



Freedom from Torture evidence submission to the Independent Chief Inspector of Borders and Immigration (ICIBI): 'Adults at Risk' in immigration detention

1. Freedom from Torture is a UK-based human rights organisation and one of the largest torture rehabilitation centres in the world. Each year we provide clinical services to more than 1,000 survivors of torture in the UK, the vast majority of whom are asylum seekers or refugees.
2. We warmly welcome that the Chief Inspector will be reporting annually on the Home Office's working of the Adults at Risk process in immigration detention. It is our experience that the Adults at Risk policy does not provide a protective framework and fails to both identify and release those unsuitable for detention.
3. The problems with identifying vulnerable individuals are not restricted to the detention system, but are recurrent in the wider Home Office, as noted in the recent ICIBI report on Vulnerable Adults, which highlighted an "absence of a consistent understanding" within the wider Home Office of defining "vulnerability" in the case of adults. Other issues identified in the report can also be found within the detention estate, including the lack of consistent and/or systematic recording of vulnerability indicators.
4. It is accepted that torture survivors and those subjected to ill-treatment are particularly vulnerable to harm in detention because independent clinical evidence shows it is profoundly damaging.^{1 2} Despite this, torture survivors are regularly detained for immigration purposes in the UK and the current safeguards fail to provide them with adequate protection. Between 1 January 2017 and 31 December 2018, Freedom from Torture received over 170 referrals from people who disclosed torture and were being held in immigration detention.
5. Given the broad statutory powers to detain people, much is left to administrative guidance and thereon Home Office decision makers' discretion. The number of unlawful detention cases (£21m in compensation claims between 2012 and 2017)³ make clear that public administration is not working effectively because poor decisions are routinely being made with Home Office staff using their powers inappropriately, and at times, unlawfully.⁴ Such decisions relate to both the decision to detain and decisions to continue detention.⁵ As noted by the Joint Committee on Human Rights (JCHR), there is a

¹ 'Literature from across all the different bodies of work and jurisdictions consistently finds evidence of a negative impact of detention on the mental health of detainees' - Bosworth M., Appendix 5: The Mental Health Literature Survey Sub-Review, *Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office*, January 2016

² von Werthern M, Robjant K, Chui Z, Schon R, Ottisova L, Mason C, Katona C, 'The impact of immigration detention on mental health: a systematic review', *BMC Psychiatry*, 2018 Dec 6;18(1):382. doi: 10.1186/s12888-018-1945-y.

³ [https://www.parliament.uk/documents/commons-committees/home-affairs/Correspondence-17-19/180625 Permanent Secretary Immigration%20Enforcement.pdf](https://www.parliament.uk/documents/commons-committees/home-affairs/Correspondence-17-19/180625%20Permanent%20Secretary%20Immigration%20Enforcement.pdf) and <https://www.theguardian.com/uk-news/2018/jun/28/wrongful-detention-cost-21m-as-immigration-staff-chased-bonuses>

⁴ Immigration cases accounts for 80% of judicial review claims. See: Robert Thomas, 'Immigration Judicial Reviews: Resources, Caseload, and 'System-manageability efficiency' *Judicial Review*, 21, no.3 (2016), 209-220.

⁵ The Joint Committee for Human Rights (JCHR) recently found that Home Office staff took an incorrect approach to detention, using their powers unlawfully and inappropriately. The JCHR also found that detention powers were used even though it was not necessary or proportionate. House of Commons, *Joint Committee on Human Rights, Windrush generation Detention*, Sixth Report of Session 2017–19.

lack of rigour in and scrutiny of detention decisions. As a result, we support their recommendation that the decisions to detain and continue detention should be made independently.⁶

6. Furthermore, in recent years, there have been six cases where the UK courts have found detention and the conditions of detention amounted to ‘inhuman and degrading treatment’ in breach of Article 3 of the European Court of Human Rights.⁷

Adults at Risk:

