



HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: [Immigration detention](#), HC 1484

Wednesday 21 November

Written evidence from witnesses:

- Amanda Weston QC, Barrister, [Garden Court Chambers](#)
- Toufique Hossain, Solicitor, [Duncan Lewis & Co](#)

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Members present: Ms Harriet Harman (Chair); Fiona Bruce; Ms Karen Buck; Joanna Cherry; Jeremy Lefroy; Baroness Hamwee; Baroness Nicholson of Winterbourne; Baroness Prosser; Lord Trimble

Questions 20-31

Witness[es]: **Amanda Weston QC**, Barrister, Garden Court Chambers; **Stephanie Harrison QC**, Barrister, Garden Court Chambers; **Toufique Hossain**, Solicitor, Duncan Lewis & Co; **Laura Dubinsky**, Barrister, Doughty Street Chambers gave evidence.

Q20 **Chair:** Thank you very much indeed for joining us and giving up your time to come and help us with our inquiry. We are the Joint Committee on Human Rights, which means half of us are from the House of Lords and half of us are from the House of Commons. We are looking at the human rights implications of detention, with special reference to immigration. There can be very few abuses or infringements of human rights that are more serious than deprivation of liberty, so that is what we are looking at.

Q21 **Ms Karen Buck:** I would like to ask you a bit about the ability of people in detention to access legal help. Before I ask you how easy it is and what the constraints are, is it necessary? Can I ask each of you to tell me, very briefly, whether it is not possible for people who are in detention to make the case for themselves? Why do they need expert representation?

Laura Dubinsky: It is absolutely necessary. We have tried to avoid duplication by subdividing the question. I will deal with the challenges to the legality of detention when it is still ongoing. Those are brought in the High Court by way of a claim for judicial review or a writ of habeas corpus. You have the procedural complexities of a High Court application

but also considerable legal complexity. A substantial body of jurisprudence from the domestic courts and the supranational courts applies. There is also a need to understand the statutory context and the relevant Home Office policies.

Even setting aside that legal complexity, there is evidential complexity in many cases. If and when detainees and their representatives, if they have them, manage to get disclosure of Home Office files, those often arrive in the form of voluminous, disorganised papers. Buried in that haystack may be critical evidence indicating that a person is unlawfully detained. Also, one has to be able to spot what is missing. Critical documents, such as detention reviews, may be missing.

So the answer is that it is certainly unrealistic to expect anyone, let alone immigration detainees, given the particular obstacles and vulnerabilities that affect many, to bring High Court challenges to the legality of detention without legal representation.

Ms Karen Buck: That is very helpful.

Toufique Hossain: Access to legal assistance is critical in relation to immigration bail and to applications that detainees have to make while in detention, such as preparation for asylum applications or deportation proceedings. When a detainee applies for bail, the Home Office provides a bail summary, effectively opposing bail and giving very detailed reasons as to why the tribunal judge should refuse bail, but often those bail summaries are filled with errors. They include submissions that can be tested and rebutted with evidence, which the detainee would have to provide.

Immigration history may not be agreed between the parties. I find absolutely impossible the idea that detainees should be brought before the tribunal, either through video link or in person, to present their case for bail without a lawyer. It simply would not work. Even when detainees have access to lawyers in relation to bail and other applications, we find that there are not enough lawyers to provide access to. NGOs that work—

Ms Karen Buck: Let me come back to that. That is a very interesting point. Do you have experience of people representing themselves and then you having to step in if there are complications?

Toufique Hossain: Yes, absolutely. We have had to deal with many previous negative decisions as a result of detainees representing themselves because they could not find a lawyer.

Ms Karen Buck: It is a hard question to answer, but what are the key characteristics of people attempting to represent themselves in such cases?

Toufique Hossain: They do not have the benefit of an interpreter until the hearing date, so they are unable to understand bail summaries, to put forward sureties in relation to bail or to provide essential evidence for protection claims. These are very complex areas of the law, which sometimes lawyers struggle with. It is essential for detainees to understand their rights and how to put forward evidence to an

independent judge, even if, at the time of the hearing, they may get assistance from a judge or an interpreter to help them through that process.

Stephanie Harrison: I will focus on the substantive immigration decisions. I do not know how many of you have looked at the legislation that has been introduced since 1971: the numerous legislative provisions, the extensive rules, the policy. It is an absolute leviathan even for experienced lawyers. There are plenty of examples of senior judges, in the Court of Appeal and above, commenting on these forms of rules—including the points-based system, which should be one of the most straightforward systems; it is not asylum, it is not international protection, it is points based: do you qualify to be a student or a worker?—and saying, “This process is so impenetrable that we cannot understand it”. It is getting to the point where the question at heart is whether you have a proper, lawful, administrative system, because it has become so complex.

In addition, appeal rights are incredibly complex and curtailed. Laws, rules and policy change on a frequent basis, and the system is not transparent and accessible, so the idea that a litigant in person is in any way, shape or form able to navigate this process is fanciful. I know that we have had a system of tribunals, which have a lot of benefit to them in terms of specialisation, but the idea that they can be navigated by a litigant in person, which they were intended to be, is not a reality. It is not a reality for immigration detention and immigration decision-making, just as it has not been for employment cases. The Supreme Court recently emphasised the importance of access to justice in the context of employment tribunals, and that is no less the case with immigration appellants and others. It really is an impossible system to navigate without a lawyer.

I can give you an example of the sorts of situations that arise when individuals are not properly represented. In a recent case, called VC, which we referred to in the Bhatt Murphy submissions and which has gone through the courts, the individual lacked capacity. He had no lawyer, and when he turned up to his appeal he was rambling and incoherent. The judge phoned up the immigration removal centre to say, “This person cannot participate in this process. What is going to happen?” He adjourned the case, as he obviously had to, which meant that it did not go ahead, and this man remained in detention, still with no legal representation throughout, until eventually there was a challenge to the legality of his detention. Any ordinary applicant has all the disadvantages that Toufique has explained, but there is also a significant proportion of highly vulnerable individuals, some of whom lack capacity, and that has not been identified.

Amanda Weston: I have little to add really, except to reiterate that you have the two sides. On the one hand, you have the vulnerabilities of the individuals concerned. They may be trafficking victims. they may be

torture victims, they may have mental health problems, so they are already starting from a disadvantage, in addition to the language problems.

You also have the impenetrable system. Bail summaries, which are produced immediately before bail hearings so there is very little time to consider them, are often many pages long and often omit important information or contain inaccurate information. There is no effective way in which a person in that position, without legal help, can interrogate those summaries.

Q22 Ms Karen Buck: That is very helpful. Legal aid is available for people in detention, and there is, I understand, half an hour of free legal advice at the point of detention. My understanding is that two-thirds of those who are detained, and who go through that half-hour, introductory, free legal aid, do not get to proceed on the basis of legal aid assistance, which seems to be a very high number.

Given that legal aid is available, could each of you indicate very briefly—do not feel that you all have to repeat things if there is nothing to add—what is still leaving us with such a high proportion of people who are detained who cannot get legal help?

Amanda Weston: One problem that is immediately apparent is the distribution of the sessions that are held at immigration removal centres. They are distributed among very many different firms. One firm may appear only once or twice per year in the rota, so it is very difficult to have continuity of representation. That is what immediately strikes me as being difficult.

Stephanie Harrison: There is a fundamental problem with the way those contracts have been administered, which will now be compounded by the recent decision to disperse them to over 50 firms. I have looked at the arrangements and there is no requirement, as far as I can see, for the firms to be expert or even experienced in challenging detention.

That is a significant problem. By the time the person has got to detention, they might not have had a lawyer to help them with advancing their substantive immigration case because they are outside scope. They may, for example, have a family case, so they may have British children; they may have very long residence in the United Kingdom. This is what has happened since the LASPO changes.

There is a very close correlation between the legality of the detention, the decision-making on detention and the substantive immigration decision. If you cannot challenge the substantive decision, it is difficult to challenge your detention decision because it is all linked to removal. That lack of legal representation at an earlier point in the process has a fundamental knock-on effect.

