutsi (sic) tribe – has a machete wound on his head to prove this";

- The acute episode on 4 November 2010 and the assessment of Dr Lomax; and

- The opinion formed by the counsellor at Colnbrook, who saw EH on a weekly basis.

(e) In any event, on the basis of the Judge's analysis at [151]-[155], D should be fixed with the contents of these assessments.

(f) The Judge's approach at [170] and [171] suggests that a doctor has to say in terms that he believes a person is a victim of torture i.e. proof of and not merely independent evidence of torture. D did not seek to dispute that the ill treatment EH suffered was torture. On any view, what happened to EH in 1994 did amount to torture, within the terms of the policy, and all that was required to trigger the policy was independent evidence of this.

(g) Finally, at [172], the Judge accepts that the reports of Dr Arnold (expert in wound healing) and Skogstad (consultant psychiatrist in psycho therapy) constituted independent evidence of torture. That evidence is compelling: Dr Arnold describes the scarring on EH's body, variously, as "diagnostic", "typical" and "highly consistent" with his account. The evidence of torture was present on the first day, and throughout, EH's detention, but the worrying effect of the Judge's analysis is that it is up to a detainee to instruct medical experts, at significant expense, to come up with the independent evidence of torture required for D's policy to be engaged. Such an approach is inconsistent with other authorities (*D and K* and *RT* in particular) and is inconsistent with the Judge's own analysis that it is D who "retains overall responsibility for the lawful implementation of the Detention Centre Rules and EIG in relation to detainees" (see [152]). If the system is incapable of generating independent evidence such as to engage the policy in a clear case like this then the statutory purpose of Rule 35 of the

Detention Centre Rules would plainly be frustrated. Finally, the reports of Dr Arnold and Skogstad are of the kind that constitute proof of torture, at least so far as a claim for international protection is concerned, not merely independent evidence of it.

8.3. **Very exceptional circumstances**. The effect of the Judge's analysis at [159] and [175] is that there were "very exceptional" circumstances which justified EH's detention.[2] However, having made that finding, it is very difficult to distinguish between the position as at 29 December 2010, when D conceded that there were no very exceptional circumstances which justified detention, and the earlier period. Accordingly, it is submitted that the finding was flawed.

8.4. **Article 3**. The Judgment discloses the following significant errors in relation to article 3:

(a) The reasons advanced at [200] that EH's detention was "both justified and reasonable" may have been present from the outset, but were certainly not present throughout, particularly after 29 December 2010 when it is accepted that he was unlawfully detained.

(b) The Judge placed insufficient weight on the evidence that it was detention of itself that was harmful to EH, particularly the contemporaneous assessments of Dr Jobanputra and the psychotherapist Theresa MacIntyre. Further, even after Dr McKay assessed EH as unfit for detention on 18 February 2011 it took D 11 days to authorise release.

(c) The approach at [213] is flawed because EH's detention after 29 December 2010 was unlawful and was not therefore a "legitimate" form of treatment (as the Judge recognised in the context of article 8 at [220] and cf *R (S) v SSHD* [2011] EWHC 2120 (Admin) at [213]). It is submitted that the serious exacerbation which occurred thereafter, which the evidence showed was significantly caused by detention itself, constituted inhuman and/or, at the very least, degrading treatment in breach of article 3.

(d) The Judge's approach to the medical treatment EH received at [215], that it was of a "high standard", pays insufficient regard to the fact that detention was exacerbating his mental illness and the evidence that psychiatric treatment encompasses matters outside of medication, and includes, fundamentally, the context in which treatment is administered. The evidence was that the treatment offered did not even adequately control EH's condition (in fact,

[2] Her findings accord with the statements of policy of Lord Filkin recorded at [34] of *D and K* victims of torture may be detained, exceptionally, where it is necessary to effect removal and if they had persistently absconded.

counselling caused exacerbation and high dose of psychotropic medication led to hospital admission on one occasion), let alone improve it. The psychotherapist Theresa MacIntyre came to the conclusion on 26 January 2011 that it was in fact unethical to continue counselling while EH remained detained and facing expulsion.

(e) The Judge's approach to handcuffing was flawed for at least three reasons (1) detention was unlawful and any use of force was an assault, (2) EH's previous absconding in the community was not such as to justify use of handcuffs and there is no evidence he attempted to abscond from custody, and (3) the evidence was that EH was at the time extremely unwell.

8.5. **Removal directions on 7 February 2011**. There are three main reasons why the Judge's approach was flawed:

(a) In the context of [229], it was unlawful to remove EH because the reports of Dr McKay (19.12.10) and Theresa MacIntyre (06.01.11) were sent to UKBA on 26 January 2011. Those reports plainly should have been treated as further submissions, particularly when previous decisions had been taken without the benefit of medical evidence. Under paragraph 353A of the immigration rules it is unlawful for the Secretary of State to remove a person who has outstanding representations.

(b) At [234] the Judge states that D took "reasonable steps" to investigate whether EH was medically fit to be removed. This is plainly flawed: D relied on the assessment of Dr Thomas dated 24 January 2011 and, quite apart from the validity of that assessment in the context of EH's condition at the time and the weight of other medical opinion, D was on notice of the significant deterioration after that, in particular what happened during the assessment with Theresa MacIntyre the following day. It would have been a reasonable step to seek an updated assessment before proceeding with removal 14 days after the Dr Thomas assessment on 7 February 2011, during which time there had been significant further deterioration in EH's psychiatric state. At [241]-[242] the Judge appears to have proceeded on the erroneous basis that UKBA Detention Services at Tinsley House were medically qualified to advise on the arrangements that would be required for the removal on 7 February 2011.

(c) Finally, there is little or no evidence to support the finding at [243] that EH's conduct was such that it was necessary for him to be restrained by the escorts. EH's unchallenged witness evidence was that he was "in such a bad way that [he] was unable to walk". The evidence available in the contemporaneous documents from the escorts was very brief, and only refers to EH being "verbally

disruptive". The weight of the evidence demonstrated EH in fact had an acute episode of PTSD on board the aircraft.