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Title	DETENTION SERVICE ORDER 01/2011 COMMISSIONING OF INVESTIGATIONS		
Process	To set out Detention Services' policy on the commissioning of investigations and management reviews		
Implementation Date	16 FEB 2011	Review Date	16 FEB 2013

CONTAINS MANDATORY INSTRUCTIONS

For Action

Author and Unit

Home Office staff and contractors operating in Immigration Removal Centres, Short-Term Holding Facilities and on escort

Alan Kittle, Director, Detention Services

For Information

Owner

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Processes Affected

Commissioning of management reviews and investigations

Assumptions

All staff will have sufficient knowledge of Articles 2 and 3 of the ECHR

NOTES

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Detention Services Order 01/2011

COMMISSIONING OF INVESTIGATIONS AND MANAGEMENT REVIEWS INTO INCIDENTS OCCURRING IN UK VISAS AND IMMIGRATION'S DETENTION ESTATE

Introduction

1. This Detention Services' Order (DSO) sets out our policy relating to the commissioning of investigations and management reviews into incidents which occur in the Home Office detention estate⁴ and/or while detainees are under escort⁵.
2. It sets out the differences between a management review and an independent investigation, the circumstances under which each is appropriate and our obligation to commission an investigation into certain incidents where Articles 2 and/or 3 of the European Convention on Human Rights (ECHR) may have been breached.
3. Not all alleged breaches will require independent investigation. Guidance on when such an investigation will be required is set out from paragraph 22 below.
4. When an incident occurs at a juxtaposed control, consideration of the terms of the Treaties with the country in which that control exists will be necessary in order to determine whether there is an obligation under Articles 2 or 3 to commission an investigation. There will also be jurisdictional limitations to take into account, such as an ability to compel witnesses to give evidence. Advice should be sought from the Director of Detention Services in all such cases.
5. This DSO applies to all those who work in or in relation to Home Office's detention estate or are concerned with the escorting of detainees. However, in particular, it applies to those responsible for commissioning management reviews and investigations, namely:
 - ◆ Centre Managers, Contract Directors, Operations Directors, and Managing Directors of the estate and escorting services; and
 - ◆ The Director and Deputy Director (Head of Operations) for Detention Services or others given delegated authority by the Director to do so. All references to

⁴ *The Home Office's detention estate is comprised of residential and non-residential short-term holding facilities and Immigration Removal Centres which are operated purely on behalf of the Home Office to hold persons detained in accordance with immigration legislation. It does not include other places of detention (e.g. prisons or police cells) which may be commissioned by the Home Office to hold detainees.*

⁵ *Escorting services are those procured by the Home Office to move detainees both within the UK and at juxtaposed controls and overseas for the purposes of removal.*

“Director of Detention Services” shall also include Deputy Director (Head of Operations) for Detention Services or others given delegated authority by the Director to do so.

Articles 2 and 3 of European Convention on Human Rights (ECHR)

6. Article 2 of the ECHR states: *“Everyone’s right to life shall be protected by law.”* We therefore have an obligation both to ensure detainees’ lives are not taken whilst in our care, but also to take reasonable steps to ensure their lives are protected. Article 2 will usually be engaged where there has been a death in the detention estate or where there has been a ‘near death’ incident which has left the individual with serious long term injuries.
7. Article 3 of the ECHR states: *“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”*. As with Article 2, we must ensure detainees are not deliberately subjected to such treatment while in our care, but also take reasonable steps to ensure they are not inadvertently subjected to such treatment.
8. When considering whether or not Article 3 is engaged, the circumstances of each case must be considered carefully to decide whether the treatment in question has reached the level of severity required for there to be a breach of Article 3.
9. For example, the use of restraint may be justified to control a refractory detainee, but the same restraint may be considered degrading if used on a compliant detainee, and may therefore arguably engage Article 3.
10. The detainee’s personal circumstances (e.g. their personal medical condition) are also relevant and for that reason, staff should remain alert to the conditions of detention and the effects they are having on them, particularly where circumstances arise in which it is necessary to depart from the usual regime (e.g. during the management of an incident).
11. Both Articles 2 and 3, where engaged, impose an investigative obligation which requires the State to ensure that the incident is appropriately investigated. What constitutes an appropriate investigation will depend on all the circumstance of the case, but the investigative obligation may be met in a number of ways including judicial proceedings, or some combination of internal complaints procedures, independent investigation and/or a coroner’s inquest.

Management Reviews

12. When an incident occurs in the estate or during escort, it will be normal for us to consider the circumstances surrounding the incident in order to understand what occurred, whether there are any lessons to be learned and whether there is any evidence to suggest misconduct by individuals which requires further investigation under disciplinary proceedings.

