

## ILPA's response to the APPG on Immigration Detention's inquiry into 'quasi-detention' – call for written evidence

### Background

ILPA is a professional association founded in 1984, 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 a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

### Introduction

On 19 February 2021, ILPA submitted [evidence](#) to the ICIBI's "Call for evidence: An inspection of the use of hotels and barracks as contingency asylum accommodation". In this response we provide a brief update on the position since then, and particularly since the case of *NB & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin) was heard. In his judgment, Linden J described Napier as "*accommodation in a detention-like setting - a site enclosed by a perimeter fence topped with barbed wire, access to which is through padlocked gates guarded by uniformed security personnel*".<sup>1</sup>

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<sup>1</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2021/1489.html> at [163]

## Suitability screening

The case of *NB* was heard on 14 and 15 April 2021. We are aware that since then, people who are unsuitable to be accommodated in the barracks have continued to be transferred to Napier, including those who have been victims of torture. As was the case before *NB* was heard, where they have a good lawyer, it seems people are generally being transferred out again, however we remain concerned for those who do not have lawyers and who are unable to advocate for themselves and articulate their unsuitability to the Home Office. We are aware that transfers into Napier have been temporarily suspended,<sup>2</sup> a decision that we welcome as we believe that Napier should not be used as asylum accommodation. However, if and when transfers resume, we believe that significant improvements are needed to the screening process. This should include ensuring that men have lawyers on or very shortly after arrival.

## Importance of safeguards concerning access to legal advice

The need for access to legal advice when a person is detained (including in an accommodation centre) and subject to an expedited process has been recognised in the past, for example:

1. When the Detained Fast Track was still in place, it had several firms with Legal Aid Agency contracts to provide legal advice and representation to those in the process.<sup>3</sup> The importance of timely access to legal advice was highlighted in *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) by Ouseley J at [221]:

*I am satisfied that the shortcomings at various stages require the early instruction of lawyers to advise and prepare the claim, and to seek referrals for those who may need them, with sufficient time before the substantive interview. This is the crucial failing in the process as operated. I have concluded that it is sufficiently*

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<sup>2</sup> <https://www.theguardian.com/uk-news/2021/jun/22/transfers-of-asylum-seekers-to-napier-barracks-suspended>

<sup>3</sup> *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) at [159]

*significant that the DFT as operated carries with it too high a risk of unfair determinations for those who may be vulnerable applicants.*

2. Detained Asylum Casework. This has a rota of legal aid lawyers who are specifically contracted to provide assistance.<sup>4</sup> The Home Office guidance “Detained Asylum Casework (DAC) – asylum process version 5 dated 18 March 2019” sets out the following process:

*“• complete an asylum screening interview (if it has not already been done)*  
*• complete a DAC induction interview*  
*• inform asylum claimants with private legal representation that they must promptly contact their representative to inform them of their detention and the allocation of their asylum claim to DAC*  
*• **for claimants without private legal representation, contact the relevant duty legal representative to notify them of their allocation to the claimant under the duty representative scheme***  
*• notify DAC of the legal representative’s details within two working days of the case being allocated to DAC*  
*• send copies of the asylum screening interview and any other relevant documents to the legal representative”<sup>5</sup> (our emphasis)*

3. People being held in Immigration Removal Centres are able to access a legal aid lawyer via the Detained Duty Advice Scheme, where certain law firms are contracted to provide that work.<sup>6</sup>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/922675/Immigration and Asylum Specification October 2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/922675/Immigration_and_Asylum_Specification_October_2020.pdf) para 8.5

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/788720/detained-asylum-process-v5.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788720/detained-asylum-process-v5.0.pdf) page 8

<sup>6</sup> <https://www.biduk.org/pages/9-how-can-i-find-an-immigration-lawyer>

4. The Nationality, Immigration and Asylum Act 2002 contains a Part 2 on Accommodation Centres. This has never been brought into force, however at 29(4) it states that:

*“The Secretary of State shall take reasonable steps to ensure that a resident of an accommodation centre has an opportunity to obtain legal advice before any appointment made by an immigration officer or an official of the Secretary of State for the purpose of obtaining information from the resident to be used in determining his claim for asylum.”*

Even the New Plan for Immigration Policy Statement refers to the need for “safeguards to ensure procedural fairness” in the context of a new “fast-track appeals process”.<sup>7</sup> Napier does not have any such safeguards around access to legal advice.