That does not mean to say that the person should properly be detained, because the experience is that when they do get lawyers in detention who are highly competent, those lawyers then go about the task of getting evidence about long residence, evidence from independent social workers about the nature of the family life, evidence of rehabilitation if the person has had a criminal conviction. That goes to whether they should lawfully be removed, and inevitably that impacts on whether they should be detained.

Toufique Hossain: There is a major problem with legal advice surgeries. The Committee heard in the previous session about NGOs' concerns. As a member of a firm that is in the detention centres and has access to these surgeries, I have seen a shift and a branching out from a few firms that had become specialised in this area to—as of September this year—many firms.

I declare an interest in that I am at Duncan Lewis, but having worked in smaller firms and in all these centres throughout my career my concern is that in order to represent detainees in relation to their protection claims, their detention, their bail, and their further representations for asylum or human rights, it takes a lot of effort, one obviously needs to be highly competent, and it takes financial resources. It also takes experts to provide medical evidence and experts on country information, and you need to pay those experts. You need to apply for disbursements from the LAA, but you need to take a financial hit before you can recoup that money from the LAA. You need to be able to pay barristers. There is a lot of work at risk because of the legal aid cuts.

Having experienced different types of firms, my concern is that it will be very difficult for small firms to survive and to do a decent job, however well intentioned they are, in this current climate. That is one of the major concerns I have in the way the surgeries are established now.

Laura Dubinsky: The crisis of legally aided representation is particularly acute in prisons. Stephen Shaw's 2018 report noted that, at the time of that report, 383 prisoners were detained solely under Immigration Act powers. The 30 minutes of legal advice to which you have referred do not apply in prisons. Moreover, the crisis that Toufique has referred to, which is sending many firms that do publicly funded work out of business, means that there may simply be no one who does publicly funded immigration work near the prison.

Chair: You set out very well, for cases in the High Court, the procedural complexity, the legal complexity, the evidential complexity, and the procedural complexity of the Home Office processes, which would be an issue. There is the vulnerable detainee, but who is on the other side in court?

Laura Dubinsky: In court, it is normally counsel.

Chair: In the High Court, if there was an unrepresented detainee dealing with all these complexities, you would have counsel and a solicitor on the other side. Who is on the other side in the tribunal scenario?

Laura Dubinsky: Normally it will be a presenting officer, who is essentially a civil servant.

Stephanie Harrison: They are a highly trained civil servant whose sole job is to present immigration cases. Occasionally, in some complex cases, a counsel would also be instructed in the appellate system.

Q23 **Fiona Bruce:** Good afternoon. The Committee looked at the case files of two members of the Windrush generation who were detained. We found that, in these cases, Home Office officials had consistently failed to look at the evidence in their files, which led to the two being wrongfully detained. As a first question, do you think the introduction of the gatekeeper function since autumn 2016 has helped to ensure that people are not wrongfully detained?

Stephanie Harrison: We have seen no evidence collectively that the introduction of the gatekeeper has had any substantial or even significant impact at all on decision-making. I saw the statistic that in about 0.5% of cases a gatekeeper says, "Do not detain". I have seen the gatekeeper's pro forma. In itself, it is wholly inadequate in identifying what information is necessary to make a lawful decision in accordance with the policy, et cetera.

Ultimately, the gatekeeper is dependent on the material that is presented to them by the caseworkers. There are so many examples of situations where the caseworkers do not have the relevant information. It is rife in the context of individuals who transfer from prison, for example. I have had cases where the person has served their prison sentence in a secure psychiatric hospital, because they have been so unwell, and there are extensive medical reports from highly experienced psychiatrists who have all assessed this person, including one person saying, "This person should not continue to be detained". Those reports were not transferred to the Home Office casework file, so the gatekeeper would not see them either. Likewise, there is evidence of rehabilitation, for example, that never gets on to the Home Office's casework file. It is in the Home Office, but it does not get on to the file of the person making the decision, which is the file that the gatekeeper looks at. Our experience to date is that although the Home Office sets a lot of store on this being a significant change, it is not. Another difficulty is that there is no review once the person has been detained. You will have learned that the primary safeguard for vulnerable people is a medical examination within 24 hours of admission to an IRC and the opportunity for an assessment as to whether they have vulnerability under rule 35. If there is no prehistory, only after the gatekeeper has made the decision will any relevant material come to light about whether the person is suitable for detention. The gatekeeper will have no role in that, so it is not going to be—and to date has not proved to be, as far as I can see—a safeguard in any meaningful way at all.

Fiona Bruce: That is a very comprehensive reply, and you have touched on the two supplementary questions that I wanted to ask. If I

address those now to you, Ms Harrison, any other members of the panel can comment additionally on my three questions.

What records are kept by the detention gatekeeper and to whom is this information provided? You have touched on that. Do detainees have sufficient information about the reasons why the Home Office has decided to detain them?

Stephanie Harrison: As far as we are aware, the gatekeeper process is wholly internal, so it is not a transparent process in any event. In cases where detention is subsequently challenged, you may have the filled-in pro forma, but it only comes through disclosure. It is not served on the person, so it does not become a visible document that anybody is aware of in order to know whether they have taken into account all the relevant material. It does not really have any purchase outside of being an internal process, which, again, is part of its problem. If you have a lawyer acting for you, they will not know what the gatekeeper has looked at. They will not have any knowledge and nor will the individual.

Generally, the decision-making process on detention is a tick-box process. You will have seen the IS91R, which is served, and then you have monthly reviews, which tend to be very formulaic. As far as I am aware, there is no service for interpreters to interpret decisions to individuals, so very many of them will not know even if they are given the piece of paper.

Fiona Bruce: For clarity, you are saying that, often, detainees will not have sufficient information about why they are detained.

Stephanie Harrison: They often do not, no. The decision-making process itself is opaque, so even if you are an expert lawyer and you are provided with the documentation, it does not tell you why; it just gives you a conclusion. It will say, "You are an abscond risk. Your removal is imminent", but it does not say why you are an abscond risk. It does not say what the obstacles to removal are. It does not explain the underlying decision. It gives a conclusion, not the reasons for it, which obviously makes it very difficult to challenge.

Laura Dubinsky: Could I add another issue in relation to reasons and disclosure, which is timing? At the start of detention, detainees are not given a copy of the decision to detain. Nor are they given a copy of the evidence on which that decision is based. Under the current regime, what they get within 24 hours is what Stephanie referred to, the IS91R checklist, or sometimes a letter to the detainee. That will generally be far shorter than the decision to detain and may be brief and elliptical: "This detainee's release is not conducive to the public good", for example.

The problem is compounded as detention goes on, because detention reviews are the mechanism by which the Home Office is supposed, at regular intervals, to decide whether to maintain detention or to release. However, those decisions are not automatically given to detainees or to their legal representatives. What detainees get instead are monthly detention updates, which are supposed to be based on the detention

reviews but are far shorter documents that may, as we often discover when we eventually manage to see the Home Office files, bear very little relation to the detention review.

In a very famous case called SK (Zimbabwe), which was ultimately heard by the Supreme Court, the detainee should have had 22 detention reviews over the course of his detention, but he only had 10. One of the many startling features of that man's detention was that, in the 12 months when he missed detention reviews, the monthly detention updates continued, based on fictional detention reviews that were not in fact happening. At first instance, Mr Justice Munby, as he then was, was very critical of what he called the "casual mendacity" of the documents. That remains an accurate decision of what we see going on with Home Office files.

Detainees cannot say, "This decision was taken about me yesterday based on a fundamental misinterpretation of the law, based on a fundamental misapprehension about my circumstances", because they do not see that decision. They may only get a copy of it months later. The way in which detainees, even if legally represented, manage to get hold of the Home Office files is ordinarily through a subject access request made under the Data Protection Act 1998. The guideline period for that is 40 days, but the Home Office often exceeds that by quite some way, so there may be a lapse of months between an unlawful decision and that coming to light.

Toufique Hossain: To follow on from what Laura says, we made a subject access request for a detention gatekeeper intake pro forma in one of the cases. It took over three months for us to get hold of it. That was the first time we saw it. It is pretty concerning that the person or the authority responsible for green-lighting detention effectively has three pages of very simple questions for deciding whether someone should be detained.

