

## Parliamentary briefing on immigration detention of victims of torture and other vulnerable people

### Key messages & recommendations

- The government may be detaining a small proportion of those liable to removal, and the numbers in detention may be decreasing, but it continues to inappropriately detain vulnerable people for whom the experience of detention is profoundly harmful. This contravenes our commitment to the presumption in favour of liberty.
- It is accepted that torture survivors and those subject to ill-treatment are particularly vulnerable to harm in detention and, therefore, the presumption in favour of liberty must be even stronger in such cases. Yet torture survivors continue to be detained.
- The Adults at Risk policy is intended to safeguard vulnerable individuals by routing them away from or out of detention, but it is not working. Vulnerable people continue to be detained because the disproportionate and irrational consideration of immigration factors outweighs overwhelming evidence of risk.
- The proposed definition of torture is unnecessary and too complex, goes beyond the expertise and remit of an immigration removal centre (IRC) medical practitioner and carries a significant risk that medical practitioners and Home Office caseworkers will misunderstand or misapply it.
- **We recommend that Statutory Instruments 2018/410 and 2018/411 be withdrawn so that a proper consultation can be carried out on the proposed changes.**
- **We recommend that the current categories of “torture” and “victims of sexual or gender based violence” be replaced with a more inclusive category modelled on the UNHCR detention guidelines, namely ‘victims of torture or other serious, physical, psychological, sexual or gender based violence or ill-treatment’.**

### Background

- In 2015, in response to growing concerns about the use of immigration detention, the Home Office commissioned Stephen Shaw to carry out a review into the welfare of vulnerable people in immigration detention. **The Shaw review highlighted the lack of safeguards for vulnerable detainees and recommended a drastic reduction in the use of immigration detention.**
- The Immigration Minister’s broad acceptance of Shaw’s recommendations was placed on a statutory footing in section 59 of the Immigration Act 2016. **The purpose of section 59 IA2016 is a protective one, based on long-standing evidence that those who have been subject to ill-treatment would be particularly vulnerable to harm if detained or remain in detention.**
- NGOs raised serious concerns about the Adults at Risk Guidance, including regarding the change in the definition of torture. Previous to this Guidance, the Home Office had applied a torture definition based in caselaw and not defined within the policy. **This definition had been wide enough to include victims of torture who the evidence showed were particularly vulnerable to harm in detention.**
- Following implementation of the Guidance in September 2016, Medical Justice and seven detainees challenged the change in definition of torture and the court found the change to have been unlawful. The judge ordered the suspension of the new torture definition and instructed the Home Office to review and reissue the policy in a reasonable time. **The court did not place an obligation on the Home Secretary to define torture in the updated policy.**
- In parallel, Stephen Shaw carried out a second review of the government’s progress towards fulfilling the recommendations of his first review. **The Home Secretary has had a copy of Shaw’s second report since the end of April 2018 and promises to publish by the end of June 2018.**
- In March 2018, and without waiting for Shaw to report, the Home Secretary laid two Statutory Instruments before parliament: one introduces a **new torture definition** into the Detention Centre Rules and the other incorporates the new torture definition, and introduces a new ‘catch-all’ provision, into the Adults at Risk guidance. These changes come into effect on 2<sup>nd</sup> July 2018.

## Why is the new torture definition unnecessary and inappropriate?

- **The definition seeks to distinguish between torture and ill-treatment, which is an important distinction in international law, but is entirely unnecessary and inappropriate for identifying those vulnerable to harm in detention.** Even when applied correctly, the definition will exclude a cohort of victims of severe ill-treatment who do not fall within the other indicators of risk.
- **The proposed definition of torture is too complex,** goes beyond the expertise and remit of an IRC medical practitioner and carries a significant risk that they and/or Home Office caseworkers will misunderstand and/or misapply it in Rule 35 reports and detention reviews. Rule 35 reports are the mechanism by which IRC medical practitioners document a detainee's claim to be a torture survivor.
- **Extracting the necessary information from the survivor will require an interrogation of the vulnerable person** that far exceeds the purpose of the safeguard and the standard of proof that applies.
- The concept of powerlessness is ill-suited to determining vulnerability to harm in detention as **IRC medical practitioners and caseworkers will struggle to form a consistent interpretation of this complex criterion.**

Victims of ill-treatment likely to be excluded from the protection of the Adults at Risk safeguard by the new torture definition will include victims of inter-personal violence on grounds of race, ethnicity, sexuality, tribal group, blood feuds or clan origins who are not in an obvious situation of powerlessness in relation to the perpetrators of violence.

