Locked Up in Limbo

Immigrants with HIV go directly to jail -- with no set sentence or even a criminal charge.

September 1, 1999 By Alisa Solomon

Memorial day is approaching and Ralph Hesselbach is beginning to get antsy. Such military commemorations always bring back his days as an army scout in Vietnam, images he'd rather not revisit. The Fourth of July is worse.

"I can't even go out of the house then because of the firecrackers," says Hesselbach, who was disabled by a wartime explosion that left such severe burns on his body that he had to be hospitalized for six months. Last year the government offered Hesselbach a bizarre reward for his sacrifice: At 5:30 one August morning, officers showed up at his Harlem apartment with guns drawn and announced that they were deporting him to Germany for his past drug convictions. Hesselbach had been born there in 1950 to a Bavarian woman and an American GI. His family moved legally to New York when he was 11; he enlisted at 17. "I assumed I was an American citizen because I'd served in the war," says Hesselbach, rolling his steely gray eyes to the ceiling as if he still can't believe the absurdity of his arrest. "I figured we'd go down to the office, see a magistrate, and it would all be straightened out in a couple of hours. So when they asked me whether I wanted to bring my medication with me, I said no. I thought I'd be home before noon."

Instead, the Immigration and Naturalization Service (INS) put Hesselbach in handcuffs and drove him five hours away to Berks County Prison in Pennsylvania. Hesselbach had fallen down the rabbit hole of U.S. immigration law and landed in the looking-glass world of INS detention.

The INS has the power to detain immigrants indefinitely while it slowly pursues deportation proceedings against them. Some detainees were caught either entering the country illegally or overstaying their visas. Others came to the United States legally but committed a crime on the INS's long list of deportable offenses. The INS calls the latter "criminal aliens." The agency has been cracking down on all three groups, especially since 1996, when Congress passed severe new immigration restrictions. One particularly harsh provision allows the INS to reach back retroactively, so countless legal immigrants who, like Hesselbach, made mistakes years ago and served their time have suddenly found the INS pounding on their doors.

The government offers two reasons for detaining such immigrants: to protect society and to contain "flight risks," those they regard as unlikely to show up for hearings. Intended as a short-term measure, detention often drags on for months or even years as cases crawl through the system's massive backlog. But holding onto the fiction that the agency does not keep anyone for

long, the INS has not sufficiently upgraded its facilities.

As for health care during these unpredictable stays, INS spokesperson Russ Bergeron says, “Anyone in INS custody has a right to appropriate, professional medical treatment, and we take that responsibility very seriously.” And the INS does look good on paper, spelling out everything from sick call schedules to translation assistance. Yet detainees with HIV say that promise is far from fulfilled.

While regular prison inmates have a handful of protections, these are mostly out of reach for those in the grip of the INS. As “administrative detainees,” not inmates, court orders requiring this or that state prison system to provide decent HIV care or space for exercise just don’t apply. According to Judy Rabinovitz, an attorney with the Immigrant Rights Project of the American Civil Liberties Union, it’s tricky for immigrant detainees to bring claims of “cruel and unusual punishment” in order to improve their conditions: They first have to prove they’ve been “punished” at all.

What’s more, though criminal defendants are entitled to court-appointed trial lawyers, INS detainees have no such right; thousands languish without assistance. And there are no sentences for INS detainees. They must live with the stress of not knowing when, if ever, they might return to their lives. Some never do: When the INS wins deportation cases, it simply drops detainees in countries they may have left decades before -- places where HIV care may barely exist.

For two weeks, Hesselbach endured such limbo. Finally an immigration judge lowered his bond from $15,000 to $1,500; his brother posted it and Hesselbach was released. But the desolate days in detention had taken their toll. Hesselbach’s viral load, which had been undetectable, leapt to 13,000, and his CD4 cell count dropped from 370 to 260. “I don’t think I could have made it much longer,” he says.