I will give you some real-world examples of very recent detention cases in which it is assumed that the detention gatekeeper has authorised detention. I have not chosen the most shocking facts; I have simply asked my team to provide me with cases that they are working on right now where the detention gatekeeper has authorised detention.

We represent several women from China who were all arrested working in brothels. No evidence of travel documentation has been provided by the Home Office, so there is no imminent removal. They have all the obvious traits of being potential victims of trafficking and deeply vulnerable, but the Secretary of State continues to detain. The gatekeeper would have gone through his or her tick-box exercise. One of the questions asks for a brief history of immigration and the encounter, so the detention gatekeeper is clearly failing to pick up that a lot of these detainees are being arrested in brothels. The alarm bells of trafficking should be ringing, but they are failing them.

Chair: What did the gatekeeper say in answer to that question?

Toufique Hossain: We have not seen all the clients' cases, but one is clearly a victim of trafficking and there was just a blank—"NA" or "not applicable". It was simply missing. Absolutely no attention was drawn to those issues. There is obviously a disconnect between the arresting officer or immigration officer who raids these brothels and the point at which the case goes to the detention gatekeeper who makes the decision.

In another case, a torture survivor, sexually abused as a child, had severe mental health problems, including PTSD and a high risk of suicide. Despite this, the Home office maintains detention. There is another case of serious self-harm, with cutting of wrists. She showed my colleagues cuts to her thighs. Her mental health has rapidly deteriorated in detention. Again, the detention gatekeeper would have assessed whether she should be detained and has passed her fit for detention, obviously because he or she has no idea whether there are issues involved or evidence that should allow them simply to say no to the recommendation of detention. We see that the detention gatekeeper is simply not working at all.

Q24 **Baroness Hamwee:** I was going to ask you about data subject access requests, which you have both mentioned. Is the Home Office now exercising its right not to provide information, as per the change under the Data Protection Act, or have you not come across that yet; it is just taking a very long time?

Laura Dubinsky: The problems I come across are those of delay only, but others may have different experiences.

Toufique Hossain: No, that is right. There are serious delays.

Stephanie Harrison: It is very important to understand why the Home Office wanted the power to say, "No, we do not want to provide the data subject access". It is because that is the primary way in which we are able to identify illegality in the decision-making. It may be that the Home Office relies on cost, but in practice it is a critical safeguard of the ability to challenge detention. Those who practise in this area saw with some dismay that the Home Office now has the ability to say no.

Baroness Hamwee: They did not say cost; they said security.

Stephanie Harrison: Yes. Our view is that they should not be able to say, in an unlawful detention case, "The Home Office is not going to provide it to you for security reasons". That has yet to be subject to litigation or contest at the moment, but it is of real concern.

Amanda Weston: It is profoundly telling that when one reads through a whole file from beginning to end one can see sometimes rather unguarded comments by the decision-makers. One sees the human being at the end of it referred to by the decision-makers as "sub": "sub says". A lot of the language that is used in the files is very dehumanising.

Fiona Bruce: For the record, it seems self-evident, but would you say that the delay or the lack of complete information is hindering preparation

of the cases that you have to work on for these people, and is that a regular occurrence?

Stephanie Harrison: Yes and yes.

Chair: Turning it from a critique into a proposal, if the system remained as it is, what do you propose should be served automatically on the potential or actual detainee? Do you have a suggestion for what should happen in order that they can see the basis on which they have been detained and can therefore challenge it by knowing the basis of the detention? It does not matter if you do not have one ready-made. You could write in to us and say, "This is what we think should happen".

Laura Dubinsky: I would be very concerned if we did not get the complete Home Office file, because that is often the only way in which we are able to decipher—

Chair: Are you suggesting that every detained person should get the complete file?

Laura Dubinsky: Where a person has a bail hearing—or, if we end up, as one hopes, with a system of automatic judicial oversight, has a hearing in the High Court to look at the legality of detention—getting the Home Office file is essential.

In answer to your question about what you should get as a matter of course, this is the bare minimum that detainees should get: the initial minute of decision to detain, and the IS91 detention authority—these are internal forms at the moment—and the detention review, which is the internal decision by which a detention is maintained. It is also, I have to say, very useful for detainees to see what is called the CID record, which is the computerised record showing Home Office activity or inactivity on their case.

Stephanie Harrison: It has to be understood in relation to the Home Office file more generally that one of the key things is a person's compliance. In a case where your client has been in the community for a long time, they have been reporting and they say to you, "I have been reporting. There is no need for me to be detained, because I have been complying and doing everything the Home Office says", that kind of information is key. Only the Home Office has that information. You can assert it, but the Home Office keeps records of compliance to show that the person has turned up when they are supposed to and done what they have done. That is a vital piece of information that you want to be able to have from the outset.

Q25 **Jeremy Lefroy:** Could we turn to the question of judicial oversight and the time limits? Does the need for an automatic bail review after four months in detention provide sufficient independent judicial oversight of detention decisions?

Laura Dubinsky: I will try to answer that question. Our answer is no, and there are four structural reasons why. First, bail is not a review of the legality of detention at all. Those are distinct legal questions. In fact, at

least until the advent of the 2016 Act, the settled legal position is that the grant of bail presupposes that detention is lawful. There are great practical distinctions in the way bail applications and legality challenges are approached. These automatic bail hearings do not oversee the legality of detention.

Secondly, those automatically scheduled hearings only kick in after four months, which is a significant delay, particularly for a vulnerable detainee.

Thirdly, the category of detainees who are most likely to be held for long periods is excluded from that provision: namely, foreign national former offenders who are being subject to criminal deportation.

Fourthly, at the moment the system is not accompanied by any guarantee of access to publicly funded legal representation.

There is a further sub-issue that I would want to raise. Under the present system, if an immigration judge has a suspicion that a person may be unlawfully detained—they may think, for example, “I cannot give this person bail, because I am not satisfied that the risk of absconsion can be satisfactorily managed. However, I have this lurking suspicion that this person may be detained in contravention of Home Office policy”—there is no mechanism by which that immigration judge can refer the case to the High Court. The immigration judge will not have the jurisdiction to look at the legality of detention, and will not have the information on which to reach that assessment in any event, but cannot refer the case to the High Court.

That safeguard is vital. I would stress that it is not a substitution for automatic review of the legality of detention, because immigration judges have such scant information before them when they are looking at bail applications that they may completely miss that they have a case before them of an unlawfully detained person.

Stephanie Harrison: Obviously, it is a wholly inadequate safeguard.

Jeremy Lefroy: What should take its place, in your opinion?

Stephanie Harrison: We suggest that the Home Office should make the decision, so that it remains an administrative decision at the outset, but it is very prompt—we suggest within 72 hours—subject to judicial decision-making, so it is not simply oversight; the judge thereafter has to authorise detention.

We suggest that it is vital to ensure that there are backstops in legislation. There need to be different backstops in the context of particular kinds of detainees, such as those who are vulnerable. There are a number of ways in which you can define vulnerability. Stephen Shaw has had a lot of time to think about it and he has given a list. It is not exhaustive, but vulnerability has been defined in statutory guidance. We suggest that in those categories of cases there should be a backstop of seven days, so that vulnerable detainees are treated the same as pregnant women, for whom had that regime was introduced in 2016, and/or children being removed from families.

This is the model that the Home Office has adopted in the cases where it has accepted that the systemic failures to apply the policy have to be remedied. The only solution that it has come up with, which we think is the best solution currently available in any event, is this backstop: 72 hours and then seven days for vulnerable individuals.

We suggest that for other categories of person there needs to be the same authorisation after 72 hours, with a backstop of 28 days, but also the possibility within that time for a judge to have scrutiny at 14 days. That is an effective mechanism to ensure that the systemic problems, which can properly be described as abuse of this very draconian power, can be brought to an end.

Jeremy Lefroy: You mentioned a backstop of 28 days, so basically you would say that there should be a statutory time limit to that extent. Is that a generally held position among colleagues?