7. In September 2016, the Home Office introduced the Adults at Risk (AaR) policy. Far from increasing protection for vulnerable detainees, the new policy increases the risk of harm by raising the evidential bar required to prove vulnerability (for example, by now having to show that detention will cause harm), whilst allowing for greater weight to be given to often vague ‘immigration factors’.
8. Whereas the previous policy⁸ had a presumption not to detain except in ‘very exceptional circumstances’, the Adults at Risk policy has raised the bar by a) introducing three levels of evidentiary burden⁹ and b) introducing a range of ‘immigration factors’ against which a decision not to detain is balanced.
9. The new policy also introduces a requirement to present specific evidence that detention is likely to cause harm in order to reach Level 3 and for release to be seriously considered. This evidence is extremely hard to come by *before* harm has occurred, with the effect that survivors of torture and other vulnerable persons are still routed in to detention. It is also extremely hard to come by such evidence once in detention, despite the likelihood that it will occur, given poor resourcing of mental health teams and incomplete Rule 35 reports (see below).
10. It is not surprising therefore, that of the 1,189 people designated ‘at risk’ in detention on 4 February 2018, only 11 people were assigned Level 3.^{10 11} Torture survivors are at risk of harm from continued detention,¹² so should not have to prove this in order to be considered for release.
11. The Adults at Risk policy has also weakened the protection offered by introducing a much wider range of ‘immigration factors’, including, for example, a failure to comply with Assisted Voluntary Return. This list very significantly lowers the threshold below ‘exceptional circumstances’¹³ even for Level 3 evidence, making it even harder for detainees to secure release.¹⁴
12. Freedom from Torture recently submitted two Freedom of Information requests. The results show that between 1 September 2017 and 1 September 2018, the number of instances of individuals being identified as an Adult at Risk were: 4,786 at Level 1; 6,300 at Level 2; and 907 at Level 3. During the same time period, the number of decisions to release individuals from detention due to being identified as an

⁶ Joint Committee on Human Rights, *Immigration detention: Sixteenth Report of the Session 2017-2019*, 7 February 2019

⁷ Medical Justice, *Medical Justice’s submission to the Joint Committee on Human Rights*, September 2018

⁸ Section 55.10 of the Enforcement Instructions and Guidance (EIG)

⁹ Level 1: self-declaration. Level 2: professional evidence (e.g. from a social worker, medical practitioner or NGO), including Rule 35 reports. Level 3: professional evidence stating that the individual is at risk and that a period of detention would be likely to cause harm.

¹⁰ Shaw, *Welfare in detention of vulnerable persons review: progress report*, para 2.117, July 2018

¹¹ This evidence is supported by Freedom from Torture’s FOI request, which disclosed similar figures at various snapshot dates.

¹² It is the position of the Royal College of Psychiatrists that detention centres are likely to precipitate a significant deterioration of mental health in the majority of cases, greatly increasing both the suffering of the individual and the risk of suicide and self-harm.

See: Royal College of Psychiatrists, *Position statement on detention of people with mental disorders in immigration removal centres*, 2015

¹³ Section 55.10 of the Enforcement Instructions and Guidance, which has now been withdrawn and replaced by the Adults at Risk policy.

¹⁴ Section 55.10 of the Enforcement Instructions and Guidance relied upon considering the risk of re-offending, inflicting harm or absconding, as well as imminent removal. The factors laid out in the Adults at Risk guidance place a much greater emphasis on non-compliance, unreasonably including a failure to comply with voluntary return.

Adult at Risk were: 139 at Level 2; 364 at Level 2; and 502 at Level 3. These statistics show just how difficult it is for at risk profiles to be released from detention. In particular, less than 6% of cases designated as Level 2, where there is professional evidence of vulnerability, are released.

13. Stephen Shaw's latest review on the progress of the Home Office's approach to the welfare of vulnerable people in detention shows that:
- The gatekeeper team is failing to screen vulnerable people out of detention;
 - Case progression panels (who conduct detention reviews) do not always consider or reference vulnerability factors, nor do they appreciate that prolonged detention can lead to increased levels of vulnerability;
 - There are issues with both the amount and the quality of interpreting services with detainees experiencing problems in trusting a third party on the telephone and disclosing sensitive information;
 - Rule 35, (a requirement for medical practitioners to report cases of suspected torture survivors in order to trigger a detention review), is not being implemented properly¹⁵ and;
 - While in detention, people's suitability for detention is reviewed. However, these decisions are often poorly reasoned, lack reference to vulnerability and contain unrealistic assessments that removals will be imminent.¹⁶
14. Therefore, torture survivors are not only routed into detention but even when identified as such inside, they are typically not released. This is because the evidentiary burden requiring them to prove their vulnerability has increased to an impossible standard.
15. The Joint Committee on Human Rights (JCHR) supported these findings noting the inability of the current system to screen for vulnerability. The JCHR submitted that "The Adults at Risk policy does not give adequate protection to individuals at risk of harm in detention either by way of policy or of practice".¹⁷ Our evidence supports this and we advise that the policy should be overhauled.