Immigrants in deportation proceedings are the fastest-growing prison population in America’s incarceration boom, tripling to 16,400 (more than three quarters of them men) since 1994. The swelling numbers date back to 1996 when, in an effort to get tough on both immigration and drugs, the Gingrich-led Congress expanded the list of deportable offenses and then mandated detention for anyone deemed deportable. President Clinton signed the Immigration Reform Act without protest. One result is that the INS has thrown many more immigrants with HIV into detention, and judges have far less discretion to grant them release on humanitarian grounds. The new law cornered PWAs in another way, too. It specifically barred immigrants with HIV from becoming permanent residents -- even as parallel legislation tied access to public health services to permanent residency, or even citizenship.

Says New York Rep. Jerrold Nadler (D), a longtime critic of U.S. immigration policy and INS procedures, “It seems that the operating principle of the INS is to be as mean and vicious as possible, and the laws are insane. Yet I don’t think there’s any hope that this Congress will overturn them.”

For Hesselbach, being out of Berks does not mean he is out of the woods. The INS is now allowed

to boot out of the country any noncitizen who has even a few misdemeanor convictions. Hesselbach has 19, all minor offenses, and all directly related to his years as an addict: possession of drug paraphernalia, for example, or small amounts of heroin. Never mind that he had served out all the sentences for those crimes, had successfully completed a drug treatment program and was working as an AIDS advocate in New York City. Or that Hesselbach, who never committed a violent crime, believes he became addicted as a result of his treatment with morphine for that Vietnam war injury. The INS pays no attention to such extenuating circumstances.

It is difficult to determine how many INS detainees are HIV positive -- but Gene Migliaccio, MD, who directs INS health care through the federal Public Health Service (PHS), estimates 100, at the very least, most of whom are men. Advocates and attorneys say they are seeing people with AIDS in all three types of INS facilities: “special processing centers” run by the INS, contract facilities run by private prison corporations and the countless county jails where the INS rents beds when its other facilities are overcrowded. “We get a steady stream of requests for legal services from detainees with HIV,” says Daniel Bernstein, an immigration attorney with Gay Men’s Health Crisis in New York City. “The numbers are probably higher than anyone realizes.”

According to the U.S. Bureau of Justice, the AIDS rate is more than six times higher in state and federal prisons than in the general population; it’s likely that the same figure applies to “criminal aliens” who go straight from prison to deportation proceedings. As for undocumented immigrants, who constitute the remainder of INS detainees, “There are no reliable statistics anywhere,” says Daniel Castellanos of New York City’s Proyecto PAPI, which does prevention work among Latino gay men. “But if you look at the zip codes of the men on our mailing list, you see definite, huge clusters in immigrant neighborhoods.” And, according to Hank Flacks, a social worker at the Immigrants with HIV Program at St. Vincent’s Hospital in New York City, detainees with HIV may be experiencing severe illness. Often, he explains, immigrants don’t seek treatment until they are very ill, perhaps anxious that a doctor would alert the INS to their presence. “It’s a throwback,” Flacks says. “Immigrants often have problems we haven’t seen in the general HIV population for a while: Kaposi’s sarcoma, pneumocystis pneumonia and candidiasis.”

Migliaccio says PHS policy is to provide standard of care to any INS detainees the agency identifies as HIV positive -- from counseling to combination drug therapy. But INS spokesperson Bergeron says he is “not aware of any specific HIV policies or field instructions” that go out to facilities. Even if there were, enforcement would be difficult. Frequently, individuals are moved from one facility to another, and their medical records are often left behind, even lost. That can be devastating for detainees with HIV, says Hussein Sadruddin, a detention attorney for the Lawyers Committee for Civil Rights Under Law of Texas, a state where the INS uses some 100 county jails for detention. “There’s a vicious cycle,” he says. “A client won’t get treated if a jail doesn’t have his medical records, and the records can take months to retrieve. When you finally do get them, the client may have been moved again.”

INS oversight is scant enough at the facilities it runs, but it’s worse at county jails, says Cheryl Little, executive director of Miami’s Florida Immigrant Advocacy Center. Though criminal inmates have some forms of redress even in these juridical backwaters, complaints from INS detainees,

explains Sadruddin, get bounced from one bureaucracy to another. “The INS says, ’Take that up with the Bureau of Prisons,’” he says. “When you do, they tell you they have no control and that you have to take it up with the INS.”

