



## **UN Convention on the rights of persons with disabilities – Review of immigration reservation**

### ***Submission from NAT (National AIDS Trust)***

NAT welcomes the opportunity to make a submission to the UK Border Agency review of the immigration reservation to the United Nations Convention on the Rights of Persons with Disabilities.

NAT is the UK's HIV policy and campaigning charity. We provide fresh thinking, expert advice and practical resources. NAT has worked with the Home Office and UKBA on key migration issues over the past several years, most notably around the dispersal, detention and removal of asylum seekers living with HIV.

HIV is a disability, in line with the definition provided by the Convention, and in the UK is always recognised as such from the point of diagnosis.<sup>1</sup> HIV disproportionately affects migrant and refugee populations in the UK, many of whom are from high prevalence areas, who also face the greatest challenges in accessing essential treatment and care.

The current immigration reservation to the Convention does not only directly affect the applicability of Article 18, but the whole of the Convention as it relates to “*entry into, stay in and departure of the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, as it deems necessary from time to time*”.

NAT urges the Government to remove the reservation, as it limits the ability of migrants with HIV to access their rights as disabled people to health, an adequate standard of living and social protection, and freedom from inhuman or degrading treatment.

We also urge the Government to reconsider the framework within which the review of the immigration reservation is taking place, which appears to prioritise aspects of domestic law, over the fundamental rights outlined in the Convention.

We would welcome the opportunity to discuss the review or any of the issues raised in our submission.

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<sup>1</sup> Equality Act 2010.

## Comments on the immigration reservation to the Convention

1. **The immigration reservation on the UN Convention on the Rights of Persons with Disabilities should be removed.**
2. The reservation is opposed by The Equality and Human Rights Commission (EHRC), the Scottish Human Rights Commission and the Equality Commission for Northern Ireland and the Northern Ireland. The EHRC “do not believe the proposed reservation is necessary or proportionate based on the rationale provided”.
3. While the reservation stands, UK immigration laws may conflict with even the most basic protections outlined in the Convention, including rights to health, food, shelter, privacy and liberty, and freedom from cruel, inhuman or degrading treatment. Furthermore, these laws may have a disproportionately and unjustifiably adverse affect on migrants with a disability (as opposed to those without a disability).
4. **There is evidence that these Convention rights are not always respected and promoted in relation to those subject to legislation relating to entry into, stay in and departure from the UK, and those who under UK law are not entitled to enter and remain in the UK. Removing the reservation is essential to ensuring that the human rights of disabled people are considered in all aspects of the asylum and immigration systems. NAT would like to draw particular attention to ongoing practices which conflict with articles 25, 28 and 15 of the Convention.**

### ***Article 25- Right to health***

5. Regulations obliging NHS trusts to charge certain migrants for essential HIV treatment, and current practice in the treatment of HIV positive detainees are in breach of Article 25, the right to health:

*States Parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.*

6. At present, HIV is singled out in NHS charging regulations as the only sexually transmitted infection or infectious disease where treatment is chargeable. This means that some migrants (for example, certain visa holders and refused asylum seekers) will be billed for thousands of pounds for accessing life-saving medication while in the UK. This is in effect discrimination on the basis of disability.
7. While HIV treatment, as an ‘immediately necessary’ treatment, is never withheld on the basis of ability to pay, the knowledge that huge costs are associated with treatment is a barrier to access for certain migrants with HIV, and therefore an effective barrier to their right to health.
8. NAT is also concerned that Article 25 is not always upheld in relation to immigration detainees. Despite working with the British HIV Association (BHIVA) to produce best-practice advice for immigration removal centre (IRC)

healthcare staff,<sup>2</sup> we are aware there are still instances of serious failures in clinical care within the UKBA detention estate. The recent report from Medical Justice, *Detained and Denied*, highlighted 35 individual cases of failures in the treatment and care of HIV positive detainees.<sup>3,4</sup>

**9. The reservation needs to be removed in order to provide a stronger legal framework to uphold the rights of migrants with disabilities, including HIV, to the highest attainable standards of health.**

**Article 28- Right to an adequate standard of living and social protection**

10. Current policies related to the treatment of people living with HIV who are refused asylum seekers, visa overstayers and undocumented migrants do not respect their right to an adequate standard of living and social protection, outlined in Article 28:

*State parties recognise the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability.*

11. This right entitles disabled people to protection from poverty, not limited to provision of only the most basic entitlements – there must be continuous improvement. The immigration reservation to the Convention has allowed the Article 28 rights of migrants living with HIV to be consistently overlooked in the provision of state support against destitution.
12. There is ample evidence that the current system of support for refused asylum seekers is insufficient to prevent deterioration of their health and wellbeing.<sup>5 6 7 8</sup> Section 4 support is inadequate both in the amount of support given (£35 per week) and the method of delivery (the pre-paid Azure card, which means recipients have absolutely no access to cash). Moreover, it is available to only a small proportion of unsuccessful applicants.