Rule 35:

16. Rule 35 (3) is a safeguard originally intended to protect torture survivors from being detained. It requires medical practitioners to report cases of suspected torture survivors, which in turn triggers a detention review. There have been longstanding concerns that the Rule 35 process has never been implemented effectively.¹⁸ These concerns include: people waiting a long time to have a report completed; doctors poorly or partially completing Rule 35 forms; and inadequate and ill-considered responses to the reports.
17. Furthermore, Rule 35 reports may only record some physical findings and not entail any mental health assessment or state that there are some mental health symptoms or that the person has been referred to the mental health team. In turn, caseowners often incorrectly deem this as evidence that there is no concern about their mental health.

¹⁵ Shaw, *Welfare in detention of vulnerable persons review: progress report*, July 2018

¹⁶ During detention reviews, Shaw noted that 'immigration factors such as travel documentation, the availability of escorts, and ongoing legal barriers, were given a higher weighting than vulnerability indicators'. Shaw, *Welfare in detention of vulnerable persons review: progress report*, para 4.70, July 2018

¹⁷ Joint Committee on Human Rights, *Immigration detention: Sixteenth Report of the Session 2017-2019*, 7 February 2019

¹⁸ Stephen Shaw (2016), *Review into the Welfare in Detention of Vulnerable Persons*, 2016; Shaw, *Welfare in detention of vulnerable persons review: progress report*, July 2018; Medical Justice, *'The Second Torture'*, 2012.

18. In 2016 (before the adults at risk policy was introduced), 800 detainees were released following a Rule 35 report compared with only 317 in 2017.¹⁹ Those identified as vulnerable are therefore typically not released and suffer further harm and increased risk of self-harming and suicide.
19. The Adults at Risk policy has artificially lowered the value of Rule 35 reports because they are typically categorised as Level 2 evidence. This now means that the reports are accorded lower weight than under the previous Enforcement Instructions and Guidance policy (Section 55.10) when assessed against the immigration factors.
20. A report will only reach the threshold of Level 3 evidence if the doctor comments on whether the individual is likely to suffer harm in detention. However, this dangerously and incorrectly raises the evidentiary requirement and undermines the presumption not to detain vulnerable torture survivors. It is also not an appropriate way of assessing vulnerability to harm in detention.
21. The treatment of Rule 35 reports and the high number of reports that do not result in release illustrate a deeply flawed approach to evidence by Home Office caseowners. Caseowners often rely on previous negative credibility findings to refute the findings contained in a Rule 35 report. This speculative and dismissive approach to medical evidence can be catastrophic for torture survivors, impeding their chances of rehabilitation.

Medical identification of torture survivors in detention:

22. We are concerned that the UK government has failed in its obligation to take effective measures to prevent torture, notably with regards to detecting and documenting the physical and psychological impact of torture.
23. Information relating to the availability and usage of interpreters in detention demonstrates an underutilized and highly inadequate service. According to Shaw's 2018 report, only 8% of triages at Harmondsworth and 6.3% of triages at Colnbrook required an interpreter. This figure is worrying low given the diverse population and the expectation to express their healthcare needs, past medical history, suicidal ideation and any history of torture or ill treatment. Shaw's report also noted that 31 patients required interpreters in October 2017 at Yarl's Wood, which is roughly only 10% of the population.²⁰
24. Recent questionnaire data compiled by Her Majesty's Inspectorate of Prisons (HMIP) also shows inadequate interpreting services. The percentage of detainees who noted that a qualified interpreter was not always available if needed was as follows: 22% in Yarl's Wood,²¹ 38% in Colnbrook,²² 31% in Dungavel,²³ 30% in Harmondsworth²⁴ and 21% in Campsfield.²⁵
25. Reports by HMIP on Immigration Removal Centres (IRCs) has repeatedly identified areas of poor practice regarding interpreting services. This includes not using professional interpreting services enough during arrival and healthcare consultations, including for confidential matters;²⁶ staff using hand gestures to

¹⁹ Shaw, *Welfare in detention of vulnerable persons review: progress report*, Figure 2.14, July 2018

²⁰ Shaw, *Welfare in detention of vulnerable persons review: progress report*, para 3.102, July 2018

²¹ HMIP, *Report on an unannounced inspection of Yarl's Wood Immigration Removal Centre, 5-7, 12-16 June 2017*, Appendix

