



Freedom from Torture Submission for the Windrush Lessons Learned Review

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.

As an organisation working with people within the immigration and asylum system, we can say that many of the problems highlighted by the Windrush scandal are not unique to the Windrush generation but are in fact systemic within the Home Office and impact on other cohorts of Home Office applicants.

It is imperative that this review looks beyond the experiences of the Windrush generation in order to understand the true extent of the issues at hand. This would be a fitting way to follow through on the Home Secretary's stated commitment to ensure that the inhumane approach evident in the Windrush cases "never happens again to any group of people".¹

What, in your view, were the main legislative, policy and operational decisions which led to members of the Windrush generation becoming entangled in measures designed for illegal immigrants?

The Windrush scandal revealed the impossible burden placed on individuals to prove their entitlement to be in the UK. This hostile environment surrounding decision-making is endemic across the Home Office where the standard of proof is consistently misapplied.

We know from our frontline clinical services that the "hostile environment" is embedded within the UK's protection system and creates deep unfairness and rehabilitation setbacks for many torture survivors.

Torture survivors in our care have been wrongly detained and faced removal proceedings from the UK. Others have been wrongly refused (or inappropriately charged for) healthcare, housing, bank accounts, education and/or employment pursuant to specific "hostile environment" measures.

Critically, we are concerned that the "hostile environment" agenda is an underlying driver for the wrongful rejection of asylum claims for many torture survivors.

Windrush has exposed two key issues that affect our client group and our submission will focus on these two areas:

1. Standard of proof in asylum decision making
2. Flawed approach to immigration detention

¹ <https://www.gov.uk/government/news/windrush-lessons-learned-review>

1. Standard of proof in asylum decision making

Freedom from Torture has long been concerned that Home Office caseworkers are misapplying the low standard of proof that applies to asylum claims as a matter of law (“a reasonable degree of likelihood”)² and we are particularly concerned about Home Office mishandling of medical evidence of torture as an example of this problem. Survivors seeking asylum in the UK can find it almost impossible to prove to the Home Office that they were tortured.

Our 2016 Proving Torture³ research demonstrated poor Home Office decision-making and recurring and systematic errors in the assessment of forensic evidence of torture resulting in an unacceptably high rate of decisions overturned at appeal at 76%. The key findings included:

- All cases in the research involved the asylum caseworker failing to apply the appropriate standard of proof to establish a past history of detention and torture
- 74% of cases in the research involved the asylum caseworker substituting their own opinion for that of the clinician on the cause of injuries
- 30% of cases in the research involved the asylum caseworker disputing or questioning the qualifications and expertise of the clinician
- 84% of cases in the research involved the asylum caseworker dismissing the medical evidence because they have already reached a negative credibility finding
- 54% of cases in the research demonstrate poor understanding by the asylum caseworker of how the Istanbul Protocol applies to torture claims.

Home Office caseworkers therefore often cast detailed, forensic evidence aside, substituting their own opinions on medical matters. These findings are supported by the Joint Committee for Human Rights recent analysis of Windrush case files which showed Home Office caseworkers discounted ample information and evidence which should have sufficed to ensure that such individuals were not deprived of their liberty.⁴

The mistreatment of expert medical evidence (and subsequent appeals) can be catastrophic for torture survivors. It subjects them to the experience of being disbelieved despite revealing a profoundly distressing account of torture, and raises fears of being returned to face further torture and of being detained in an Immigration Removal Centre.

This fundamentally undermines their rehabilitation both before and after status is granted, as without the safety and security of secure legal status in the UK, survivors experience ongoing stress, trauma and both chronic and acute difficulties in meeting their basic needs for income and housing.

Campaigning work following this research resulted in 41,000 signatures supporting our petition to the Home Office calling for a fair asylum system and proper protections for torture survivors; and over 80 MPs writing to the Home Affairs Committee or raising concerns with the Home Secretary or Immigration Minister.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf (section 5.2)

³ https://www.freedomfromtorture.org/sites/default/files/documents/proving_torture_a4_final.pdf

⁴ House of Commons, Joint Committee on Human Rights, Windrush generation Detention, Sixth Report of Session 2017–19, <https://publications.parliament.uk/pa/it201719/itselect/jtrights/1034/1034.pdf>

We share the concern expressed by many that the problems exposed by the Windrush scandal are systemic and impact on other cohorts of Home Office applicants. In July 2018 we coordinated an open letter to the Home Secretary⁵ on the “impossible” standard of proof applied in practice to many asylum seekers plus a related news story by the Guardian.⁶

More than 30 leaders from refugee and human rights organisations and faith communities signed the letter which draws a comparison between Home Office mishandling of applications by various profiles of asylum seekers and the mistreatment of so many of the Windrush generation.