Stephanie Harrison: There is concern, which you will have already heard, that if you have a backstop of 28 days, that becomes the norm. We know that people are released very much sooner than that and in higher proportions, suggesting that they should never have been detained at all. That phenomenon has to be taken into account. But if you have a 72-hour authorisation, that should, I hope, address that situation. Coming up with 28 days seems to be the consensus for the backstop that we are proposing.

Toufique Hossain: I share the concern about the outer limit of 28 days almost normalising detention to that point. Detainees ought to be given an opportunity, in that initial period where judicial authorisation is required, to make representations to the judge, so that we move away from the idea of automatic assessment, which we see in the current regime of automatic bail, where bail applicants are often simply produced in court having no idea what is going on. The detainees should be able to put forward submissions as to why the judicial authorisation should go in such a way that detention is refused or no longer maintained.

Even with the 72-hour period, the Committee ought to appreciate the harm caused by that initial period of detention. The shock factor of that initial few hours and days of detention for many people, including many vulnerable people, needs to be flagged up. The judicial authorisation in that period, even from the outset, needs to be looked at.

Laura Dubinsky: Stephanie has already addressed two facets of how one could introduce time limits without, in a sense, there being a normalisation of the backstop. First, you have a short-stop period; you have 72 hours, and after that you need to have judicial authorisation.

Other safeguards could be introduced to avoid that sort of normalisation of the backstop. One is to have an express requirement that the backstop kicks in only in exceptional circumstances. Another would be a statutory requirement that the detention be demonstrated, by evidence from the Home Office, to be necessary—strictly necessary, I would add.

Jeremy Lefroy: In perhaps very exceptional cases where detention is needed for longer, or at least the Home Office is making that case, how should that be handled? I mean longer than the 28 days you are suggesting.

Stephanie Harrison: I was going to follow up, because this answers that question in part. The Home Office's current policy has been in place for a very long time. Even in the context of persons who have committed criminal offences and so fall within the criminal casework directorate, the policy says that detention should only be exercised where removal is imminent. "Imminent" is defined in the policy relating to those who have committed criminal offences as three to four weeks. It should not be seen as something that is picked out of the air or does not take into account that protection issues are part and parcel of the decision-making over whether someone should be detained and for how long. That is important to recognise: that the Home Office itself has picked a period to define imminence—four weeks—in the context of such cases.

You asked if it was common consensus. The Bar Council did a very thorough piece of research into what it called the injustice in immigration detention, and it supported 28 days. You wanted to know about consensus, and that is the position of the Bar.

Inevitably, the question of public protection is a challenging one. To start from first principles, this is a power about controlling immigration. Its purpose is not to deal with public protection issues. If there is no proper immigration purpose, it does not exist simply to control risk that arises from people who have committed criminal offences and may reoffend. That is an important point about this power. That does not mean to say that it is not relevant to how long is appropriate, but it cannot be exercised for that purpose.

Secondly, where a person has served a criminal sentence, if it is of any substance, they may well be on licence conditions. There is already a system in place that deals with the continuing potential for reoffending by British citizens, who cannot be subject to this regime, or by migrants, who cannot be removed; they have to be released from prison at the end of their criminal sentence. Parliament has drawn the lines on where you can have preventive sentencing, and those preventive sentencing options would be available to a foreign national as they are to British citizens. There is a regime in place that deals with the risk of offending.

Thirdly, it is important to recognise that where someone has been convicted and is serving a sentence, there is a fundamental failure in Home Office practice to ensure that the process of deciding whether that person is going to be removed is front-loaded. You should not be getting to the point where you say that it is conducive to the public good to remove or deport a person if you are not making that decision until they have completed their sentence.

There was a detailed policy in place that was supposed to ensure active decision-making for foreign national offenders who could be removed at

the end of their sentence, which the Home Office has systematically failed to address. It is not open to the Home Office, if this is how it comes back on the issue, to say, "Well, what about foreign national offenders? We have to have greater powers to detain them for longer", unless it can show this Committee that it has taken all the proactive steps necessary to determine the substantive immigration case, so that it is in a position to remove that person within the 28 days. That is essentially its current policy: if it is not imminent, we should not be detaining them.

It is also important to recognise that there is a failure in the Home Office to properly assess risk. They do not really address all the evidence about rehabilitation. There is a blanket failure to look at rehabilitation evidence if you are a foreign national prisoner. They excluded foreign nationals from the Rehabilitation of Offenders Act. In our system, which has always recognised that you can change, you can be a different person, that is not really afforded to foreign national prisoners. That is also a problem when it comes to their assessment of who continues to present a risk.

It should also be recognised that very extensive regimes have been developed even to deal with national security cases, which is an area that I specialise in, under the Special Immigration Appeals Commission. This is not risk relating to other kinds of criminal offending but national security risks. There are extensive powers, short of detention, available to the Home Office, which have been used for a very long time to manage risk, going right up to 24 hours' house arrest. Of course, that would have to be an exceptional national security case, but it illustrates that there are alternatives to detention.

Our position would ultimately be that you should not have a different backstop for former foreign national prisoners. You have to recognise that if you exclude them and treat them differently, as the current regime does, they are the category of persons who have, in fact, been subject to some of the most serious breakdowns in rule of law protection. Of the six Article 3 cases, which you will have looked at, at least three had serious criminal convictions. One of the clients I represented had a sentence for four years for assault. Another individual, BA, had a 10-year sentence. They were subject to Article 3 relating to ill treatment because the Home Office treated their criminal offending and the risks as justification for prolonged detention. It is critical that this group of individuals is not taken outside the protection.

Laura Dubinsky: Following on from Stephanie's point, there are statutory provisions, other than the power to detain administratively, that afford mechanisms to deal with the areas that may be of concern to you. Your question was about how the backstop works in certain cases that pose particular concern. A common concern is the unscrupulous person who may be trying to game the system by obstructing expulsion just past the time limit. The answer to that particular concern, for example, is that there is a criminal offence of failing, without reasonable excuse, to comply with a requirement imposed by the Home Office. If the Home Office says,

for example, "Give me your data about your identity, attend this travel documents interview, comply in the following ways", and the person, without reasonable excuse, fails to comply, the answer is to prosecute, not to administratively detain. That is so important, of course, because of the particular safeguards that go along with the criminal process.

Toufique Hossain: We have to be careful not to identify distinct cohorts of vulnerable detainees and foreign national prisoners. In my experience, many of the clients I have had who happen to be ex-offenders are deeply vulnerable, and many of the reasons why they commit offences in the UK stem from historical torture and trauma. It is sometimes difficult, I know, to appreciate that they may also be deeply vulnerable, but that is a distinction that we need to be careful about.

Amanda Weston: It is also important to remember that the Mental Health Act has provisions for managing risk for people who have offending histories connected to their mental ill health.

Q26 **Baroness Prosser:** I was going to ask you, first, whether you think that policy and legislative changes in rights to challenge immigration decisions had had implications for people in detention, but I think you have covered most of that.

Unless you think there is something extra to say, I will move on to the next point I want to make. When individuals are released on immigration bail, do you think the conditions upon which they are released are reasonable? Do you have evidence or views that would give us any information on that aspect?

Stephanie Harrison: The regime that was introduced in 2016, which removed the possibility of release, was a serious retrograde step. It overturned centuries of common law protection that said, "It is not a choice between detention and bail, but between detention, release and bail". That has meant that every single person who is not detained is now subject to bail.

Bail is predicated on being able to lawfully detain somebody, and therefore on being able to put quite serious restrictions on their liberty. We have had a regime since 2016 that allows for people who cannot be lawfully detained, and would not be detained, to be subject to conditions, and they are intrusive conditions. There has been an escalation in the conditions that the Home Office is imposing almost on a routine basis. Residence and reporting have always been the basic conditions of bail, but they have been added to with not being able to work, which has very serious implications, for all kinds of reasons, on well-being, sense of worth, et cetera. Study is not possible when you are on bail.

Baroness Prosser: Are these people who would have been working previously or studying previously?