## New interview process at Napier

The main development in relation to the use of Napier since the hearing has been the introduction of substantive asylum interviews for those in the barracks. On 22 April 2021 ILPA was notified by one of the organisations assisting the men in Napier that some of them had received a date for their asylum interview, and that it was to be held in Napier. On 4 May 2021 ILPA understands that attendees at the South East Strategic Migration Partnership meeting were told that interviews were taking place at Napier. ILPA had still not been notified of this by the Home Office.

After concerns had been raised with us about these interviews taking place at very short notice, and in the knowledge that these were pre-existing issues in relation to accessing lawyers at Napier<sup>8</sup>, ILPA emailed the Home Office on 12 May 2021. We raised access to justice issues in the context of these interviews taking place, and asked for a meeting to be convened

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/972517/CCS207\\_CCS0820091708-001\\_Sovereign\\_Borders\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS0820091708-001_Sovereign_Borders_Web_Accessible.pdf) page 20

<sup>8</sup> <https://ilpa.org.uk/ilpas-response-to-the-icibis-call-for-evidence-an-inspection-of-the-use-of-hotels-and-barracks-as-contingency-asylum-accommodation-19-february-2021/> page 4

with ILPA, the Home Office, the Law Society, Migrant Help and the Legal Aid Agency, so that we could try to ensure that the men subject to this new process were able to access legal advice. We also asked what was being done to monitor decisions made under this process, in particular refusals.

On 25 May 2021 we were told that *“At Napier, prior to asylum interview, Migrant Help provide a list of legal representatives to residents. There is also provision onsite for legal representatives to attend both the asylum interview and consult with their client either face to face or through Wi-Fi enabled voice and video calls.”* The Home Office also said that they were providing a standard minimum notice period of five working days of the asylum interview. Anyone who works in the asylum sector can tell you that it is almost impossible to find an asylum lawyer at such notice due to the lack of capacity in the sector.<sup>9</sup> ILPA responded the same day advising that the provision of a list of lawyers was not enough to ensure that a person was able to obtain a legal representative. We reiterated our request for a meeting to discuss the issues. We also asked Migrant Help, copied into the email, for an update on their experience of people accessing lawyers in a timely manner before their interview.

On 26 May 2021 Migrant Help advised that *“accessing legal services does not appear to be an issue from what we are hearing”*. ILPA advised that the organisations working with those in Napier were reporting an entirely different situation, and that problems were continuing to be reported to us. Instead of accepting that this issue, which had been raised repeatedly since Napier was opened, including in the course of the *NB* litigation, remained live and in need of resolution, both Migrant Help and the Home Office asked us to provide specific examples of individuals. Again, the reluctance of those within the asylum system to make any sort of complaint is well-known, particularly when people do not have a lawyer, as they are concerned that doing so will affect their asylum claim. Insisting on evidence from the people affected, instead of listening to the NGOs who are working in Napier, means that problems can be easily ignored. We explained this to the Home Office, who nonetheless insisted on named examples being provided.

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<sup>9</sup> See e.g. the report published by Dr Jo Wilding, Maureen Mguni and Travis Van Isacker in June 2021: “A Huge Gulf: Demand and Supply for Immigration Legal Advice in London” <https://justice-together.org.uk/wp-content/uploads/2021/06/A-Huge-Gulf-FINAL-report.pdf>

On 15 June 2021 ILPA again requested a meeting where the three NGOs working in Napier who had raised concerns would be invited to explain the issues in more detail and answer any questions.

