Written evidence submitted by Louise Finer (FPP0030)

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1. In this submission, I consider the call for evidence question "What is the Ministry of Justice's current strategy for safely and effectively managing the prison population, and how effective is it?" and specifically the announcement made by Secretary of State for Justice Alex Chalk on 3 October 2023 that the government will "enter exploratory discussions with potential partner countries in Europe to rent prison space abroad". [1]

2. On 16 October, the Secretary of State reiterated the government's intention to "bring forward legislation to enable prisoners to be held in prisons overseas - an approach taken by Belgium, Norway, and Denmark in recent years".[2] No further detail has been published about these plans specifically and so I would like to take this opportunity to raise issues that need to be considered if such a programme is to go ahead.

Learning lessons from previous schemes to rent prison space overseas

3. Reports by independent torture prevention bodies shed light on the inherent challenges of the previous transnational prison schemes that the Secretary of State cites, as well as the effect these had on the people that were subject to them. They provide a compelling evidence base for the likely challenges posed by such arrangements and so should inform any debate about the government's plans.

4. Regarding the transfer of prisoners from Belgium to the Netherlands (Tilburg prison), the Council of Europe Committee for the Prevention of Torture highlighted a range of concerns including:[3]
    - Transfers to Tilburg prison were non-voluntary and often made with little notice (para. 8);
    - Prisoners in Tilburg earned lower wages than they would have done in Belgium, in part due to the limited availability of work (para. 19);
    - Limited opportunities for education, vocational training or cultural activities, due to the refusal of Flemish authorities to provide relevant services (para. 20)
    - That for people coming to the end of long sentences, transfer to Tilburg caused disruption that could affect their future rehabilitation and life plans, and was seen as an "additional hardship" (para. 21);
    - Delays in transferring medical files including those relating to medical history and treatment, and the risks of needing to keep computerised files up to date

[1] https://www.gov.uk/government/news/foreign-prison-rental-to-ensure-public-protection
[2] https://www.gov.uk/government/speeches/the-governments-approach-to-criminal-justice
[3] Council of Europe Committee for the Prevention of Torture, *Report to the Governments of Belgium and the Netherlands on the visit to Tilburg Prison carried out by the CPT from 17-19 October 2011*, CPT/Inf(2012)19, https://rm.coe.int/1680697812

in two countries which "appreciably increase[s] the risk of incorrect care" (para. 27);
- Different approaches to treatment of health issues, leading to harmful "fluctuation" of treatments as individuals moved between the two systems (para. 28).
- Language barriers (for French-speakers) caused difficulty communicating with staff and understanding essential safety information, as well as making these individuals unable to understand decisions to apply disciplinary sanctions or their ability to appeal (paras. 34, 37);
- The location of the prison meant for some families it took several hours to get there for a visit (para. 42).

5. Regarding the arrangements by which individuals were sent from Norway to Norgerhaven prison in the Netherlands, the report of the Norwegian National Preventive Mechanism identifies the following challenges:[4]

    - 34% of those held in Norgerhaven Prison had been transferred there against their will (section 8.10);
    - Risks during transport including the routine use of bodycuffs during air transport and routine tightening of these before exiting the aircraft (section 8.4)
    - The failure to guarantee equivalent rights to healthcare, as well as access to medical records and a health care complaints procedure. (section 8.5)
    - The transfer of individuals whose extensive and sometimes complex health concerns could not be adequately supported under the transfer agreement (section 8.5.3)
    - Transfer of medical records posed issues around consent to sharing confidential information not being freely given, and the records being shared containing inadequate information (8.5.6 and 9.5)
    - Despite the "flexible solutions" for visits envisaged under the transfer agreement, few of those transferred received visits due to cost and the time it would take to visit. Furthermore, all post sent had to be routed via a Norwegian prison and so was subject to significant delays (8.6);
    - Language barriers, which affected prisoners' understanding of application and complaints processes (8.7) and particularly affected those who did not speak or had difficulty communicating in English (8.10 and 9.4.1);
    - Longer processing times for parole and transfer applications, caused by the need to establish new information systems and processes (8.8)
    - Limited education provision which meant some of those transferred were not able to access appropriate level courses (8.10 and 9.2.3).