Stephanie Harrison: They could have been. That could have been the basis on which they were in this country. But it also means that you have

people who, sometimes for prolonged periods, are simply stuck in a situation of depending on very limited amounts of support, not being able to live a normal life, living in a limbo situation, effectively.

In addition, the Government have now said that if they are going to impose any kind of curfew condition so that you have to be in your home, it has to be backed up by tagging. They are increasingly using tagging. You have to recognise that, while additional restriction on liberty might be a solution for the sorts of persons we have talked about who present risk, it should not be used as a routine mechanism, which it is being. Tagging is a very significant intrusion and constraint on liberty, or at least on personal freedom, and has stigma and everything else attached to it.

There is excessive use of tagging and conditions that bear no relationship to proportionality or necessity. There are very few effective ways of remedying that. Even if the bail court does not impose the condition, the way the regime works is that, once you have been granted bail by a judge, which may be just the restrictions of residence and reporting, you then have to report to the Home Office and it can impose conditions. Usually, they are much more severe than what the judge has assessed. That is wrong as well.

Laura Dubinsky: I have a specific issue about residence requirements that are sometimes imposed and which a detainee may simply have no way of meeting. Immigration judges, the First-tier Tribunal or the Secretary of State can grant bail to a person who is currently detained, subject to a residence condition. But at present there seems to be no functioning system by which detainees can apply for publicly funded accommodation if they are destitute or even make submissions about why they should be eligible for that accommodation and why they need it.

We have this extraordinary scenario where people may get a grant of bail that says, "You are released, but you have to have residence", which they then cannot satisfy. The Home Office may simply go silent on why they are not being granted accommodation under Schedule 10, or it may turn around and say, "You have not shown that you are destitute, so you are not getting this accommodation", in circumstances where no submissions were invited as to whether that person was destitute.

Toufique Hossain: On that, unfortunately, we have so many examples of where we have had to go to the High Court in effect to get an order to force the Home Office to provide the Schedule 10 accommodation that it is supposed to. The delay from getting that bail in principle to release is so unreasonable that, for detainees who are fortunate enough to find legal representation, the only way to speed up that process is to get the High Court to intervene. That is a serious concern.

Q27 **Baroness Prosser:** Well, Lord above. As a final question from me, could you explain what you see as the difference between judicial review and appeal rights? Do you think one is better, more useful or more helpful than the other?

Stephanie Harrison: Judicial review and an appeal are fundamentally different. A judicial review will only look at the way in which a decision was taken. On very limited grounds would you be able to identify illegality in a decision taken. An appeal is a full merits appeal in which the judge can look at all the facts and, in our current system, at any material that is relevant, even if it was not before the decision-maker, which is a fundamental difference from judicial review.

They can make their own decision, weighing up all the factors. It is a much more effective safeguard than a judicial review. There are lots of cases in which the Home Office has sought to limit or avoid a merits review in an appeal and said, "Oh well, judicial review is a sufficient remedy", and the court has said, "It is not", because they are so fundamentally different.

Baroness Prosser: That is quite clear.

Stephanie Harrison: Yes. Judicial review is not an adequate remedy. One of the important things about appeal rights in the system is that appeal rights were suspensive, so that no decision could be taken while ever the appeal was pending. There are some changes to that, but there is still a mechanism. If it is judicial review, the only thing that will stop you being removed from the country is if the court makes an order. That means that you have to work under extreme pressure—Toufique will have more direct experience of doing that, on a daily basis, no doubt—to prevent removal. The access to justice and legal representation issues are much more complex when it comes to having to put together an application for judicial review and an interim order injunction to stop removal, so there is also that fundamental problem with it.

There is one other issue. Under the appeal regime, when you appeal, if you had existing leave to remain—say I was here as a student or had indefinite leave to remain—and the decision was taken to end your status, while your appeal is pending your status continues. You remain in the country lawfully; you remain on the same conditions as you previously were, so it holds the ring. That is not provided for if your remedy is a judicial review. You become unlawful in the country. You are exposed to what is called the "hostile environment" because you do not have any lawful leave to be in the country. That is also often for prolonged periods, if you are able to get into court, so that is also unsatisfactory.

Baroness Prosser: Is there anything good about judicial review? It seems as though the scales are pretty much tipped. Why would somebody go for JR?

Stephanie Harrison: Judicial review is a remedy of last resort. It is a fundamental safeguard in our system, but it is not a substitute for appeal rights. As Parliament has removed appeal rights, what has come in their place is the remedy of last resort, which is judicial review. It is a much weaker protection than a substantive appeal, with a judge making their own decision and reviewing all the evidence. There will always be, because it cannot be ousted, the ability to challenge a decision by way of

judicial review, but it is very much a backstop remedy and inferior to appeals.

Amanda Weston: Can I give an example of this happening to a family? A family has been in the UK on a form of leave leading to settlement and pays something like £7,000 for indefinite leave to remain applications. Those are refused on quite technical grounds, not on human rights grounds, which give rise to a point of law that goes all the way to the Court of Appeal. They are lawfully in the UK, exercising their right to challenge the decision, but it has to be by way of judicial review because there is no longer a right of appeal. The protections that Stephanie referred to would not kick in. They are here unlawfully. They are served with what are called red notices by the Home Office and, quite terrifyingly for a family of four with two teenage children, threatened with detention. That is the reality of the loss of appeal rights.

Toufique Hossain: I can describe to you an example that shows the interplay between judicial review and an appeal. You have a client in detention who has had his or her protection, asylum or human rights claim refused. Then they make a fresh claim for asylum, because they have new evidence that goes to his or her well-founded fear of persecution back in his or her home country. He puts forward fresh representations, which are then refused. If the Home Office decides that that does not come within the scope of a fresh claim, that refusal can only be challenged by way of judicial review. In that process, the Home Office, once it has refused, will try to remove that person.

Again, that removal can be stopped only by way of judicial review. Judicial review can potentially obtain an injunction to stop the removal and challenge the legality of that fresh claim refusal. If that person succeeds in his or her judicial review in challenging the fresh claim, often the Home Office has to make a new decision, and this time make it lawfully. That can also, if it is a protection claim, lead to an appeal. Ultimately, then, an appeal would lead to leave to remain if that person succeeds. The appeal eventually paves the way for status in the UK, but judicial review prevents that person being removed prior to potential success down the road.

Q28 **Joanna Cherry:** I want to pursue the question of effective remedies. You have been very clear that an appeal mechanism is more effective than judicial review, because it goes to the merits of the decision rather than the process of the decision, and because the decision appealed against will be suspended while the appeal is pending. Do you also agree with me that it is nevertheless still very important in that situation for appellants to have access to legal advice, assistance and representation?

Stephanie Harrison: It is absolutely vital.

Joanna Cherry: The shortcomings you have described with the legal aid system would still apply, even if we reintroduced appeals.

Stephanie Harrison: Yes, they would.

Amanda Weston: I am reminded of Lord Justice Irwin's description of the Immigration Rules as "impenetrable" and "a disgrace" in a recent speech.

Joanna Cherry: It would be fair to say that it is one of the most complex areas of law in our current system, both the rules and regulations, and the decisions and case law. To be clear, the legal aid position that you have described so far is the position in England and Wales. That is right, is it not? You will be aware that north of the border there is a different legal aid system. We do not have price-competitive tendering, such as you have described. There are not the same severe restrictions on access to judicial review.

Our independent review of the Scottish legal aid system was published earlier this year. It found that there is less spend per capita on legal aid in Scotland than there is in England and Wales, but legal aid is of greater scope and eligibility. We see that in the area of immigration detention, where there is greater scope and eligibility. Do you think the time is ripe for an independent review of legal aid in England and Wales, as opposed to the Government's own internal review?

Stephanie Harrison: That is vital. One thing that needs to be looked at is what you allude to there, which is that if you remove funding for the first process, which would be before the appellate authority, there will be a large number of cases where there is no challenge at all. There is a very real risk that individuals with strong and arguable claims will not have a remedy at all. What will also happen, and what does happen, is that the costs are shifted elsewhere. Judicial review is a much more costly remedy than an appeal process.

