ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
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ILPA Briefing for the Department of Health on the legal basis for immigration detention and release from detention, and how this interacts with transfers under the Mental Health Act 2008

Summary and recommendations

The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including UK Border Agency, and other consultative and advisory groups.

The legal basis for detention under immigration powers, and for release from immigration detention, allows for a wide range of options for release and treatment of mentally ill detainees. These have been outlined in this briefing. We consider that decisions regarding hospitalisation or community treatment for people in immigration detention with serious mental illness should be driven by clinical considerations.

Despite the positive duty of care of the Secretary of State towards people held in administrative detention under immigration powers, the full range of releases available to the UK Border Agency are not being deployed where mentally ill detainees are identified and where release is clinically indicated. The four cases with findings of breaches of Article 3 of the European Convention on Human Rights in the case of severely mentally ill immigration detainees over the last year indicate this[1]. Guidance produced by the Department of Health on transfers under section 47 and section 48 of the Mental Health Act 1983 does not reflect this full range of options for release and is therefore misleading. It requires urgent review, together with consequential revision of some Ministry of Justice documentation for such transfers.

The 2011 Department of Health guidance document should be revised to reflect the current legal basis for both detention and release under immigration powers, and the articulation of these powers in the context of the Mental Health Act 1983.

[1] *R (HA) (Nigeria) v SSHD* [2012] EWHC 979 available at http://www.bailii.org/ew/cases/EWHC/Admin/2012/979.html;
R (BA) v SSHD [2011] EWHC 2748 (Admin) (26 October 2011) available at http://www.bailii.org/ew/cases/EWHC/Admin/2011/2748.html; *R (S) v SSHD* [2011] EWHC 2120 (Admin) (5 August 2011) available at http://www.bailii.org/ew/cases/EWHC/Admin/2011/2120.html ; and *R (D) v SSHD* [2012] EWHC 2501 (Admin)

The legal basis for detention under immigration powers

Most people who are not British citizens or citizens of another member State of the European Union are subject to immigration control and can - theoretically at least - be subject to immigration detention. In practice the following three broad groups are detained under immigration powers

- People subject to immigration control detained pending examination and a decision on whether to grant, cancel, or refuse leave to enter. This includes around 2000 people each year who make an asylum claim and are detained for the purpose of examining their claim under the Detained Fast-track process or the Non-Suspensive Appeals determination process.[2]

- People subject to immigration control who have entered the UK illegally or overstayed a visa or grant of leave, have been refused leave to enter, have failed to observe conditions attached to leave to enter or who have used deception in seeking leave to remain, can be detained along with their family members subject to immigration control, pending examination and a decision on whether to issue removal directions and pending administrative removal. People reasonably suspected of falling within these categories can also be detained pending further examination and a decision.[3]

- People who are subject to deportation action

  i) where the Secretary of State considers that the continued presence of the individual in the UK is not conducive to the public good;[4]
  ii) where they are the subject of a criminal court recommendation that they be deported;[5] or
  iii) where subject to provisions in the UK Borders Act 2007[6] there is a duty on the Secretary of State to make a deportation order against what that Act terms a 'foreign criminal,' unless any of the statutory exceptions apply. People subject to deportation action may be detained at specific stages of the deportation procedure.

Asylum seekers and migrants in the UK can be detained by immigration officers exercising powers conferred on the Secretary of State under different Immigration Acts including the Immigration Act 1971; the Immigration and Asylum Act 1999; the Nationality, Immigration and Asylum Act 2002; the UK Borders Act 2007 and the Borders, Citizenship and Immigration Act 2009. The Immigration Act 1971 provides the majority of the statutory powers of detention for those subject to immigration

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[2] In 2011 2118 main asylum applicants were accepted onto the Detained Fast-track process (Source: Home Office Immigration Statistics, Asylum Data Tables, table as.11 (2012). Available at http://bit.ly/PDASaK). For further information about the Detained Fast-track and the Detained Non-Suspensive Appeal Process see ILPA, (January 2008), *The Detained Fast Track Process: A best practice guide*, and ILPA, (April 2010), *The Detained Fast Track Process: A best practice guide update*.
[3] Under Paragraph 16(2), Schedule 2, Immigration Act 1971.
[4] Provision contained in s 3(5)(a) Immigration Act 1971.
[5] Provision contained in s 3(6) Immigration Act 1971.
[6] S 32 UK Borders Act 2007. This regime is commonly referred to as 'automatic deportation' in the sense that it has the effect of removing the discretion of the Secretary of State in taking deportation action.