²² HMIP, *Report on an unannounced inspection of Colnbrook Immigration Removal Centre 29 February-11 March 2016*, Appendix

²³ HM Chief Inspector of Prisons, *Report on an unannounced inspection of Dungavel House Immigration Removal Centre, 2-5, 9-11, 16-19 July 2018*, Appendix

²⁴ HMIP, *Report on an unannounced inspection of Heathrow Immigration Removal Centre Harmondsworth site by HM Chief Inspector of Prisons, 2-20 October 2017*, Appendix

²⁵ HM Chief Inspector of Prisons, *Report on an unannounced inspection of Campsfield House Immigration Removal Centre, 10-21 September 2018*, Appendix

²⁶ HMIP, *Report on an unannounced inspection of Colnbrook Immigration Removal Centre 29 February-11 March 2016*, paras S3, S36, 1.9; HM Chief Inspector of Prisons, *Report on an unannounced inspection of Dungavel House Immigration Removal Centre, 2-*

communicate rather than the telephone interpreting services;²⁷ and using other detainees to translate during confidential interviews, including in reception, for medical interviews,²⁸ for confidential interviews, such as assessment, care in detention and teamwork (ACDT) reviews²⁹ and for highly sensitive Rule 35 reports.³⁰

26. Such poor practice compromises accuracy and confidentiality and, as noted by HMIP, “hindered their [detainees’] ability to communicate concerns to staff”.³¹ This in turn can have highly negative knock on effects for both individuals’ health and their cases.
27. The Home Office do not readily share the content of any training they may give about the identification and documentation of torture. The content, regularity and reach of the training is therefore unclear.
28. Doctors working in IRCs are not required to have any knowledge of the Istanbul Protocol and its guidance on the assessment of victims of torture. Whilst the Detention Services Order (DSO) on Rule 35 makes clear that doctors ‘do not need to apply the terms or methodology set out in the Istanbul Protocol’, the DSO also states that:

‘Where possible, the healthcare professional should say why they consider the person’s account is consistent with the medical evidence. The healthcare professional should consider whether the injury, health problem or other indicator may have other possible explanations which do not relate to torture. The healthcare professional must identify any medical evidence which may or may not be contrary to the account given by the detained person.’³²
29. However, doctors in IRCs are employed as GPs and typically do not have additional specific forensic skills, making it a challenge for them to identify and document evidence of torture. Without a requirement for specialised knowledge and training, there are repeated failures to properly assess the complex healthcare needs of torture survivors and prevent them from being further harmed by unnecessary detention.
30. Furthermore, even if doctors have completed a Rule 35 report, IRC healthcare do not appear to have a system in place for reviewing those who have alleged torture to identify if they are being harmed by continued detention.
31. Despite the DSO outlining recommended processes, there is also no evidence that suggests that these processes are being followed. For example, checking or signing the responses to Rule 35 reports or escalating concerns if they continue to be concerned a person is unfit for detention.

Torture definition:

5, 9–11, 16–19 July 2018, paras 2.36, S6, 1.8; *HM Chief Inspector of Prisons, Report on an unannounced inspection of Campsfield House Immigration Removal Centre, 10-21 September 2018*, para 1.3.

²⁷ HMIP, *Report on an unannounced inspection of Colnbrook Immigration Removal Centre 29 February-11 March 2016*, para 1.9; HMIP, *Report on an unannounced inspection of Heathrow Immigration Removal Centre Harmondsworth site by HM Chief Inspector of Prisons, 2–20 October 2017*, para 1.9

²⁸ HMIP, *Report on an unannounced inspection of Colnbrook Immigration Removal Centre 29 February-11 March 2016*, para 1.9; HM Chief Inspector of Prisons, *Report on an unannounced inspection of Dungavel House Immigration Removal Centre*, 2–5, 9–11, 16–19 July 2018, para S23; HM Chief Inspector of Prisons, *Report on an unannounced inspection of Campsfield House Immigration Removal Centre, 10-21 September 2018*, paras S22 & 2.40.