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<sup>2</sup> BHIVA and NAT. 2009. *Detention, removal and people living with HIV*. <http://www.nat.org.uk/Media%20library/Files/Policy/Poverty%20and%20Social%20Disadvantage/NAT%20and%20BHIVA%20Booklet%20on%20HIV%20and%20Removal%20Centres%20%28June%202009%29%20EMAIL-1.pdf>

<sup>3</sup> Burnett, J, Fessahaye, E and Stopes A. 2011. *Detained and Denied: the clinical care of immigration detainees living with HIV*. Medical Justice.

<sup>4</sup> NAT. 2007. *Immigration Removal Centres – Results of a survey of healthcare managers*. <http://www.nat.org.uk/Media%20library/Files/PDF%20documents/Immigration-Removal-Centre-Discussion-Paper-%28May-2007%29-FINAL.pdf>

<sup>5</sup> Asylum Support Partnership (ASP). 2010. *Your inflexible friend: The cost of living without cash*. <http://www.refugeecouncil.org.uk/policy/position/2010/azurepaymentcard.htm>

<sup>6</sup> ASP. 2010. Parliamentary briefing on the Azure Payment Card and the need for cash support for refused asylum seekers. November 2010. [http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/parliamentary\\_briefings/1011\\_Azure%20card%20briefing.pdf](http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/parliamentary_briefings/1011_Azure%20card%20briefing.pdf)

<sup>7</sup> Citizens for Sanctuary. 2010. *This system is breaking my spirit: A Glasgow citizen monitoring of the Azure payment card*. [www.citizensforsanctuary.org.uk](http://www.citizensforsanctuary.org.uk)

<sup>8</sup> Mulvey, S. 2009. *Even among asylum seekers we are the lowest- Life on Section 4 support in Glasgow*. Scottish Refugee Council. [www.scottishrefugeecouncil.org.uk](http://www.scottishrefugeecouncil.org.uk)

13. There is a similarly significant body of evidence about the degree of destitution among refused asylum seekers who are not entitled to Section 4 or Section 95 support, and among undocumented migrants more generally.<sup>9 10 11 12</sup>
14. Research by NAT has shown specifically the impact of destitution on migrants living with HIV.<sup>13</sup> Between 2006 and 2009 one quarter of applications to the Hardship Fund, a charitable fund which provides emergency cash support to people living with HIV who are living in extreme poverty, were on behalf of asylum seekers. Their poverty seriously affected their ability to manage their health, as they were unable to access food, to travel to hospital appointments or to heat their home. The Hardship Fund paid for essentials such as bus fares, basic groceries and winter clothing for asylum seekers.
15. This research also clearly illustrated how the poor quality accommodation provided to asylum seekers affected the health of people living with HIV, which made it more difficult to manage their treatment needs and left them more vulnerable to opportunistic infections and illnesses.<sup>14</sup>
16. NAT is also very aware of inadequacies in the living conditions of people living with HIV who are accommodated in immigration detention.<sup>15</sup> This includes exposure to damp and unhygienic conditions, which places their health at risk. People with HIV who live in shared asylum housing also face breaches of confidentiality related to their HIV status, which can lead to harassment from other residents.
17. These identified areas of non-conformity of Article 28 of the Convention represent breaches of the fundamental rights of migrants with HIV. **While it stands, the immigration reservation is a barrier to people living with HIV claiming their right to food, clothing, shelter and adequate living conditions.**

**Article 15- Freedom from torture or cruel, inhuman or degrading treatment or punishment**

18. NAT also questions whether current UK immigration practices always uphold Article 15, in particular, freedom from inhuman and degrading treatment:

*States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.*

<sup>9</sup> Crawley, H., Hemmings J. and Price, N. 2011. *Coping with Destitution: Survival and livelihood strategies of refused asylum seekers living in the UK*. Centre for Migration Policy Research (CMPR), Swansea University. Oxfam Research Report February 2011.

<sup>10</sup> Lewis, H. 2009. *Still destitute: a worsening problem for refused asylum seekers*. Joseph Rowntree Charitable Trust. <http://www.jrct.org.uk/>

<sup>11</sup> Smart, K. 2009. *Second destitution tally*. Asylum Support Partnership

<sup>12</sup> British Red Cross. 2010. *Not gone, but forgotten*. [www.redcross.org.uk](http://www.redcross.org.uk)

<sup>13</sup> NAT and THT. 2010. *Poverty and HIV: 2006-2009*.

<sup>14</sup> See also NAT. 2009. *Housing and HIV*.

<http://www.nat.org.uk/Media%20library/Files/Policy/2009/Housing%20and%20HIV%20update-d-1.pdf>

<sup>15</sup> JCHR. 2007. *The treatment of asylum seekers*. Tenth report of session 2006-07.