control, although these provisions have been amended and augmented by subsequent legislation.[7]

It is now a matter of UK Border Agency policy that any asylum claim, whatever the nationality or country of origin of the claimant, is potentially suitable for consideration while the applicant is held in immigration detention under one of two processes (the Detained Fast-track process, and the Detained Non-Suspensive Appeal process). Those claims that are held to be suitable are those where once the person has been screened (basic biometric information and information about their journey taken) the claim appears to officials to be one where a quick decision may be made. There are a limited number of extraneous factors militating against detention and hence against inclusion in these procedures, for example being a survivor of torture, having been trafficked or being a separated child under 18. A long-standing concern is that these are not factors easily identified during the screening process.

In limited circumstances nationals of other States of the European Union may be subject to detention under immigration act powers and there have been cases where, because they have struggled to prove their identity and to prove that they are not subject to immigration control, British citizens have been unlawfully detained under immigration powers until such proof was furnished.

It is important to distinguish between 'deportation' and removal. Where a person has no leave to be in the UK they are expected to depart voluntarily. If they do not, the Secretary of State can take steps to remove them. This is an administrative measure. Removal is primarily governed by the Immigration and Asylum Act 1999 and deportation by the Immigration Act 1971 and the UK Borders Act 2007. In certain circumstances a person who departs or is removed may be prevented from making a successful application to return for particular purposes for a fixed period, set by reference to the circumstances of their leaving, including whether or not the cost of their return was paid from public funds (known as "re-entry bans").

Distinct from removal is the process of *'deportation'*. Deportation is an order for expulsion from the UK and a prohibition on return while the order remains in force. A deportation order *can* be made:

- Where a Court has made a 'recommendation for deportation' following a conviction of a criminal offence.
- On the ground that the person's presence is 'not conducive to the public good'.
- against a family member of a person being deported

A deportation order *must* be made by the Secretary of State in the case of 'foreign criminals' who fulfill certain criteria. Known as 'automatic' deportation orders, these are governed by the UK Border Act 2007.

[7] Both domestic case law and case law of the European Court of Human Rights set limits to the detention powers of the state. Under Article 5 of the European Convention on Human Rights, detention must be proportionate to the objective (e.g. removal), and alternatives to detention and the need for bail sureties and reporting restrictions must have been properly considered for detention to be lawful.

Although the Home Office immigration powers of detention are not powers to detain people because they have committed a criminal offence, around 50% of the people held in immigration removal centres are being held under immigration powers having served a criminal sentence.[8] Typically, a foreign national who is subject to 'automatic deportation' is initially detained under s36 (1) of the UK Borders Act 2008.[9] This power is of relevance to the correct use of directions for transfer from immigration removal centres under s 48 of the Mental Health Act 1983, outlined below in this briefing.

Conditions of detention are covered by the statutory Detention Centre Rules 2001 (SI 2001/238)[10], and non-statutory detention centre operating standards,[11] which include standards for healthcare provision.[12] Statutory powers of detention are subject to further development via non-statutory instruments such as the UK Border Agency 's 'Enforcement Instructions and Guidance',[13] a manual of guidance and information for officers dealing with immigration enforcement within the UK.

Policy guidance to UK Border Agency decision makers on those groups which should normally be excluded from immigration detention is contained in Chapter 55 'Detention & Temporary Release' of the UK Border Agency Enforcement Instructions and Guidance. Section 10 (55.10), 'Persons considered unsuitable for detention', provides a list of specific categories of person that should be considered suitable for detention 'only in very exceptional circumstances'. These categories include children, the elderly, people who are disabled, pregnant women, victims of trafficking or torture, and people who are mentally ill. In August 2010 this guidance was amended by the UK Border Agency without any prior consultation with the Department of Health or others. The resulting, latest version of Enforcement Instructions and Guidance, Chapter 55.10, on persons now considered unsuitable for detention now states:

> **UK Border Agency Enforcement Instructions and Guidance. Chapter 55 'Detention and Temporary Release'**
>
> **55.10. Persons considered unsuitable for detention**
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> Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.