While detainees at some facilities receive their medications without incident, others complain that they don’t get their drug therapies on schedule, in proper combinations or at all. Some say that it can take days before a request to see a doctor is granted, and then the doctor may merely make a few notes or offer Tylenol. Carlos (not his real name), a 29-year-old restaurant worker who came legally to the United States from El Salvador in 1988, was picked up by the INS last year over an old shoplifting charge. He ended up at Terminal Island Detention Center in California for three months. He remembers guards confiscating scraps of food he would save from meals in order to have something to eat with his HIV medication. “They’d search me and take away everything, like they were afraid I was going to try to kill someone with a piece of bread,” he says with a laugh. “I’d take my medicine without food, and I got headaches and dizziness all the time.”

He lost weight quickly, his 5-foot, 7-inch frame becoming gangly at 120 pounds. Guards ostentatiously donned rubber gloves whenever they escorted him, in handcuffs, to see a visitor. And they sometimes put him in solitary -- supposedly for his own protection. He spent his first two weeks at Terminal Island in isolation, where, he says, “I felt like I was going crazy because I didn’t have any contact with other people or even reading material. Isolation was making my condition worse.”

Isolating detainees with HIV may not be the solution, but conditions at some facilities do threaten their health. Terminal Island experienced epidemics of measles, chicken pox and scabies in the early ’90s. Sadruddin says he has been barred from visiting detainees at county jails in Texas because of outbreaks of tuberculosis. Bergeron, of the INS, blames “undocumented immigrants,” who, he says, “don’t undergo the same health screenings that people who come through normal immigration do. Any time you’re dealing with a large number of individuals from countries where issues of health and hygiene aren’t as fully addressed as here, there’s a chance of contagious outbreak.”

Until early May, many ill detainees were sent to Krome, a notorious INS facility on the swampy outskirts of Miami. There they were housed in a special building run by the PHS. Protests by detainees, who complained of roach infestations, unwashed floors, lack of ventilation and other substandard conditions, forced the INS to shut it down for renovation. Its detainees were distributed among Krome’s general population.

Pedro Arreola-Sanchez, 44, who entered the facility a few weeks later, was dumped in a 50-bed pod with caging along the hallways. Arreola-Sanchez was in a Florida hospital last winter being treated for an HIV-related esophagal infection when he got a letter from the INS requesting his attention. He called to find out the problem, and was told to come into the office to sort things out. Once there, he was shackled and taken directly to the razor-wired compound at Krome. A farmworker from Mexico, Arreola-Sanchez had been a permanent legal resident of the United States since 1982. In 1984, he was convicted of possessing a small amount of cocaine and

sentenced to three months. He had long put that episode behind him, and he'd kept his record clean ever since. But the 1996 law made his rehabilitation moot.

"I don't get it," Arreola-Sanchez said on a sweltering May day in the office cubicle that the Florida Immigrant Advocacy Center maintains at Krome. "I never hurt anybody. I've never even been in a fight. And now they're giving me a death sentence."

It had been a month since Arreola-Sanchez was brought to Krome, and he had already shed 38 pounds. His sinewy arms hung limply at his sides; sweat ran down his sun-leathered face, though the air-conditioning was blowing at full blast. His hands trembled as he laboriously signed a form to grant his attorney access to medical documents. "I had been doing well at home," he said. "I could go to work." But in Krome, with inconsistent access to medication, herpes had erupted all over his body; the sores in his throat made it impossible to eat. Meanwhile, the other men in his pod were so noisy that Arreola-Sanchez couldn't sleep. And they smoked constantly. The ordeal left him so discombobulated that when he asked his lawyer what time it was, and she answered "five o'clock," he choked back tears of bewilderment and inquired, "In the morning or evening?" Two days later, the INS moved Arreola-Sanchez to a hospital, and his lawyer was pushing for a humanitarian release.

