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Immigration detention – a shameful, inhumane system

Jed Pennington on how the Home Office fails to comply with the law

On 28th January 2014, in a judgment that was not widely reported, the Administrative Court found that a severely mentally ill man, administratively incarcerated by the Home Office at Harmondsworth immigration removal centre, was held in conditions that were inhuman and degrading, contrary to Article 3 of the European Convention on Human Rights (ECHR). This was the case of *R (S) v Secretary of State for the Home Department* [2014] EWHC 50 (Admin). This is the fifth time in three years that such a finding has been made by the Administrative Court.

For the first 11 years that the Human Rights Act 1998 (HRA) was in force, no UK court had found conditions of immigration detention to violate the absolute prohibition in Article 3 ECHR; and, prior to the HRA, neither had Strasbourg. According to lawyers and NGOs working in this field, these are not isolated cases but illustrations of systemic failures in the way that mentally ill people are treated in the immigration detention system. Many others who have suffered similar abuses have been paid off by the Home Office for five and six figure sums in damages and legal costs. There will be many others who have suffered in silence and been whisked away for removal without any scrutiny of the way they have been treated.

How has this been allowed to happen? One answer lies in the increasing use of immigration detention, with what was at one time Government policy to be used as a last resort now increasingly used as a first resort. Currently the immigration removal centre estate has capacity for up to about 3,500 detainees with, as at April 2014, a further 1,200 detainees held in prisons. Additionally, since the 2006 foreign national prisoner crisis, we have seen immigration detainees held for increasingly longer periods of time, and a willingness by the higher courts to uphold as lawful periods of detention approaching four years. This has been illustrated in the cases of *R (Muqtaar) v Secretary of State for the Home Department* [2012] EWCA Civ 1270 (41 months) and *R (Shafiq-Ur-Rehman) v Secretary of State for the Home Department* [2013] EWHC 1280 (Admin) (46 months).

It is no coincidence that four of the five cases over the last three years, as mentioned above, concerned individuals who had been convicted of criminal offences who the Home Office wished to deport.

Whatever the context may be, what lies at the heart of these cases is a straightforward failure by the Home Office to comply with the law. Until August 2010, it was the Home Office's stated policy that the mentally ill should only be detained in exceptional circumstances. Arguably, this policy merely reflected the implied limitations that the courts have imposed on what, on the face of it, are the unfettered statutory powers of detention. This has been explored in the cases of *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB) and *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12.

In a number of cases, the Administrative Court held the Home Office to its public law duty to comply with this policy, finding that mentally ill people had been detained for lengthy periods and were entitled to substantial payments of damages. See, for example, *OM (Algeria) v Secretary of State for the Home Department* [2010] EWHC 65 (Admin) and *R (T) v Secretary of State for the Home Department* [2010] EWHC 668 (Admin).

Left: A young refugee with a broken leg from an accident during a police chase after being made homeless after the clearing of a regugee camp near Calais in France.

Apparently unhappy with losing in court, and without notice or consultation, the Home Office changed the wording of the policy, so that only those with serious mental illness which could not be satisfactorily managed in detention would benefit from it. When challenged, a senior official stated that the changes did not represent a change of policy, but merely clarified how the policy had always been understood within the Home Office. When faced with a legal challenge that the policy was unlawful, because the changes had been made without due regard to the race and disability equality duties, the same official, apparently in an attempt to persuade the judge to withhold relief in the event that he found against the Home Office, gave an undertaking to commence an equality impact assessment within seven days. The judge went on to declare the policy unlawful, a finding the Home Office initially sought to appeal, before withdrawing shortly before the hearing in the Court of Appeal.

An equality impact assessment was finally commenced in January 2014, albeit with a limited remit and, it appears, a failure by the Home Office to collect data on those with protected characteristics passing through immigration detention. There is little optimism that meaningful changes will be made.

Are the mentally ill the only group who are suffering inhumane treatment in the immigration detention system, or are they but one symptom of a broken system? On 2nd July 2011, Muhammad Shukat, a 47-year-old Pakistani man detained at Colnbrook, was found collapsed and unresponsive in his cell. Serco healthcare staff had dismissed his repeated complaints of chest pain without carrying out proper investigations. An inquest jury found that neglect had contributed to his death, with 'a total and complete failure of care in the management of his health at Colnbrook [immigration removal centre]'.

Jimmy Mubenga, a 46-year-old Angolan man with a wife and five children resident in the UK, died during restraint by G4S guards during a deportation flight on 12th October 2010. The inquest heard that two of the three guards responsible for his care had numerous explicitly racist text messages on their mobile phones. In her report following the inquest, the Coroner said that these messages 'seemed to evidence a more pervasive racism in G4S'. The inquest jury gave a verdict of unlawful killing and, having initially decided that there was insufficient evidence, the Crown Prosecution Service has now charged the three guards with manslaughter.

Then there is the case Alois Dvorzac, an 84-year-old Canadian man suffering from dementia, who was transferred from Harmondsworth to Hillingdon hospital and died after being restrained in handcuffs for five hours. In a report published in January 2014, Her Majesty's Chief Inspector of Prisons found that there was 'a lack of intelligent individual risk assessment' in the use of restraints during escorted visits to hospital, with the result that 'most detainees were handcuffed on escort and on at least two occasions, elderly, vulnerable and incapacitated detainees... were needlessly handcuffed in an excessive and unacceptable manner', describing these as 'shocking cases where a sense of humanity was lost'.

The Home Office, which is required to authorise the use of restraint on detainees, was on notice of their inappropriate use. In July 2012, a High Court judge had found that the prolonged restraint of an Algerian man during escorted in-patient treatment, also at Hillingdon hospital, breached Article 3 ECHR. This is set out in the authority of *FGP v Serco and Secretary of State for the Home Department* [2012] EWHC 1804 (Admin).

These cases are illustrative of a broken system that is spiralling out of control. They would ordinarily have provoked widespread outcry and, probably, a wide-ranging inquiry followed by the promise of real change. But with the current predominant discourse on immigration and stated Government policy to create a 'hostile environment' for migrants, the Home Office will no doubt take the view that there is little appetite for a compassionate approach to migrants. With the passing of the Immigration Act 2014, we see the further erosion of migrants' rights, with curbs on appeal rights, the right to apply for immigration bail, and restrictions on access to the NHS and private residential accommodation, as well as (separately) further restrictions on access to legal aid.

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