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[8] Home Office Immigration Statistics April - June 2012. 2nd edition. Available at http://bit.ly/PDASaK

[9] UKBA 2007, 36(1). "A person who has served a period of imprisonment may be detained under the authority of the Secretary of State—(a) while the Secretary of State considers whether section 32(5) applies." Available at http://www.legislation.gov.uk/ukpga/2007/30/section/36

[10] Available at http://www.legislation.gov.uk/uksi/2001/238/contents/made

[11] UK Border Agency, *Detention Centre Operating Standards*, available at http://bit.ly/VlyxAS

[12] In 2010 NGO representatives were invited by the UK Border Agency to make suggestions for revision of Immigration Removal Centre healthcare operating standards prior to a review. Suggestions were made, but no revisions were made.

[13] Available at http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/. See for example, *Enforcement Instructions & Guidance*, Chapter 55 'Detention and Temporary Release'.

In CCD cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:

- Unaccompanied children and young persons under the age of 18 (but see 55.9.3 above);
- The elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention;
- Pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 above for the detention of women in the early stages of pregnancy at Yarl's Wood);
- Those suffering from serious medical conditions which cannot be satisfactorily managed within detention.
- Those suffering serious mental illness which cannot be satisfactorily managed within detention (in CCD cases, please contact the specialist Mentally Disordered Offender Team).
  In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;
- Those where there is independent evidence that they have been tortured;
- People with serious disabilities which cannot be satisfactorily managed within detention;
- Persons identified by the Competent Authorities as victims of trafficking (as set out in Chapter 9).

(Version from August 2010 to date)

The effect of this change was to define more narrowly the numbers of people with mental illness who would be considered by UK Border Agency to be unsuitable for detention thus reducing their numbers at a stroke. The new instruction introduced in August 2010 required that a person must be 'suffering from' mental illness (i.e. symptomatic), and would need to have a 'serious' mental illness, before they could be considered possibly unsuitable for detention.

This significant revision to the guidance was challenged by ILPA. For example, clarity was sought as to whether the new guidance meant that a mentally ill person could continue to be detained until their mental state deteriorated to the point where 'satisfactory management' was no longer possible, at which point they would be considered for release. It was pointed out that it was unclear how the policy change fitted with the UK Border Agency's positive duty of care toward those deprived of

their liberty. In its response to ILPA the UK Border Agency said[14] that the qualifier 'satisfactorily managed'

> *"Is not defined, nor to we consider it necessary to do so. The phrase is intended to cover the broad basis on which a person's healthcare, mental health or physical needs might need to be met if they were to be detained, with the expectation being that where these needs cannot be met the persons concerned would not normally be suitable for detention."*

This revised UK Border Agency policy (s 55.10 of the Enforcement Instructions and Guidance) and the manner of its introduction is subject to ongoing legal challenge. .

Her Majesty's Inspectorate of Prisons uses a set of criteria for assessing the conditions for and treatment of immigration detainees, called "expectations".[15] However, a recent review of these expectations in pursuit of more 'light-touch' inspection has removed a number of expectations, including Expectation 18 from the healthcare section (at page 58 in the earlier document[16]), which stated that:

> *"There is a presumption against detention of any detained person whose mental or physical wellbeing is likely to be adversely affected by continued detention".*

In a consultation on new expectations in 2012 ILPA member Bail for Immigration Detainees wrote to Her Majesty's Inspectorate of Prisons saying

> *"We strongly recommend that [expectation 18] be reinstated. We believe that this offers an important statement of principle in light of the ongoing role of human rights principles in the work of the Inspectorate, and the forward looking stance of the implied restrictions on the power to detain for the purposes of removal set out in the Hardial Singh principles".*

The legal basis of release from detention

There are two forms of release from immigration detention that are available to and are required of the UK Border Agency. Neither requires an application from the detainee or his/her legal representative, although an application may be made. The UK Border Agency is required to release from detention (under the power of 'Temporary Release') a person held against their eventual removal or deportation from the UK at the point at which it becomes apparent that removal or deportation from the UK cannot be achieved within a reasonable period of time. The UK Border Agency is required to release separated children and to release persons in other circumstances, for example, because the state of health of the person means that

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[14] Written response from Alan Kittle, Director of UK Border Agency Detention Services to ILPA, 20th December 2010.