There is a very close correlation between losing appeal rights and/or losing legal funding for participation in it, and the increased use of detention. Costs come out in other parts of the system. It is very costly to detain a person: £34,000 per year—£125 million. That is a lot of money. It is used where individuals should not be there because they would have very good claims if they had proper representation. Many of them will only get it at the point where they are detained.

We gave a lot of examples, particularly in the context of family cases where there is no funding. When they are detained, they have been through the appeal system without a lawyer. They have lost their appeal. They then become liable to detention and they are detained. If they are fortunate enough to get a competent lawyer—those who do are at the tip of the iceberg—that lawyer will then obtain, in challenging the detention, the information that was always available to be obtained about the substantive immigration case, as I said at the outset. Whether it is an assessment of the family relationships, whether it is evidence of mental health problems or vulnerability, that can be provided, but it will have

cost a much more substantial amount of money to run the system like that.

The remedy comes in effect at the end of the process, when you are in detention and you have to access much more costly remedies of judicial review, with the purpose, as Toufique explained, of getting you back to the beginning so that you have a fair opportunity to pursue your appeal. There are numerous examples. We put them in the context of the written representations, particularly in Article 8 cases, where access to legal advice and representation has been removed.

Joanna Cherry: Really, you are saying that if the Government focused funding on giving people early access to legal advice and assistance, the Government might very well save money further down the line by preventing detentions that should not have happened, and preventing the very significant cost of judicial review procedures, which if successful really only send us back to square one again.

Stephanie Harrison: Yes, plus the cost of damages claims and the cost of the litigation, which again is very expensive. You do not have the statistics for the costs of damages claims. You have, from the Home Office, the amount that is paid out in damages, but it will be inevitable that the legal costs far exceed the damages.

Joanna Cherry: That is damages for wrongful detention.

Stephanie Harrison: That is for unlawful detention, yes.

Joanna Cherry: We have some stats that suggest that in the period between 2012 and 2017 there were 887 cases of wrongful detention. We know that during that time over 150,000 people went through the detention system. Some might seek to suggest that the fact that there are only 887 cases of wrongful detention suggests that the system is protecting against wrongful detention. I see you shaking your head. Can you tell us why that would be a wrong assumption?

Stephanie Harrison: It is a wrong assumption because that figure is only the tip of the iceberg of unlawful detention. I do not know exactly where that figure comes from, but it is evident from a number of sources that many more people are wrongfully detained. There are the Government's own statistics about the numbers who are not removed and are released. There is also the fact that very many people, although they will challenge their detention through bail or judicial review, will not bring a damages claim for all kinds of reasons, such as access to justice, time, and their lawyers dealing with other matters, such as their substantive case.

Critically, that information was from 2012 to 2017. There has been extensive litigation, which is generic litigation. There are a small number of individuals who are the lead cases, but they represent systemic failure. A good example is the detained fast-track process. That has been found to have been operating with systemic unfairness and unjustly. The Government abandoned it because it was unfair decision-making and a failure of rule 35, et cetera, in 2015. If you want to put the detained fast

track into the statistics, that was from 2012 to 2015. At its height, over 3,000 people per year were detained under it. You would need to add to that list the 9,000 people who were wrongfully detained during that period.

We have done litigation with regard to pregnant women who were wrongfully detained. The Government accepted that their policy with regard to pregnant women was systemically failing. Again, that is hundreds of additional people. Litigation is the tip of the iceberg, and the other cases with the same illegality in the decision-making will not figure in the statistics at all. There have been many other examples of what is called strategic litigation, which has identified systemic problems during the period between 2012 and 2015. There is the failure to apply rule 35, which is the key safeguard for vulnerable people. A court found in 2014 that it was not being applied effectively.

There are cases going back to 2006. All those people who were vulnerable will potentially have been unlawfully detained because they have not been identified. Those statistics will in no way be reliable. I imagine that the 150,000 includes people who are turnaround cases; they turn up at the airport, may have to be held overnight and are then removed. So who falls within the 150,000 would also have to be scrutinised.

Joanna Cherry: Thank you. That is very helpful.

I have one other small set of statistics for the last calendar year. For 2017, they suggest that out of 119 detention-related judicial review cases that received permission at the paper consideration or oral hearing, only 38 received a substantive hearing. That means only about a third of them going forward to a substantive hearing.

I open this question out to everybody. Can you offer any comments as to why only a third of these cases are going forward to a substantive hearing? What is happening between the permission stage and the substantive hearing that means that it does not go ahead?

Amanda Weston: There are a number of reasons. First, a lot of the cases are settled. Some decision-making goes on at the Home Office about the cases that it does not want to fight, particularly the ones that are capable of demonstrating systemic problems. Then they settle, in my experience.

Secondly, judicial review is the correct remedy where you are seeking a prerogative remedy of release. Once your client has been released and the issue turns to a damages claim, the court will normally transfer those cases to the county court, or to the High Court if it is a high-value claim. For those two main reasons, cases do not often go substantive in judicial review, usually because when people apply for permission to apply for judicial review, they also apply for interim leave by way of release and usually get it.

Joanna Cherry: Are you really suggesting that the Home Office is settling cases that it feels demonstrate systemic failures in order to avoid

having a decision that other litigants can jump upon and say, "I fall into this systemic failure category"?

Amanda Weston: That is absolutely right. That is my experience. There are some egregious examples. I spoke earlier about what one finds in Home Office files. Sometimes one finds some very disturbing decision-making, and those cases get settled.

Joanna Cherry: We certainly saw that with the Windrush files that we saw. Do you have any evidence for your contention that this is what the Home Office is doing?

Amanda Weston: I do not have evidence from the Home Office that that is its practice. They are all experienced litigators and we are all familiar with the phenomenon of cherry picking a case that is going to most serve your claim.

Joanna Cherry: I will throw that open to the other members of the panel. Can you support as a phenomenon that the Home Office is picking off cases that might be indicative of systemic failures and settling them so as to avoid having a decision that other litigants could look at and say, "I fall into that category"?

Laura Dubinsky: That is right. It is also why, when we read High Court determinations, concerning Article 3 breaches for example, we should bear in mind that those may not be the most egregious cases. The most egregious cases—the ones that might have led to adverse media attention, the ones that the Home Office felt it was bound to lose, or the ones that might have set what it felt was an adverse legal precedent for its purposes—are not the ones going to court.

Toufique Hossain: To really hit home on that, in the vast majority of cases that we see where the Home Office tries to settle, it settles with an offer of damages that is confidential to the parties. It is saying in effect, "We will settle it if we pay you X amount of money, but you are not allowed to tell anyone about it".

Chair: It is like a non-disclosure agreement.

Toufique Hossain: Yes. Often very desperate, vulnerable detainees say, rightly, "Yes, I have sought release. I have achieved what I wanted to. I will take the money that is being offered".

Chair: That is interesting.

Stephanie Harrison: In addition, you can look at cases in which individuals have been able to bring their cases, there has been very compelling evidence of systemic failure, and the Government have resisted tooth and nail, in all kinds of different ways, the court being able to look at the general picture. That means that while the individuals may get a remedy, there is not the finding that can mean that there has to be some substantive, significant change overall.

The rule 35 debacle, which is the only way of describing it, is exactly that. If you were to look at the cases from 2006, 2013, 2014 and the end of the DFT, at each stage the Government resisted the court looking at the evidence obtained from very many different sources that this vital

safeguard was not being effective. That meant they could say, "That is in this individual case. We are not going to do anything". Ultimately, it is only the Shaw review that has done that. Those problems with that key safeguard could have been identified in a legal judgment at least as early as 2013, but the Government resisted the court looking at that matter.

Q29 Lord Trimble: You have told us quite a lot this afternoon. You have mentioned how difficult the legislative picture is, how it is virtually impenetrable, and illustrated the difficulties that are engaged with that. You have also told us that the Home Office is very poor at administering its own system, particularly that important information comes in but does not reach the appropriate person or get into the correct files. We have a picture of a system that is not working terribly well, because they are putting so much effort into covering up the mistakes that have been made and the difficulties. Even when they lose cases, they restrict the ability of the wronged person to say what is going on and what has happened. The question I have is this: what do we do with all this mess? Are there solutions? What solutions would you look for?