6. The government's first public announcement of this programme promised that the facilities, regime and rehabilitation in overseas prisons must meet "British

[4] Sivilombudsmannen, *Visit Report: Norgerhaven Prison, 19-22 September 2016* https://www.sivilombudet.no/wp-content/uploads/2017/05/2016-Norgerhaven-prison-Visit-report-EN.pdf

standards", and the conditions will be "to the same standards as prisons in England and Wales". Given the catalogue of critical reports into standards in prisons in England and Wales made by HM Inspectorate of Prisons and the Independent Monitoring Boards, this is hardly a reassuring claim to make. Beyond this, the government has yet to provide any information about how the government will attend to crucial "treatment" issues (eg use of force, segregation, adjudications, healthcare) for those held in an overseas prison. Will the government require that these operate to the same policy, procedures and standards as in prisons in England and Wales? Will they train staff accordingly?

7. I urge the Justice Committee to challenge any suggestion that these precedents whereby states have transferred prisoners to another state provide justification for the government's scheme, without also considering carefully the inherent risks and challenges that have been so conclusively exposed by national and international monitoring bodies. In this respect, it is worthy of note that though the CPT did identify some positive experiences within the Belgium/Netherlands transfer scheme, these arose because there were areas that needed improving in the prisons in the sending state rather and did not provide justification for compulsory transfers.[5]

The risk of creating an accountability gap

8. As yet there is no information about the role that independent scrutiny bodies will play in overseeing these overseas arrangements. It is important to note that there is a clear expectation that UK detention monitoring bodies should play a role deriving from its international human rights obligations. The UK's ratification of the UN Optional Protocol for the Prevention of Torture (OPCAT) means it must live up to international standards for independent detention monitoring, which should be delivered through its National Preventive Mechanism (NPM). These standards are primarily issued by the UN Subcommittee on Prevention of Torture which has issued authoritative guidance for such situations, saying that where a state makes an arrangement to send detainees to a facility located in another state, it is the responsibility of the 'sending' state to ensure its NPM has the "legal and practical" capacity to visit detainees, even where the 'receiving' state has existing detention monitoring arrangements.[6]

9. The principle is clear but this will pose further practical challenges. HM Inspectorate of Prisons (HMIP) may be given a role and indeed it has for a long time inspected some immigration and military facilities overseas as well as conducting prison inspections in Overseas Territories. However there are further, crucial questions:

[5] Council of Europe Committee for the Prevention of Torture, *Report to the Governments of Belgium and the Netherlands on the visit to Tilburg Prison carried out by the CPT from 17-19 October 2011*, CPT/Inf(2012)19, para 22.

[6] Ninth Annual report of the UN Subcommittee on Prevention of Torture, 22 March 2016 (CAT/C/57/4), p.22 (paras 26-27)

- If HMIP is to inspect, will it have the same ability to visit unannounced, to move around overseas prisons unaccompanied, to access information systems and crucial records such as those relating to the use of force?
- Will inspection reports be published, to the same process and timeline? Whose responsibility will it be to act upon recommendations and how will they be held to account if they do not? How will the UK government work with the authorities in receiving states to ensure any problems identified are rectified?
- Would HMIP be able to issue Urgent Notifications should it deem this appropriate?
- Will the second "layer" of monitoring provided by the Independent Monitoring Boards in England and Wales apply?
- What, if any, role will UK regulatory bodies have in ensuring the safety of healthcare provided to those held overseas? What about health and safety regulations, fire standards?
- Who will monitor the transport arrangements for sending prisoners to overseas prisons – an area of significant risk particularly if the transfers are not conducted voluntarily – and how?
- What role will the PPO play in investigating complaints or any deaths of prisoners held overseas? Will coroners be able to discharge their duties under Article 2 of the Human Rights Act to investigate any deaths?