[15] HM Inspectorate of Prisons, (2007), '*Immigration Detention Expectations: Criteria for assessing the conditions for and treatment of immigration detainees*' [currently under review]. See Section 5, 'Healthcare' for details of inspection expectations in relation to mental health. Available at http://www.justice.gov.uk/downloads/about/hmipris/immigration-expectations-2007.pdf

[16] UK Border Agency, '*Detention Services Operating Standards Manual*' available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/immigrationremovalcentres/

they no longer fulfil the Home Office criteria for persons "suitable to be detained". Temporary Release generally comes with reporting requirements. Officers of the Border Agency also have the power to release someone from detention under 'Temporary Admission,'[17] typically where an individual is apprehended and detained at a UK port or airport pending further examination. Temporary admission is what it says, permission to be at large in the UK for a limited period, although one does not have leave to enter or remain.

In addition, the detainee or their legal representative may do any of the following:

- Make an application to the UK Border Agency for Temporary Release or Temporary Admission.
- Make an application to the UK Border Agency for release on bail, (known as 'Chief Immigration Officer' bail). Normally this will require two sureties who are able to put forward significant sums in the region of between £3,000 and £5,000 each. There is no court hearing for Chief Immigration Officer bail, the decision on whether or not to grant bail is made by the UK Border Agency Chief Immigration Officer in his/her office on the papers.
- Make an application to the Immigration & Asylum Chamber of the First -tier Tribunal for release on tribunal bail, a legal procedure available to any person who has been detained by the Secretary of State once they have been in the UK for seven days. Applicants appear at the hearing via videolink, the Home Office is represented, and an independent tribunal judge determines whether release to a specified address is appropriate. Release on tribunal bail generally involves reporting conditions.
- Make an application to the High Court for a judicial review of the government's decision to detain, with release on bail as interim relief, or as part of the final order.
- Ask the court to issue a writ of Habeas Corpus to end a person's detention.

Routes to treatment for immigration detainees, including transfers under the Mental Health Act

The Department of Health guidance contained in Good *Practice Procedure Guide: The transfer and remission of adult prisoners under s 47 and s 48 of the Mental Health Act*, (revised 2011),[18] offers guidance for the use of s 48of the Mental Health Act 1983 to transfer immigration detainees for treatment. In April 2011 Department of Health amended this guidance as it dealt with the implementation of s 48(2)(d) for people held in immigration removal centres. At 4.42 the guidance now says

> *"The aim is to return detainees to the IRC when inpatient treatment is no longer required".*

[17] Paragraph 21 of Schedule 2 to Immigration Act 1971 Act gives authority temporarily to admit any person to the UK who is liable to be detained under Paragraph 16 of the same Schedule. See Border Force Operations Manual, 'Temporary Admission (TA), (November 2011). Available at http://bit.ly/WyOg4J

[18] Available at http://bit.ly/Rx16zk

In our view this is not correct. Where a person has been held in immigration detention there are a number of options open to the UK Border Agency at the end of a period in hospital following a transfer under the Mental Health Act 1983, including release to the community with reporting conditions. In ILPA's view, as a result of this revision, the Department of Health guidance document does not accurately reflect the legal basis of immigration detention, nor does it reflect the full range of options for release from immigration detention for the assessment and treatment for detainees who are mentally ill, specifically those who have been transferred initially under the Mental Health Act 1983.

The previous version of the Department of Health guidance[19] did suggest that for immigration detainees

> *"Caseworkers will need to be approached by the Healthcare Manager initially for a decision on whether Temporary Admission is appropriate. Admission may be by Sections 2 / 3 if the case-worker decides on Temporary Admission. Where continued detention is required transfer will be by Section 48*."

This version of the guidance correctly clarified that release from detention should be properly considered at the point when admission to hospital is being considered.

