Unpublished Home Office Guidance on considering MLRs under the Adults at Risk Policy

Joint Note by Duncan Lewis Solicitors and Garden Court Chambers

Following a Freedom of Information Act request and prolonged six-month internal review, the Home Office have disclosed helpful internal unpublished guidance on how the Adults at Risk in Immigration Detention (AAR) policy should be applied by its caseworkers and how they should consider Medico-Legal Reports (MLRs) when determining an individual's suitability for detention under the AAR Policy.

Our client, the Appellant in *AK (Morocco) v SSHD* (C4/2020/0676), has made an expedited application for permission to appeal to the Court of Appeal asking the Court to determine the lawfulness of the approach to the medico-legal report submitted in his case, which contradicted both the published AAR policy and the internal unpublished guidance.

In summary, the internal guidance confirms that, when assessing an MLR under the AAR policy, caseworkers should not challenge its findings unless there are '*clear mistakes or errors*' noting that they should "*not specifically challenge the doctors' clinical opinion*". The guidance also confirms that, in the absence of such clear errors in the MLR, Home Office caseworkers should not delay reviewing detention in light of the MLR and should not place reliance on conflicting assessments from an IRC healthcare department to dispute whether a detainee should be treated as a "Level 3" adult at risk.

Background

The published AAR policy sets out the criteria for "Level 3" evidence of risk of harm (the highest level) as follows: "*Professional evidence (for example from a social worker, medical practitioner or NGO) stating that the individual is at risk and that a period of detention would be likely to cause harm…*" (p13). If an immigration detainee can establish "Level 3" evidence of risk then it is much more difficult for 'immigration factors' to outweigh the very strong presumption in favour of release and justify continued detention (p17).

The AAR policy states in terms that such professional evidence should be "*afforded significant weight*" and "*should normally be accepted and any detention reviewed in light of the accepted evidence*" (p.13). The policy goes on to state: "*However, caseworkers should not usually disagree with medical evidence unless there are very strong reasons for doing so - for example, a finding by an independent tribunal that rejects the same evidence or credibility concerns arising from other sources (such as an asylum casework decision)* (p.13)."

Duncan Lewis sent a FOI request to the Home Office in September 2019 seeking any internal guidance or documents, other than the published AAR policy, which instructed caseworkers on how to approach MLRs for the purposes of reviewing suitability for detention. This request was

prompted by concerns that, in practice, the Home Office was routinely failing to treat MLR reports as amounting to Level 3 evidence despite express findings by psychiatrists that detention was causing, or was likely to cause, harm to the individual's mental health.

The internal guidance eventually disclosed in May 2020 was produced by the Home Office's 'Adults at Risk Returns Assurance Team and entitled 'Medico-Legal Reports (MLR) – Guidance and Frequently Asked Questions'. Though it contains additional detail, the internal guidance clearly reflects the published AAR policy in that MLR reports should be accepted as level 3 evidence and detention should be promptly reviewed upon receipt. This is consistent with the AAR policy's protective aim. The internal guidance has been in place since at least June 2018 but does not appear to be being applied consistently in practice.

The Internal Guidance

The circumstances under which an MLR can/should be challenged

Under the heading 'Can we challenge an MLR?' the policy states that medico-legal reports should be challenged only where there are '*clear mistakes or errors*'. The examples provided are instructive:

(i) where the report refers to incorrect personal details, suggesting that it was produced for another person;

(ii) where the report refers to facts that are obviously inconsistent, such as reference to a person's '*elderly age*' when the individual is a young adult; and

(iii) where the '*modus operandi*' of the report is not clearly set out.

The guidance also refers to circumstances where it is unclear how the assessment has been carried out (p.1) or where there are adverse credibility findings (p.3). The report makes clear that although the report may be challenged on the basis of such errors '*caseworkers should not specifically challenge the doctors' clinical opinion*'.