²⁹ HMIP, *Report on an unannounced inspection of Heathrow Immigration Removal Centre Harmondsworth site by HM Chief Inspector of Prisons, 2–20 October 2017*, para 2.18

³⁰ HMIP, *Report on an unannounced inspection of Heathrow Immigration Removal Centre Harmondsworth site by HM Chief Inspector of Prisons, 2–20 October 2017*, para 1.17

³¹ HMIP, *Report on an unannounced inspection of Dungavel House Immigration Removal Centre*, 2–5, 9–11, 16–19 July 2018, para 1.8

³² Home Office, *Detention services order 09/2016 Detention centre rule 35 and Short- term Holding Facility rule 32*, July 2018

32. As of 2 July 2018, the Home Office introduced a new definition of torture for the purpose of identifying torture survivors in detention.³³ Rule 35 (6) of the Detention Centre Rules states that:
- “‘torture’ means any act by which a perpetrator intentionally inflicts severe pain or suffering on a victim in which-*
- (a) The perpetrator has control (whether mental or physical) over the victim, and*
- (b) As a result of that control, the victim is powerless to resist.”*
33. This definition is far too restrictive, raises the evidentiary burden, and undermines the main aim of primary legislation, which is to identify and protect those vulnerable to harm in immigration detention. Following the case of *R (Medical Justice) v SSHD, CO/2382/2018*, we understand that under Rule 35(6), it will suffice for individuals to demonstrate severe ill treatment in ‘a situation of powerlessness’, and not that the individual had to be ‘powerless to resist’.
34. The definition seeks to distinguish between torture and ill-treatment, which is an important distinction in international law, but is entirely unnecessary for identifying those vulnerable to harm in detention and inappropriately raises the standard of proof. The definition also invites subjective interpretation which encourages inconsistent assessments by both doctors and Home Office caseworkers.
35. Victims of ill-treatment, such as victims of inter-personal violence on grounds of race, ethnicity, sexuality, blood feuds or clan origins who are not in an obvious situation of powerlessness against the aggressor could be excluded under this definition.
36. From a clinical perspective, the new definition is highly problematic. It forces doctors to make assessments far beyond their expertise, requiring them to make legal judgments and gather facts relating to asylum claims, which is gravely inappropriate.
37. Furthermore, IRC doctors do not have access to detainees’ immigration case files so cannot make this kind of assessment in the limited time available to them to complete a Rule 35 report. Doctors also lack resources to complete the forms effectively, including a lack of time, training and background information from immigration documents.

Recommendations:

1. Torture survivors should not be detained under any circumstances. They should be prioritised in alternatives to detention.
2. The Home Office should reinstate the categories based approach to identifying vulnerable people and only detain them in very exceptional circumstances. Where someone self declares a vulnerability, such evidence can carry less weight but there must be a duty on the Home Office to investigate their vulnerability.
3. Under the existing Adults at Risk framework, the Level 3 requirement for evidence that detention will likely cause harm should be dropped. Anyone with professional evidence of torture, including Rule 35 reports, should be designated as Level 3.

³³ The definition can be found in Rule 35 (6) of the Detention Centre Rules and Statutory Instruments (SI) 410 and 411. SI 2018/411 introduces the torture definition into the Detention Centre Rules. SI 2018/410 introduces the Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2018 enacting the updated guidance *“Immigration Act 2016: Revised Guidance on adults at risk in immigration detention”*. The Guidance incorporates the new definition at footnote 3, and includes a new ‘catch-all’ provision at paragraph 12.

4. Decisions to detain should be made independently. The individual in question and their lawyer should be able to make direct representations at this stage to the Gatekeeper Team or any future independent body.
5. In detention reviews, vulnerability should outweigh immigration factors, unless there are very exceptional circumstances, which must be clearly specified.
6. Conduct an immediate independent review of the application of Rule 35.
7. Remove the requirement to comment on the likely impact of ongoing detention so that Rule 35(3) reports can be afforded the appropriate weight.
8. Adequately resource mental health teams in IRCs and ensure IRC doctors are given the necessary resources to enable them to document torture effectively. This includes training, time and consistent usage of high quality interpreters in order to facilitate more effective identification of torture survivors and improved Rule 35 reporting. Doctors should also have to sign the response to their reports as required, indicating if they accept a decision to deny release or wish to escalate their concern.
9. Statutory Instruments 2018/410 and 2018/411 detailing the definition of torture should be annulled immediately with administrative guidance subsequently amended. The Home Office should instead rely on a more inclusive indicator, for example, modelled on the UNCHR detention guidelines, namely “victims of torture or other serious, physical, psychological, sexual or gender based violence or ill-treatment”.

Please do not hesitate to contact us should you require any further information. Please also note that Freedom from Torture would like to be a part of the AaR Forum.

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