13. For lower-level incidents, a management review is likely to be appropriate and may be commissioned by the Centre Manager, Contract Director, Operations Director or Managing Director for the estate or escorting service.
14. For more serious incidents, it will be appropriate for the Director of Detention Services, to commission the review.
15. It will be for the individual commissioning the review to determine who best should conduct it.
16. However, before a management review can be commissioned, consideration must be given as to whether the circumstances of the incident suggest that the investigative obligation under Article 2 and/or 3 has been triggered and if so, whether an independent investigation may be necessary. If one is deemed necessary this should be commissioned promptly after the need is realised and before a management review.
17. It is important to note that the Home Office's internal complaints or grievance procedures cannot be considered to be independent in order to discharge the investigative obligations under Articles 2 or 3. Neither can an internal management review, even if conducted by another Directorate (e.g. the Professional Standards Unit) be considered suitably independent for the purposes of satisfying the investigative obligations under Articles 2 or 3⁶.

Independent Investigations

Considering whether an independent investigation is necessary

18. Prompt action must be taken when it becomes known that the circumstances of an incident suggest that the investigative obligation under Article 2 and/or 3 may have been triggered. Centre Managers, Contract Directors or Managing Directors for the estate have a responsibility to discuss the particular facts of the case with the Director of Detention Services.
19. Where a Home Office commissioned independent investigation is required, responsibility will fall to the Director of Detention Services to commission one.
20. An independent investigation is not necessary every time a detainee (or his or her legal representative) alleges that their Articles 2 or 3 rights have been breached.
21. In deciding whether or not to commission an independent investigation, the Director of Detention Services shall have regard to the paragraphs 22 – 36 of this DSO.

⁶ PSU remains an appropriate investigative source in other case types and matters should be referred to them in the usual way unless the director of detention services has decided that an independent investigation is necessary in order to satisfy the requirements of Article 2 or 3.

Article 2 of the ECHR

22. Where there has been a death arising from suicide or self harm or homicide there will often be an inquest and an investigation by the Prisons and Probation Ombudsman into that death which satisfies the investigative requirement of Article 2. If there is not such an inquest or investigation the Home Office will **normally** commission an independent investigation.

23. Where there has been a near death incident which:

- i. posed a real and immediate threat to the life of the individual involved, such as a suicide attempt that came close to success;
- ii. has left the individual involved with serious long-term injuries; and
- iii. the long-term injuries sustained have significantly affected the ability of the individual involved to know, investigate, assess and/or take action in relation to the circumstances of the incident

it suggests that the investigative obligation under Article 2 may have been triggered so the Home Office will consider commissioning an independent investigation into the incident.

24. There will be exceptional circumstances in which neither paragraph 22 or 23 apply but in which Article 2 is engaged and the circumstances mean that we will commission an independent investigation into the circumstances of the particular incident.

25. All cases in which there has been a death or near death of a detainee must be reported to the Director of Detention Services without delay. All deaths will be referred to the Prisons and Probation Ombudsman for investigation. In the case where there has been a near death the Director of Detention Services will decide whether to commission an investigation and in reaching that decision he or she shall have regard to the following:

- iv. Whether the criteria set out in either paragraphs 22 or 23 have been met;
- v. The circumstance of the incident and the available evidence;
- vi. The severity of the individual's injuries and the likelihood of the longevity of the impact of those injuries;
- vii. The availability of alternative proceedings by which the matter may be adjudicated such as civil, criminal or administrative proceedings in the courts or by reference by the individual to the Prison and Probation Ombudsman (the PPO) or any combination of the above;

- viii. The ability of the individual to provide instructions to a legal representative or to initiate and participate in an investigation by the PPO in light of the injuries resulting from the incident;
- ix. Any other relevant matter.

26. Where the individual is able to provide instructions to a legal representative / refer the matter to the PPO and judicial proceedings and/or an investigation by the PPO will provide an effective remedy given all of the other factors taken into account, a Home Office commissioned independent investigation will not normally be required.

Article 3 of the ECHR

27. In deciding whether or not an independent investigation is necessary in a case where there are Article 3 issues, the Director of Detention Services must consider two issues:

- i. Whether there is credible evidence to suggest that there has been an arguable breach; **and**
- ii. If so, whether the individual can secure adequate investigation, retribution and redress without the need for a Home Office commissioned independent investigation.

Has there been an arguable breach?

28. Whilst the threshold to demonstrate there has been a breach of Article 3 is high, the requirement to trigger the need for an effective remedy is only that there is sufficient evidence that there has been an **arguable** breach (the first stage of the test set out above). In order to demonstrate an *arguable breach*, the treatment about which the detainee (or his/her representative) is complaining must be of the minimum level of severity to engage Article 3 and in the context of detention must go beyond the restrictions inherent in being detained.