10. Relevant to these practical challenges is the crucial question of the statutory basis for overseas inspections and detention monitoring. HMIP's current practice is to conduct overseas inspections "by invitation" as these do not form part of its statutory functions. It should be noted that when HMIP sought to include powers to inspect military detention overseas into its legislation, to enable it to take forward one of the recommendations of the Baha Mousa inquiry, the government turned this down.[7] The government has also consistently refused to create a legislative underpinning for the NPM, despite the repeated calls to do so by UN human rights bodies, as well as by the Justice Committee.[8] Any failure to ensure there is a statutory basis for independent scrutiny of the treatment and conditions in which anyone overseas is held would surely result in a lower level of accountability and a weaker safeguard should any problems arise.

11. The long-standing resistance by successive UK governments to the extra-territorial application of its international human rights treaty obligations is also relevant. In its last review under the UN Convention Against Torture, the government again rejected the principle that this treaty does not "have extra-territorial effect".[9] OPCAT makes clear that states parties should apply its provisions to any places where

[7] NPM, Sixth Annual Report 2014-15, p.19.
[8] Justice Committee, Report of the Prison Governance inquiry, 31 October 2019, para 185. Letter from the UN Subcommittee for the Prevention of Torture to the NPM Chair, 29 January 2018 https://nationalpreventivemechanism.org.uk/document/letter-advice-from-the-spt-2018/ ; UN Subcommittee on Prevention of Torture report to the UK government, 25 May 2021 (CAT/OP/GBR/ROSP/1), paras 24-28
[9] UN Committee against Torture, *Concluding Observations on the sixth periodic report of the UK and Northern Ireland*, 7 June 2019 (CAT/C/GBR/CO/6) paras 30-31.

individuals are deprived of their liberty under the state's jurisdiction and control (Article 4). The current legal understanding of how the Human Rights Act and the European Convention on Human Rights should apply extra-territorially was deemed "troubling" and "unsatisfactory" by the government's Independent Human Rights Act Review.[10] In response, the Joint Committee on Human Rights issued a cautionary message: "Given the approach already taken in the Overseas Operations Act, it seems highly likely that any further changes envisaged by the Government would be intended to limit the extra-territorial reach of the HRA rather than to extend it."[11]

12. This key aspect of the similar, now concluded arrangement between Norway and the Netherlands has so far been overlooked. Among the many criticisms of the arrangements made by Norwegian Parliamentary Ombudsman and NPM was the damning conclusion that "inmates who are transferred to Norgerhaven Prison are not guaranteed adequate protection against torture and inhuman or degrading treatment". It risked, they said, creating a "legal vacuum" for the protection of human rights "as a result of the unclear division of responsibility between two states".[12] There is a risk that the UK government will create its own legal vacuum unless it ensures its international treaty obligations as they relate to this scheme are upheld.

13. In conclusion, I hope that the Justice Committee will be able to provide necessary scrutiny of these proposals as part of this inquiry. The question of how this scheme has been envisaged as a response to an entirely predictable crisis in the prison system has been covered amply by others. Beyond this, it is my intention in this submission to highlight the inherent risks of a transnational arrangement which will inevitably create different standards for treatment and accountability and potentially open up a legal vacuum for the protection of human rights. Unless the scheme is accompanied by strong and accountable legal safeguards, it is my view that it will risk breaching the UK's obligations to prevent ill treatment.

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[10] The Independent Human Rights Act Review, December 2021, Chapter 8, para. 5

[11] Joint Committee on Human Rights, *the Government's Independent Review of the Human Rights Act*, 8 July 2021, chapter 6

[12] Sivilombudsmannen, *Visit Report: Norgerhaven Prison, 19-22 September 2016*