On 22 June 2021 we sent a further email to the Home Office reiterating our request for a meeting, and we enclosed with that an email which had been forwarded to ILPA by some of our Members. The email was sent by Legal Aid Agency contract managers, and stated:

*Following the recent legal decision concerning Napier Barracks, it is the intention of the Home Office to carry out initial Immigration interviews at the Barracks. Migrant Help (MH) are urgently trying to identify Immigration providers who have capacity and the willingness to assist asylum seekers, currently accommodated at Napier Barracks, remotely before and after interview.*

*Unfortunately we don't have all of the detail at this stage but I have included some further information below in case you are willing to assist without wanting to discuss with me.*

- Whilst we do not expect clients to receive an outcome on their claim straight away, we do expect they will be dispersed following the interview within a maximum of 90 days. Unfortunately we cannot anticipate where clients will be dispersed to at this point.*
- We anticipate that the interviews will be conducted remotely with a maximum of 6 per day commencing around the 12<sup>th</sup> July – although this has not yet been confirmed.*
- Providers may need to arrange for attendance of interpreters as required in the normal way.*
- Providers will also need to assure themselves that the matter is in scope in the usual way.*

- *Migrant Help have confirmed there will be provision for private conversations between clients and providers pre and post interview which can be arranged as needed and they will be on hand to help facilitate if required.*
- *These are not DAC matters, but are being dealt with expeditiously on the back of the recent judgement.*

This email was concerning for a few reasons. First of all, it seemed to indicate that there were in fact issues with accessing lawyers that were acknowledged by Migrant Help. Secondly, it appeared that there was something changing about interviews being carried out in Napier from 12 July that the Home Office had not notified the sector about. The reference to Detained Asylum Casework was also concerning and appears to be an acknowledgement of the similarities between those asylum cases that are processed in detention and those processed in Napier. Finally, it was unclear what relevance any of this had to the case of *NB* (which was presumably the recent judgment referred to).

We are concerned about these processes being put in place without the sector being informed in advance. The legal aid sector is stretched well beyond capacity and it simply is not in a position to react quickly to these changes, particularly when unaware of them. If the Home Office had involved the sector at an earlier stage we would have been able to communicate both the need for and the lack of availability of lawyers, and perhaps with the involvement of the Legal Aid Agency it would have been possible to come up with a solution or alternatively the Home Office would have realised that the proposed process would mean that people were unable to access legal advice in a timely manner. On the latter point, we note that following the initial interviewing pilot at Napier the Home Office has now considerably extended the period of time for Migrant Help to signpost people to lawyers prior to the substantive interview.

The other issues with the lack of transparency about what is being done is that, on receipt of the email from the Legal Aid Agency, several lawyers have expressed concerns about responding to that request for assistance due to the lack of clarity about what is happening with the interviews in Napier. Lawyers have commented on its resemblance to the Detained Fast Track system, and are concerned about propping up what may be a seriously flawed

process. Without more information about the process being followed, it is not possible for lawyers to assess this in deciding whether or not to engage, and so many are simply declining.

As it had not been possible to arrange a meeting to discuss these issues by requesting one via email, we reiterated this request in two meetings with the Home Office in the week commencing 21 June 2021. The Home Office has now advised us that they intend to set up a cross cutting group to explore the issues surrounding access to legal aid, a move that we welcome, however our concerns in relation to people in Napier remain very much live. We await a meeting to discuss Napier specifically, which we have now been told will be arranged.

ILPA has recently been shown a presentation on the hotel and Napier interviewing pilots, and it appears that many of the issues we raised on 12 May 2021 surfaced during the course of the pilot, and the Home Office intends to adjust its processes accordingly (for example by increasing the period during which Migrant Help will signpost to legal representatives). Again, this is welcome, however it would not have been necessary if relevant stakeholders had been involved at an early stage. As always, ILPA's concern is for those who have been disadvantaged by this process, which could have been avoided if the Home Office had been more transparent and engaged with relevant stakeholders at an earlier stage in order to facilitate proper access to justice.

29 June 2021