Stephanie Harrison: The first solution has to be statutory—clear limits and criteria in statute as to when these powers can be exercised. That is vital. That has to set a fundamentally different framework, of the kind that we have suggested. There is also an institutional culture issue. Strict time limits with clear criteria can guard against the default position that has been operating for at least a decade, but there still need to be some fundamental questions about institutional culture. We have a situation where there is virtual impunity.

There are few other areas of the law where the Government are so regularly held to be breaching the law, breaching fundamental rights and subjecting people to really appalling treatment. There is no consequence. You can see the civil servants who have been involved at a high level in policy and implementation. They have overseen this process and there is no accountability. I am not aware of any circumstance, apart from the recent Brook House abuse, where anybody has been held to account. If the court finds that you made unlawful decisions, it has no repercussions. The culture of impunity has to be addressed, and at a number of levels. We suggested that this requires some kind of overall change, as happened in the police force after the Macpherson inquiry when institutional racism was identified. It is a systemic problem as serious as that. I am not saying that it is institutional racism. There is institutional dehumanisation, indifference and disregard for the human being. There are some clear examples of actual racist behaviour and language used in certain contexts. The institutional culture has to be addressed as well as the legal framework. They need to go hand in hand.

Lord Trimble: The Government are proposing to introduce legislation for a completely new arrangement with regard to migration. I am not sure what the timescale is for this, but it is not that far away.

Chair: It is next year.

Lord Trimble: Is there any way in which one can get into that system or what is being done within government, so that some of the things you have mentioned could be addressed and put right? If we have major legislation next year and we do not get something done in it, it will be ages before we can get the Government to come back with further legislation. There is a real challenge now as to whether one can influence this new legislation and get it to improve on the situation so that we do not hear these sad stories again.

Stephanie Harrison: One of the things that we said in the conclusion to our report is that Parliament also has to step up. As lawyers, we are doing what we can. The NGOs you have heard from are doing what they can to be a check and balance in the system. But, too often, legislation that impacts in this way—both primary legislation and the current proposal for the Government to make changes to the detention centre rules—has gone through Parliament with very little scrutiny. That needs to be heavily scrutinised. If there is an opportunity in Parliament to address this, it is pressing. It is not a situation that can be allowed to continue. If it is possible to make amendment to that legislation, we would certainly say that it is urgent and it is vital to do so.

Lord Trimble: Before legislation arrives in Parliament, at some point within the system work must be going on at the moment to design the new immigration structures. Are there any channels available to you or us to find out what is going on and find ways of influencing it?

Stephanie Harrison: We are not aware of any. There are consultations taking place, for example on adults at risk, which is being reviewed again following the Shaw review. I would have to say that our participation, collectively as lawyers and NGOs, in those consultation processes is pretty unedifying. We put in the effort to make the representations, but there has already been a decision about what the policy is going to be. That was shown most evidently with the first introduction of the adults at risk policy. Within a year, the High Court had ruled it to be unlawful.

On the change to the definition of torture, NGOs and others had made representations to the Home Office that the definition of torture change was wrong. The judge commented on the fact that that had been said in consultation, but it made no difference. It is very difficult to see how we can participate effectively in that process. People are very willing and put in a lot of time to do so, but, again, it is a culture issue.

Unless the individuals in the Home Office who are responsible for policy are willing to hear a different side, and willing to take on board that what is happening is not acceptable and needs fundamental change, it is very difficult to see that the processes that have been adopted so far for consultation and exchange of ideas are going to result in any difference.

Lord Trimble: We have a new Home Secretary at the moment, one who has given the impression of wanting to try to address the failings of the system. Has anything come to you from that? Are there any opportunities that might arise from that? I see heads shaking.

Amanda Weston: I notice that in the Statement to Parliament in light of the second Shaw report, the Home Secretary mentions human dignity twice. Certainly from my perspective, on the current practice, it matters less to me as a practitioner trying to do my best for my clients what the changes are to the policy and what the changes are to the law if there is no urgent effort to inculcate a culture of human dignity among the decision-makers on the ground.

I am struck particularly by an extract that Stephen Shaw chose from the interviewees he met while preparing his report. He noted that one caseworker said, somewhat ruefully, that her job had been easier before the visit as it had been possible to consider detainees just as case files rather than as people. That speaks volumes to me.

Toufique Hossain: Touching on Stephanie's point about accountability, I have been involved in immigration detention now for over 10 years. I have seen successive Home Secretaries come and go. In 2012, the then Home Secretary was found to be in contempt of court in relation to an immigration detention case, and she is now the Prime Minister. We have seen that at the top things will not change, but if we understand the processes involved, and hold to account the staff at the mid or low level who carry out the day-to-day decisions of detaining people who work in brothels or who are torture survivors, we will start seeing a shift. Right now, they seem not to care too much about paying out millions per year in compensation and in costs. That does not seem to be a deterrent. There needs to be a shift to something that is a deterrent. It is not going after the top, because we know that does not necessarily work. It is to go into the very heart of the Home Office and change the culture there.

Stephanie Harrison: And change the personnel. If you look at human rights cases, where there has been a culture of systemic abuse the court will look to see not just that laws and legislation have changed or are being implemented but that the personnel who have been responsible for abuses taking place are no longer in place. It is a pretty basic element of how you end impunity. That is a starting point.

One very concerning example is what has happened as a result of the Brook House abuse. I do not know if you have had an opportunity to watch that "Panorama" programme, but it shows where this ends up if you do not get a grip on it. People were subject to physical abuse, threats to kill them, there was a suicidal person. It was announced last week that there will be no prosecution of any individual arising out of that abuse. The Government have indicated that they will agree to an inquiry, but they will not agree to a full independent inquiry, in public, with the ability to cross-examine and call evidence. That is an opportunity. It is an extreme example of where this all ends up.

Even in that context, there is a reluctance to allow an effective form of investigation into exactly what happened and, critically, the lessons learned. It is also about that. Stephen Shaw has commented on this. Even with the number of inquiries that he has done over the years, which have not been the full form of investigation of the kind we think is necessary, he is saying that their lessons have not been learned.

Despite the exposé from an undercover reporter, not through any mechanisms that exist in the system to expose what was happening to that particular individual, the Home Office is indicating that it is not prepared to order the kind of very thorough, rigorous investigation that could result in lessons actually being learned and individuals coming along to explain how this could have happened.

Q30 Baroness Hamwee: I almost feel that we should leave it there, because that is such a good summing-up of the problems, but I have a couple of tidying-up questions. First, leaving aside adults at risk, but following David's question about legislation, I was struck by what you said about the conditions required to be met for detention, which are not being met. Should there be a statutory presumption against detention for immigration purposes? Is that something we should have a go at?

Laura Dubinsky: Yes, absolutely. The best way to deal with it may simply be to stipulate that detention must at all times be strictly necessary and be demonstrated to be necessary by evidence. At all levels, but even starting on bail applications, you are confronted with this extraordinary situation where the Home Office is not generating any evidence to show why this person should be detained or to show that it has, for example, internally considered alternatives to detention.

Toufique Hossain: I note that Lord Woolf is not here today, but it was his case, Hardial Singh, that set the parameters in common law as to how detention should be reviewed. I welcome that presumption of liberty going into statute, but the Home Office breaks the law, whether it is statute, common law or policy. We need to shift from the idea that statute would somehow improve Home Office decision-making, take the power out of the hands of the Home Office and put it into some sort of judicial oversight.

Lord Trimble: You mentioned the possibility of having an inquiry into certain matters. A couple of years ago in the House of Lords, we had a Select Committee doing a post-legislative examination of how the inquiries legislation had worked out. I was on that.

It became clear, when we looked at it, that the habit in officialdom of saying to Ministers who want an inquiry that they should have a non-statutory inquiry because it is more flexible is completely bogus. When you look carefully at the legislation, it was intended to be prescriptive for all inquiries—that all inquiries should be statutory inquiries. If they are, you have more chance of getting a thorough

examination of what is happening, and it is more difficult for officials to brush things under the carpet. In thinking about inquiries, do ask for the full rigour of the existing legislation, which has not been applied as it could be.