In line with the EHRC guide to the Convention, we understand inhuman treatment to mean “treatment which causes severe mental or physical harm”, and degrading treatment to mean “treatment that is grossly humiliating and undignified”.<sup>16</sup>

19. Many of the issues that have been raised in relation to Articles 25 and 28 are also relevant to Article 15. Failure to provide sufficient financial support and accommodation to destitute asylum seekers and migrants who do not have any legal means of supporting themselves, and are reliant upon the state, is degrading. In addition, the experience of being trapped in such severe poverty has a clear impact on the physical and mental health of people living with HIV – as such it is can also be considered inhuman treatment of disabled people.
20. Likewise, the failures in healthcare in immigration detention highlighted above could be considered inhuman treatment. Medical Justice’s report identified 21 instances of HIV treatment interruption, which can lead to deterioration of the patient’s health as well as the development of drug resistance.<sup>17</sup> Development of drug resistance while in an IRC is particularly serious if the detainee is going to be removed and repatriated, as destination countries for HIV positive asylum seekers often have fewer treatment options than in the UK. Their health is therefore seriously compromised simply because of their treatment while in the custody of the state.
21. **It is clear that people living with HIV who are subject to immigration laws are not always free from inhuman or degrading treatment in the UK. The removal of the reservation is an essential first step to addressing this breach of their human rights.**

## Comments on the UKBA review of the reservation

22. **NAT is very concerned by the list of ‘considerations’ identified by UKBA as the guiding principles for this review.**
23. The first is the need to consider how the decision to retain or remove the reservation would align with paragraph 16, Schedule 3 of the Equality Act 2010, which makes decisions around entry clearance and stay in the UK exempt from protections on the basis of disability.
24. There should be no question of retaining the reservation in order to retain the Equality Act exemption. This would make a mockery of the UK’s commitment to the Convention and to international law generally, which should inform the direction of domestic law – not the other way around.
25. The consultation document also notes that the Government wishes to continue to have the option of “the introduction of a wider policy of health screening for those seeking leave to enter or remain in the UK, if the Government were to decide that should be necessary at some future point, including for the protection of public health.” We are not convinced that

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<sup>16</sup> EHRC. 2010. *The United Nations Convention of the Rights of People with Disabilities – What does it mean for you?* [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

<sup>17</sup> Burnett, J, Fessahaye, E and Stopes A. 2011. *Detained and Denied: the clinical care of immigration detainees living with HIV*. Medical Justice.

emergency measures to address serious threats of infectious disease have any relevance to the protections afforded under Article 18 of the Convention. We are sure, however, that discriminating against the entry or residence of a migrant simply because they have a disability is an unacceptable denial of human rights. The Government's current reservation on this point simply permits disability discrimination against a certain group (migrants) – it is unacceptable and should end at once.

26. We are particularly concerned that failure to uphold Article 18 could lead to introduction of entry and residence restrictions based on HIV status. Such a move would be contrary to UK practice to date and to developments worldwide, where immigration restrictions based on HIV status are increasingly challenged and removed.<sup>18</sup> NAT asks for assurance that this will not include compulsory testing for HIV, or immigration restrictions based on HIV positive status.
27. With respect to the use of the Optional Protocol, we urge that the right of disabled migrants to make a complaint about a violation of the Convention is respected. To consider retaining the reservation simply because of the possibility that immigration decisions may be challenged at the UN Disability Committee is disproportionate and undermines the UK's commitment to the Convention as a whole.
28. Finally, comments about how the review of the immigration reservation will consider the Government's future plans for review of access to the NHS by foreign nationals is further illustration of how the current reservation allows the UK Government to make decisions which are in violation of the Convention. This is both in terms of specific articles and also the broader principle that the rights outlined by the Convention should form the basis for all domestic law which affects disabled people.
29. **The Government's arguments fail to address the fundamental questions- do the cited domestic provisions unfairly discriminate against disabled people, breach their human rights or undermine their dignity? It is perverse, and indeed irrelevant, to argue against a right simply because domestic law would need to change, were it ratified.**
30. **In reviewing the immigration reservation, the Government must not decide to retain the reservation simply because domestic law would need to be changed so that it also upholds the rights of disabled migrants. This is contrary to the principles of the Convention, and undermines the UK's commitment to it.**

## **Comments on the Equality Impact Assessment (EIA)**

31. NAT recommends that UKBA consider in the EIA the issues raised and sources cited in this submission in relation to NHS charging, healthcare in the asylum system, and destitution among migrants living with HIV, all of which evidence of the disproportionate impact the current immigration reservation has on disabled migrants.

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<sup>18</sup> See for example, the case of *Kiyutin v Russia* in the European Court of Human Rights (10 March 2011); and the lifting of the HIV-related travel ban from the United States in 2010.