## Why isn't a catch-all enough to mitigate the risk?

- **A 'catch-all' provision does not adequately mitigate the risk of excluding from the protection of the safeguard, those who are known to be at risk of harm in detention such as victims of ill-treatment.** A 'catch-all' is essential to provide an effective safeguard for those vulnerable due to unforeseen circumstances, but known vulnerabilities must be captured within the list of indicators.
- Even if the 'catch-all' provision did capture this cohort, **there is no effective mechanism in place for identifying such individuals as they are not covered by the Rule 35 process** (which focuses on torture, risk of suicide and detention being injurious to health).

**Under current arrangements (a relatively broad torture definition and an extensive list of indicators) the Adults at Risk policy does not work to ensure that fewer vulnerable people are detained for shorter periods of time. It is already failing and the proposed changes will exacerbate the problem.**

## Why is the Adults at Risk policy currently failing to protect vulnerable people?

- **The Guidance raises the threshold for a decision not to detain, by increasing the evidentiary burden on the individual.** Under the previous policy, victims of torture needed only to show independent evidence of their history of torture to be considered unsuitable for detention except in '*very exceptional circumstances*'. The Guidance introduced an additional requirement to present specific evidence that detention is likely to cause harm in order for release to be seriously considered. This evidence is extremely hard to come by before harm has actually occurred.
- **The Guidance has also weakened the safeguard by introducing a wider range of 'immigration factors' which can outweigh the evidence on vulnerability.** These factors place a greater emphasis on non-compliance. This has replaced the previous threshold of '*very exceptional circumstances*' that related principally to public protection concerns, the risk of absconding, and imminent removal.

As a result of the higher evidential threshold within the Adults at Risk guidance, the release rate following a Rule 35 report has fallen dramatically: in Q3 2016 (before the policy was introduced) 39% of those with a Rule 35 report were released. In Q1 2018 this has fallen to 12.5%.

Even when victims of torture are identified under the Adults at Risk policy, it fails to protect them as they continue to be detained due to the increased evidentiary burden placed upon them, and the act of balancing the risk of harm to which they are exposed against immigration factors. From January to September 2017, Freedom from Torture's medico-legal report service received 101 referrals for suspected torture survivors in detention. Of these, 19 cases contained a Rule 35(3) report on file and a Home Office Rule 35 response letter. All 19 individuals were accepted by the Home Office as an adult at risk on the grounds of being a torture survivor. Not one of the 19 cases was released as a result of the Rule 35(3) report. The weight given to immigration factors in the 19 cases far exceeds what is rational. In every case, continued detention was justified on the grounds that removal was considered possible within a reasonable timeframe. However, in only one case was removal predicted within two weeks. In almost all other cases, the asylum interview had not yet taken place and, allowing for the decision-making process, removal was anticipated in anything from four to 14 weeks. On average, 10-14 weeks was given as the predicted wait for removal. The immigration factors taken into consideration in the 19 cases included being a visa overstayer, and someone with no close ties in the UK to ensure compliance. By far one of the most common justifications for continuing detention was the dismissal of the asylum claim as 'late and opportunistic' because it was made in detention.

### Home Office failure to consult appropriately or consider relevant evidence

- **The SIs were laid before parliament following an inadequate and expedited 'consultation'** on the new definition of torture with a limited group of NGOs.
- NGOs stated that **a torture definition should not be introduced in isolation from the necessary revisions to other parts of the safeguard** (Detention Centre Rules & Adults at Risk Guidance) and asked the Home Office to await publication of the second Shaw review. The Home Office ignored these concerns.
- Considerable resource and expert input has been expended on the second Shaw review. **It is ill-considered to proceed with these changes before the Home Office, parliamentarians and stakeholders have the benefit of considering these changes in light of the full insights of this review.**

### Our recommendations

1. **The Statutory Instruments should be withdrawn and any further changes should be postponed** until the second Shaw review has been published and a proper consultation can be carried out.
2. **There is no need for a torture definition within the Guidance or the Detention Centre Rules, so the proposed torture definition should be withdrawn.** The current categories of "torture" and "victims of sexual or gender based violence" should be replaced with a more inclusive category modelled on the UNHCR detention guidelines, namely 'victims of torture or other serious, physical, psychological, sexual or gender based violence or ill-treatment'.
3. **The indicators used within the Guidance must carry a presumption that the individual is particularly vulnerable to harm** and there should be no need to demonstrate further that the individual is likely to suffer harm in detention.
4. **The broad range of immigration factors should be replaced with the threshold of "very exceptional circumstances"** to justify continued detention of those identified as particularly vulnerable.

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