Such releases have been granted in some cases. Daniel Cardona, 36, a farmworker with HIV, was turned over to a hospice after a harrowing stay at Krome. Unlike Hesselbach and Arreola-Sanchez, Cardona is undocumented. He entered this country illegally some 20 years ago and worked since then in Florida, mostly picking tomatoes and oranges. He had been on dialysis for about six months in early 1998, when an employee at the public hospital treating him reported Cardona to the INS. Officers took him into custody right from the ward, shackling his wrists and ankles and depositing him at Krome. After eight weeks in the PHS-run facility, sometimes getting dialysis, sometimes not, he won parole on humanitarian grounds. By then, recalls his former attorney, Stacy Taeuber, "he had turned yellow, had a rash all over his chest and had pretty much stopped talking." Now he is living at Genesis House in Miami, and Cardona says his health has stabilized. But the INS hasn't dropped the deportation case.

The Presidential AIDS Advisory Council recommended in 1996 that the INS grant asylum or stays of deportation to people with HIV "when permitted by statute." And the United States occasionally grants HIV-based asylum, when a PWA can prove that treatment is unavailable in his or her home country. But according to Dusty Araujo, the asylum coordinator at the International Gay and Lesbian Human Rights Commission, it's almost impossible to pursue such a case once someone is in detention. "It's so hard for them to find an attorney, and so hard for them to make calls," he says. Even if they manage that, he adds, it's extremely difficult, from the inside, to amass the reams of evidence required to build a compelling case. And if an HIV positive detainee has been classified as a "criminal alien," that phrase, "permitted by statute," cuts off most avenues of relief.

But lawsuits challenging the constitutionality of statutes like the one mandating detention for "criminal aliens" are beginning to have success. A number center on detainees with HIV. The American Civil Liberties Union, for example, took up the case of Kenneth Durant early this year,

charging that his detention violated his right to due process. Born in Barbados, Durant, 41, came to the United States legally in 1984 to join his mother and siblings. In 1989 he learned that he was HIV positive. “My whole life changed,” he recalls. “I was afraid to tell my mother and I wanted to kill myself.” Depressed and isolated, he spiraled into homelessness and drug use. He was arrested for possession of a crack stem and, later, for other minor drug crimes, for which he served two years in a prison in upstate New York. Upon his release last November, the INS began deportation proceedings against him, first holding him for seven weeks in its downtown Manhattan detention center -- on the airless fourth floor of a Varick Street office building -- then farming him out to the Berks County Prison in Pennsylvania, where Ralph Hesselbach had languished before him. “You know how bad it must be here at Berks,” Durant said in March, “when I’m begging to go back to prison upstate.”

One judge ruled that Durant should not be deported because in Barbados HIV drugs are available only for pregnant women, but the INS insisted on holding him while it appealed. His strong deportation challenge and deteriorating health “made Kenny’s case very compelling in raising the question of the constitutionality of mandatory detention,” says Durant’s ACLU attorney, Christopher Meade. At the end of May, Meade got a phone call telling him Durant would be released in a matter of hours.

The release was a celebratory occasion, even though the INS has not dropped deportation proceedings against Durant. He was brought back to Varick Street for processing, and Meade waited several hours on the sidewalk in front until Durant bounded out of the building and threw his arms around the attorney, exclaiming, “It feels so good to breathe this air!” He smiled broadly, the gold trim of his front teeth glimmering in the New York City haze. “I haven’t done any drug, smoked any weed, drunk any alcohol or even smoked a cigarette since 1995,” he said. “I feel good.” Durant said he looked forward to finding work and rebuilding his life. But not before eating “a good West Indian meal.”

In letting Durant out, of course, the INS made the ACLU’s constitutional claim moot. Meade said he would have to search out new cases to use to keep chipping away at the law. Finding them, he noted with chagrin, would not be hard.

If you know someone caught in the INS system who needs support, or you want to lobby for immigration law reform, call Citizens and Immigrants for Equal Justice in Dallas, Texas, 972.279.4168. To get involved in advocacy for a more humane detention policy, call Detention Watch Network, coordinated by the Lutheran Immigrant and Refugee Service in New York City, 212.532.6350 ext. 353. Or to obtain a copy of “Immigrants and HIV: A Manual for AIDS Service Providers,” call the National Immigration Project of the National Lawyers Guild in Boston, Massachusetts, 617.227.9727.

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