The steps that should be taken where a report is challenged

Where a decision is taken to challenge a report on the basis of the very limited grounds above, the guidance directs Home Office case workers to '*contact the legal representatives, highlighting the errors we have noted and asking for clarification*'. Caseworkers may only delay substantively considering the report and reviewing detention in light of its contents '*where clarification is being sought from the legal representatives*'. Caseworkers may place '*no weight*' on a report only where '*there are many mistakes/errors*' or where '*we are in a strong position to say that the report is unreliable following a response from the legal representatives*'.

The role of the IRC Healthcare Department

The guidance confirms that if caseworkers are in a position to substantively consider an MLR (i.e. there are not possible defects that need to be clarified with legal representatives) "*[they] should*

not delay doing so in order for healthcare/mental health team in the IRC to undertake a mental health assessment for that individual".

Importantly, where there are no grounds for challenging a report, the doctor's clinical opinion should be accepted and detention reviewed in light of the report's conclusions, even if there is conflicting information from IRC Healthcare:

> *What if we have conflicting evidence from the MLR and Healthcare?*
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> *In the circumstances where we are in receipt of conflicting information, for example; the content of the MLR satisfies Level 3 evidence (that detention is, or is likely to worsen symptoms/condition of the individual), and after reviewing the MLR, healthcare have responded with the information that they do not consider the individual to be suffering with any mental health conditions and have no concerns for the individual with regards to detention, we should consider the below guidance:*
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> • *Where we have agreed to place no weight on the MLR due to concerns (noted above), we can consider the evidence we have from healthcare as the most recent professional evidence and should consider the case under the Adults at Risk policy accordingly.*
>
> • *Where none of the above concerns with the MLR are present and the MLR doctor has seen and/or appropriately assessed the individual, we should regard the MLR as the most recent professional evidence and should consider the case under the Adults at Risk policy accordingly. We should remember that the Dr carrying out the MLR assessment is an expert in their field.'* (p.3)

Email Chains

The additionally disclosed emails sent to Home Office caseworkers by the Adults at Risk Returns Assurance Team, dating from June and December 2018, generally repeat the internal guidance but provide further useful information:

(i) The internal guidance was "*agreed with Detention Policy colleagues and representatives across the business*"

(ii) That in cases where MLR reports are "*diagnosing conditions related to mental health (e.g. PTSD) and which state that the detention is, or is likely to worsen the symptoms of the condition of that individual*" then "*we should be raising the Adults at Risk Level to Level 3 (as set out within the policy) and reviewing detention accordingly.*"

(iii) That it is '*good practice*' to share the MLR with IRC Healthcare for the purpose of '*assist[ing] their safeguarding provisions on release, or ongoing care if detention is maintained."*

***AK (Morocco) v SSHD* (C4/2020/0676)**

AK's application for permission for judicial review and interim relief was refused by the High Court in April 2020. He had sought his release from detention on the basis of an MLR report

he argued constituted Level 3 evidence under the AAR policy. AK has made an expedited application for permission to appeal to the Court of Appeal, arguing in particular in respect of the guidance that:

- The Home Office acted unlawfully in having issued unpublished guidance to caseworkers on the approach to MLR reports under the AAR policy. That guidance should have been published and made publicly available as the correct approach to the AAR policy and should been applied consistently by caseworkers.
- That the Home Office did not apply and/or acted inconsistently with and/or in breach of her own internal policy guidance in rejecting the Appellant's MLR report as being Level 3 evidence, and that had the unpublished guidance been made available to the High Court, the Judge should have adopted the same approach to the AAR policy as advocated for by the Appellant.

A decision on permission to appeal is awaited.

Conclusion

The internal guidance is now in the public domain and confirms how the AAR policy should be interpreted and applied. We understand that it is still applicable and should inform detention decision-making when considering MLRs under the AAR policy.

AK is represented by Lewis Kett and Emma Dawson of Duncan Lewis Solicitors, instructing Stephanie Harrison QC and Grace Capel of Garden Court Chambers.

For any further questions in respect of the internal guidance or *AK (Morocco)*, please feel free to contact Lewis Kett at lewisk@duncanlewis.com and/or Grace Capel at gracec@gclaw.co.uk

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