29. The circumstances of each case will differ and the Director of Detention Services must consider the totality of evidence available to demonstrate whether or not an arguable breach has been established. When considering whether treatment was degrading the Director of Detention Services must consider whether its objective was to humiliate or to debase the detainee. For example, where the only evidence of an incident is one person's word against another it is likely that the person alleging that the breach occurred has an arguable case. However, if the incident was captured on CCTV and this shows that the person alleging the breach was not telling the truth it is likely to be reasonable to conclude that there has not been an arguable breach. In such circumstances the Home Office will not need to consider the second question (dealt with in paragraphs 30 - 36).

Is an independent investigation necessary?

30. If it is concluded that there has been an arguable breach, the Director of Detention Services must consider whether or not an independent investigation is necessary.

31. If there is an arguable breach, it is necessary that the individual concerned has a suitable remedy available to them but that remedy does not necessarily need to be an independent investigation and could be satisfied by the availability of civil or criminal proceedings. The other available remedies should therefore be considered and if considered adequate by the Director of Detention Services, an independent investigation will not be required.

32. The Director of Detention Services should take the following points into account when reaching such a decision:

- Allegations of breaches occurring in detention are less likely to be satisfied by civil and criminal proceedings but that does not mean that in every case they cannot be so satisfied;
- An independent investigation is more likely to be necessary where it is difficult or not possible to identify those who are alleged to have breached the detainee's rights;
- Allegations of systematic ill treatment are also more likely to require an independent investigation.

33. The Director or Detention Services should also take into account:

- The detainee's account where available;
- Statements from staff who were present / have knowledge relevant to the circumstances surrounding the incident;
- Statements from anyone else present including other detainees, members of the IMB, etc.
- Any CCTV or other video footage which is available;
- Relevant medical records.

34. So, for example, the scenario above in which a detainee alleges assault by a single DCO is likely to be suitably dealt with in civil proceedings before the county court. Given the availability of this remedy the Home Office would not commission an independent investigation.

35. If judicial proceedings alone cannot satisfy the investigative obligation the Director of Detention Services should also consider whether the availability of the PPO to conduct an investigation into a complaint at the individual's request or a combination of the PPO and judicial proceedings satisfy the investigative obligation. The factors

set out at paragraph 33 will be relevant to this decision too. The PPO is deemed to be an independent investigator for the purposes of Article 3.

36. In the majority of cases the availability of the PPO to conduct an investigation coupled with the availability of judicial proceedings will satisfy the investigative obligation of Article 3. The Home Office will only commission an independent investigation in the most serious of cases where the Director of Detention Services considers the issues to be so serious as to warrant another type of investigation.

Commissioning an independent investigation

37. This section deals with commissioning an independent investigation where it needs to comply with Articles 2 or 3 of the ECHR.

38. The purpose of the investigation is to establish:

- The full facts
- Whether there is any evidence of wrong-doing by staff or detainees
- Any lessons to be learned for the future.

39. It is important therefore that the investigation:

- Is commissioned quickly;
- Is conducted by an investigator who is independent;
- Is conducted in a transparent manner;
- Makes its report public;
- Enables participation of the individual concerned or, where that person is deceased, their family.

40. Former employees of the Home Office, Ministry of Justice or those who have previously had links with our contractors may not be sufficiently independent and the circumstances of such individuals should be carefully considered so that the Director of Detention Services is objectively satisfied of their independence before asking them to begin an investigation.

41. It is also important that he or she has relevant knowledge and experience in order to ensure the investigation is objective and detailed.

42. Independent investigations commissioned to comply with the investigative obligation under Articles 2 and/or 3 of the European Convention on Human Rights (ECHR) must be made public. This will normally involve publication on the Home Office's website. In most circumstances, publication of the investigation report itself will be sufficient, but in some circumstances, a public hearing of some kind may be required.
43. While it is important that the investigation is commissioned quickly, it will be a matter for the investigator to decide the rate at which the investigation proceeds, in particular where either a police investigation or coroner's inquest takes precedence.

Collation of Evidence

44. It is imperative that staff keep careful records during an incident.
45. Records not only include written reports, but also include things like CCTV or other hand-held video footage, contemporaneous notes and logs.
46. Not only will this evidence assist with a decision whether or not an independent investigation is necessary, but more importantly as evidence itself for an investigation.
47. Where it is not possible to complete written reports during an incident, it is important that they are written up as soon as possible afterwards whilst events are still fresh in the mind of the officer.
48. Where more than one officer is involved in an incident, they should write their reports independently and without conferring as the value of statements can be reduced if officers have had an opportunity to discuss what occurred before making them.
49. It is preferable to hold any debrief concerning an incident after the completion of reports. However, where it is essential to hold an immediate debrief, managers should be very clear from the outset that officers are not to discuss events with one another whilst incident reports and statements are being made. The debrief itself should be neutral and kept to a minimum, for example to establish whether any officer has been injured. Even then, details of how the officer became injured should not be discussed in front of other officers unless in the interests of the officer's health.
50. Such debriefs should as a minimum be recorded by a note-taker as to the date, time and location of the meeting, who attended and what was said and by whom. It should ideally be videoed as well.