The Department of Health guidance covers the use of s 47 and s 48 of the Mental Health Act in both the prison estate and the detention estate. However, the legal bases for being held in custody in a removal centre under immigration powers and for being released from it are entirely different from those relating to custody in the criminal justice system and it is our view that the guidance on the use of s 47 and s 48 Mental Health Act 1983 requires revision to reflect this as a matter of urgency.[20] The current transfer of commissioning to the National Health Service of healthcare provision in immigration removal centres provides an opportunity for this.

For other detainees with mental illness, a Mental Health Act transfer may not be clinically indicated, rather the patient simply needs to no longer be in a custodial environment. A detainee with a diagnosis of Post Traumatic Stress Disorder will typically not require a Mental Health Act transfer for compulsory treatment, but it may be clinically indicated that he or she be released from a custodial environment for treatment in the community or in hospital. In our view this is not only desirable but entirely possible given the range of powers both of detention and release – with conditions – that are available to the UK Border Agency.

These powers include but are not limited to:

i. Release on temporary admission or Chief Immigration Officer bail to permit access to community services on a voluntary basis.
ii. Release on temporary admission or Chief Immigration Officer bail on condition of transfer to a specific hospital.

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[19] Issued in October 2007, available at http://webarchive.nationalarchives.gov.uk/20110603043925/http://psi.hmprisonservice.gov.uk/PSI_2007_50_mental_health_transfer.doc

[20] Associated Ministry of Justice documents, such as the form 'Remission to prison of s.47 or s.48 patients' may also require urgent revision. Available at http://www.justice.gov.uk/forms/moj

iii. Release on temporary admission or Chief Immigration Officer bail on condition of transfer to a specified hospital and if considered necessary under compulsion by virtue of s 2 and/or s 3 of the Mental Health Act 1983.
iv. A direction for detention in a hospital, see paragraph 3(1)(d) of the Immigration (Places of Detention) Direction 2011.[21]
v. Maintaining detention and transferring the person under s 48 of the Mental Health Act 1983 if the person is suffering from a mental disorder of a nature or degree which makes it appropriate for him/her to be detained in a hospital for medical treatment; s/he is in urgent need of treatment; and appropriate medical treatment is available for him or her[22].

A fundamental principle of the Mental Health Act 1983 is "minimising restrictions on liberty" (s 118(2B)(c)). Despite this, it is the experience of ILPA members that in the context of immigration detention, where the clinical practice of healthcare providers must coexist with the imperative of removal from the UK on the part of the detaining agency, release on temporary admission or Chief Immigration Officer bail for the purpose of assessment in the community or in hospital is rarely used, and rarely used in a planned way so as to ensure continuity of care.[23] Release to the community, with proper attention paid to setting a care plan in place, is extremely rare, despite there being powers available to do so, with reporting restrictions if required.

ILPA is informed by the Refugee & Asylum Seekers Working Group of the Royal College of Psychiatrists[24] that increasing numbers of patients with serious mental illnesses are now treated in the community, for example by crisis or home treatment teams, because these are less restrictive ways of meeting their health needs than hospitalisation (either informally or under the Mental Health Act 1983). There are very broad and easy access mechanisms of appeal for such patients detained under s 2 or s 3 of the Mental Health Act 1983. The working group identifies that these community options would be feasible if such patients held in immigration detention are given bail or temporary release. It has provided its view that where hospitalised patients improve sufficiently to allow discharge, this should also be into the community unless the risk of absconding is thought to be overwhelming.

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[21] Made 3 May 2011. Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/Immigrationdirection2011/immigrationdirection11/immigrationdirect11?view=Binary

[22] Section III of the Mental Health Act 1983 applies to "patients concerned in criminal proceedings or under sentence", specifically s 47 of the Mental Health Act 1983 'Removal to hospital of persons serving sentences of imprisonment, etc.' and s 48 of the Mental Health Act 1983 'Removal to hospital of other prisoners'. The latter provision, s 48 applies to immigration detainees. Those transferred to hospital under s 48 remain detained under immigration powers.