Q31 **Baroness Hamwee:** I was going to ask about adults at risk, and you have already commented a certain amount on that. Can you tell us what improvements you think are needed, including in the application of rule 35?

Amanda Weston: I wanted to start by saying that I also act in the Court of Protection for people who lack capacity. It is very apparent that there is a huge gulf between safeguarding approaches to individuals in the community who may lack capacity, whose capacity may be an issue, and what happens in immigration detention. Safeguarding used to be in the old *No Secrets* guidance; it is now on a statutory footing in the Care Act. In the community, there are certain responsibilities in respect of safeguarding, held chiefly by local authorities. In prisons, there is a separate regime, which specifically applies to the Prison Service's duties to individuals in prison.

Nothing seems to happen effectively in respect of safeguarding of individuals. It seems reasonable to predict that if you are going to change your policy to start detaining people you previously thought unfit for detention because they had mental health difficulties, some of those people are going to lose capacity while they are in detention. That is completely foreseeable. Notwithstanding that, neither the Home Office inquiry nor the gatekeeper inquiry makes any reference to assessing people's capacity when entering detention. The whole issue of capacity is given no proper attention at all. Why is that important? Because of the changes to the appeals structure, you only have an appeal at all if you have expressly raised a human rights claim that has been refused by the Home Office. That will get you a right of appeal.

Say you are a person who lacks capacity, cannot handle your immigration affairs, cannot deal with the documents you are being given. Let us say, for instance, that you are sent a letter by the Home Office in detention saying, "We are minded to deport you. Tell us all the reasons why we should not deport you". If you do not respond adequately to that, there is no means of identifying you as a person who is unable to respond, rather than simply somebody who has not responded. You will lose your right of appeal if you do not respond by raising a Human Rights Act claim. That has happened in several cases in which I have been involved.

What is the consequence of that? You have an individual who may lack capacity and cannot respond to documents spending years in immigration detention because they cannot be removed or there are no proper arrangements in place to remove them. There are even Home Office records stating things such as, "I see we have had a signed waiver here, but I do not think he has capacity", but with no consideration of whether

ongoing detention remains appropriate. Those are the sort of difficulties that arise in respect of the inquiry that we conducted. There is nothing in the adults at risk policy about that.

We also have the issue of how those people come to light if they cannot act in their own best interests. They come to light through whistleblowing by healthcare workers who are profoundly concerned and breaching confidentiality so they can get the news out about this person who has been knocking around in various immigration removal centres for many months. When they become unmanageable they are moved on. Sometimes, Detention Action might come across them, or the Gatwick Detainees Welfare Group might try to get the news out that there is somebody here who is very ill indeed, but it is all very ad hoc and huge suffering has already occurred by the time any of those cases get to a lawyer. There is nothing in any of the current policies held by the Secretary of State to deal with that situation.

My view is that the previous policy of not detaining people with mental health conditions was there for a very good reason. When the change of policy occurred, there were no attempts to train individuals about what things mean. Hence, when and if the gatekeeper gets round to asking a clinician, "Is this person ill?", they might, for instance, get a response that they do not understand, such as that they do not have a mental disorder under the Act. That means that they cannot be detained under the Act. It does not mean that they are not ill, but the decision-maker does not know the difference.

This is just one small example of the mismatch between the policy intention of detaining people and the fiction of satisfactory management under the terms of the policy or under the AAR policy in detention. It is a horrendous problem, giving rise to massive, ongoing unlawful detention claims and no end in sight.

Stephanie Harrison: The adults at risk experience is an example of the problem in microcosm. You had litigation showing that mentally ill people were being unlawfully detained and in significant numbers being subject to Article 3 on ill treatment. That resulted in the Tavistock inquiry and the Shaw inquiry, which identified systemic failings across the board. Parliament then legislated in Section 59 that something had to be done and there had to be statutory guidance to do what the Government committed themselves to do, which was to improve the safeguards for vulnerable people so that they would not be in detention and to reduce the numbers of vulnerable people in detention.

What the Home Office actually did, in both the guidance and the policy, was to recalibrate the existing policy, which was very simple and straightforward, although not applied properly: "We should not detain those with serious mental illness, unless there are very exceptional circumstances". They recalibrated it first by removing a section of people who were otherwise protected, through a different and unlawful definition of torture, which was overturned by the High Court. They removed very

exceptional circumstances as the threshold for detaining a seriously mentally ill person. They also put additional evidential burdens on the individual to show harm.

Mary Bosworth will have explained this to you when she was here, but she did the Shaw literature review into the adverse impacts of even short period of detention on those who are mentally ill. It causes harm. The policy was predicated on that basis. All it was necessary to show was serious mental illness. It was the same with torture victims; if you fall into that category, we already know that detention is likely to cause harm. You do not need to have a medical report, which is difficult to get in detention, to show harm, but now you do under the adults at risk policy. As well as removing this high threshold of very exceptional circumstances, they recalibrated the balance very much in favour of immigration control and risk factors.

The end result is that despite being told by Parliament that the Shaw review was accepted and it was necessary to improve the safeguards, the adults at risk policy substantially undermined even the existing failed safeguards. That is a fundamental reason why it cannot be left to policy alone, because, whether by default or design, that is what happened as a result of that process. This Committee really needs to analyse carefully exactly how and why it happened.

Why did a policy that was supposed to be designed to prevent detention of vulnerable people actually sanction it? That shows you the limits of the Executive being allowed the power to formulate policy. It also shows you the limits in a context where the institutional culture does not accept constraint on this power, because it responds more effectively to internal pressure to remove people and a pretty hostile political environment against migration generally. The adults at risk policy and what happened in Shaw's subsequent review underscores why there has not been a political or institutional will to ensure that vulnerable people are not detained in the way that was intended.

Baroness Hamwee: Can I ask one specific, quick question? The concern came to me yesterday that those identified as likely victims of trafficking who are in detention are not being referred to the national referral mechanism. Have you come across that? People are nodding.

Toufique Hossain: Yes, absolutely. In fact, as I mentioned in some of the case studies I have given you, we have real concerns about the recent operation they call Elucidate. My understanding is that they go around, arrest and detain Chinese nationals, often women who are victims of gender-based violence and trafficking, and put them into detention. That is a major problem.

Baroness Hamwee: They are not linking the two bits of our system.

Stephanie Harrison: You might find, by way of explanation from the Home Office, that it sees this first and foremost as an enforcement problem. If you come to their attention through enforcement and then

you claim asylum, that is seen as you falling into a category of abusive person who should therefore be detained.

It is the general experience that trafficking victims, by their very nature, will not present themselves and say, "Here I am. I am a victim of trafficking", because they are in a controlled environment and a power situation. That is why, ironically, despite the Government taking great steps to enhance the protection for trafficking victims, because they are seen primarily through this immigration and enforcement mechanism, they are disproportionately caught up in detention.

That is what we found in the detained fast track process. In the litigation that resulted in the detained fast track being suspended, a very large number of victims or possible victims of human trafficking were caught up in that process. They were not referred to the NRM because they had not complied with the notion of bringing yourself to attention as soon as you can. That stayed with them as the justification for detention. It is a very significant problem and it is ongoing.

Amanda Weston: You have the twin ills of placing the burden on the vulnerable person to identify their vulnerability, and the culture of disbelief and suspicion that applies to them when they do. There are no external means of safeguarding the interests of those vulnerable people or identifying even who they are.

Baroness Hamwee: Thank you. I just wanted to get that in.

Chair: Can I thank you very much indeed? Across the four of you, you have presented a very compelling picture requiring reform. As David said, if there is a Bill coming forward that has sufficient breadth in it for us to bring forward amendments, we fortunately have time in the Lords as well as in the Commons to make some progress on the imbalance of power and the levels of impunity that you have set forth, on what could hardly be a more serious issue. Thank you very much indeed for your evidence.