[23] In response to a request under the Freedom of Information Act the Ministry of Justice has told Bail for Immigration Detainees that "Between 1 January 2009 and 31 August 2011, the Secretary of State received 40 applications for the transfer of persons detained under immigration powers. In 37 of these cases, he made a transfer direction under s 48 (2)(d) of the 1983 Act. The Secretary of State did not decline any such request for a transfer direction. In three cases, the request was withdrawn because the detainee's mental health had improved to the extent that treatment in hospital was no longer required" (7 November 2011). A request to UKBA for information on the number of s 2 and s 3 MHA transfers from removal centres could not be complied with on cost grounds since such information was held by individual healthcare providers (1 December 2011).

[24] Personal communication 11 October 2012 from the convenor of the working group.

The legal basis of the power to transfer detainees under s 48 of the Mental Health Act 1983

Section 48 of the Mental Health Act 1983 was amended after the UK Borders Act 2007 was enacted. Thus it does not encompass those detained under s 36(1) of the UK Borders Act 2007 (the power to detain whilst consideration is given to whether the 'automatic' deportation provisions apply). There is currently no power to make a transfer direction using s 48 of the Mental Health Act 1983 for immigration detainees held under s 36 (1) of the UK Borders Act 2007: the power to compulsorily admit such detainees to hospital only exists under s 2 or s 3 of the Mental Health Act 1983. There is however a power to use s 48 of the Mental Health Act 1983 to transfer people detained under any immigration act powers other than s 36 (1) of the UK Borders Act 2007. The power arises where there is urgent need for treatment.

As stated above, up to 50% of immigration detainees at removal centres at any one time, but a much larger proportion of the 20% or so of detainees who are held for more than six months (including some who have been detained for a matter of years), will be detained using the powers under s 36 (1) of the UK Borders Act 2007 for some part of their time in detention. On the face of it, for this cohort of detainees in Immigration Removal Centres, there is no power to make a transfer direction under s 48 of the Mental Health Act 1983, yet it is often this group of long-term detained people, typically with complex immigration cases, and detained long enough for their mental state to deteriorate or their condition to become apparent, who are most likely to need transfer or release from detention for the purposes of treatment of their condition.

It is the experience of a number of ILPA members that the UK Border Agency has to date treated s 48 of the Mental Health Act 1983 as equally applicable to immigration detainees held under s36 (1) of the UK Borders Act 2008, and has arranged a number of transfer directions under s 48 of the Mental Health Act 1983 despite there being no power to do so.

A person held under immigration powers facing transfer to hospital for voluntary treatment or under s 2 or s 3 of the Mental Health Act 1983 must first have their 'immigration hold' removed by UKBA by grant of Temporary Release or Temporary Admission. Once that person is in hospital they are no longer held under immigration powers but remain 'liable to detention' following their release from hospital.

A transfer under s 48 of the Mental Health Act (2008) is different. An immigration detainee transferred to hospital for treatment remains detained under immigration powers while in hospital, with the addition of a Ministry of Justice warrant. Transfers under s 48 of the Mental Health Act 1983 are therefore parasitic on the decision by UK Border Agency to maintain immigration detention while treatment is ongoing.

The lacuna in s 48 of the Mental Health Act 1983 has been raised with UK Border Agency by ILPA member Bail for Immigration Detainees (BID). The Agency's position, restated in August 2012, is that in its view the lacuna cannot be fixed quickly as it would require primary legislation. In the meantime we understand that UK Border Agency operates what they describe as a "workaround", but we have not

been able to obtain details of this. The use of transfers under s 48 of the Mental Health Act 1983 where there is no power to use the section, as is the case with immigration detainees held under s36 (1) of the UK Borders Act 2007, may render detentions of such persons in hospital unlawful under the Mental Health Act 1983.

We have concerns that faced with this lacuna in drafting, a person held in immigration detention under s 36(1) UK Borders Act 2007:

i) may now not be transferred under the Mental Health Act despite there being an urgent need, or
ii) that the UK Border Agency make a deportation order in order to allow detention to continue and a s 48 transfer to take place, with a view to transferring such a person back to detention once treated.

It is our view that the treatment needs of detainees held under s 36(1) of the UKBA 2007 can be met using the existing powers under s 2 or s 3 Mental Health Act 1983.

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