This includes aggressive and skeptical interview techniques, an approach to asylum interviews that assumes applicants are not telling the truth and a refusal of life-saving claims for asylum based on minute contradictions in detail or an inability to remember specific dates or details. For torture survivors, these problems can be made more acute due to post-traumatic stress disorder (PTSD) and other mental health issues caused by the trauma of their detention and torture. Survivors report that they feel it is presumed from the outset they are not telling the truth, and that interviewers try to ‘trip them up’ or catch them out.

We would welcome the inquiry examining what is behind this approach, and whether caseworkers are under any pressure to refuse, whether due to quotas or other political pressures.

2. Flawed approach to immigration detention

The Joint Committee for Human Rights (JCHR) 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.⁷ This abuse of powers was not exclusively applied to the Windrush generation and therefore requires fundamental changes to policy, culture and training.

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)⁸ make clear that public administration is not working effectively because poor decisions are routinely being made.⁹ Such decisions relate to both the decision to detain and decisions to continue detention.

Last year, the High Court found that the UK’s ‘detained fast track’ process used for asylum appeals from 2005-14 was unlawful and beyond the power of the Home Office. This ruling shows how the Home Office used detention unlawfully for a ten year period, meaning that potentially thousands of asylum applicants may have had their claims wrongfully decided.

⁵https://www.freedomfromtorture.org/news-blogs/11_07_2018/joint_open_letter_to_the_home_secretary_on_standards_of_proof_in_asylum

⁶ <https://www.theguardian.com/uk-news/2018/jul/11/sajid-javid-told-torture-victims-driven-to-suicide-by-system>

⁷ House of Commons, Joint Committee on Human Rights, Windrush generation Detention, Sixth Report of Session 2017–19, <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/1034.pdf>

⁸ https://www.parliament.uk/documents/commons-committees/home-affairs/Correspondence-17-19/180625_Permanent_Secretary_Immigration%20Enforcement.pdf

⁹ Furthermore, Immigration accounts for 80% of judicial review claims. (Robert Thomas, 'Immigration Judicial Reviews: Resources, Caseload, and 'System-manageability efficiency' *Judicial Review*, 21, no.3 (2016), 209-220).

Torture survivors and those subjected to ill-treatment are particularly vulnerable to harm in detention because independent clinical evidence shows it is profoundly damaging.¹⁰ It causes or worsens anxiety, depression, post-traumatic stress, suicidal thoughts and self-harm.¹¹

In 2016, Stephen Shaw published his review of the welfare in detention of vulnerable persons. He expressed grave concerns about the continued detention of vulnerable individuals and the failure of safeguards within the process. The Adults At Risk policy was introduced to address these concerns but is fundamentally flawed in a number of ways.

Far from increasing protection to vulnerable detainees, the new policy increases the risk of harm by increasing the evidential bar required to provide 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', and narrowing the definition of torture used within the policy.¹²

Torture survivors are routinely detained and often, they can be held in detention unlawfully. This was recently exposed in [The Guardian](#) who found that over half the people in their survey of 200 detainees were either suicidal, seriously ill or torture survivors.

Between 1 January 2017 and 31 December 2018, Freedom from Torture received over 170 referrals from people who have disclosed torture and were being held in immigration detention, showing that vulnerable people continue to be detained under the Adults at Risk policy.

Stephen Shaw's latest review on the progress of the Home Office's approach to the welfare of vulnerable people in detention shows that every safeguard in the new Adults at Risk policy is ineffective:

- The gatekeeper team is failing to screen vulnerable people out of detention;
- Case progression panels do not always consider or reference vulnerability factors, nor do they appreciate that prolonged detention can lead to increased levels of vulnerability;
- Rule 35, (a requirement for medical practitioners to report cases of suspected torture survivors in order to trigger a detention review), remains unfit for purpose.

Therefore, vulnerable people are not only routed into detention but even when identified inside, they are typically not released. This is because the standard of proof requiring them to prove their vulnerability has increased to an impossible standard.

So long as current safeguards fail to provide adequate protection and the standard of proof is impossibly high, torture survivors will continue to suffer and more unlawful detention claims will be lodged.

¹⁰ Bosworth M (2016) Appendix 5: The Mental Health Literature Survey Sub-Review. In Shaw (2016), Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf

¹¹ Royal College of Psychiatrists (2015) Position statement on detention of people with mental disorders in immigration removal centres, <https://www.rcpsych.ac.uk/pdf/Satisfactory%20Treatment%20in%20Detention%20document%20December%202015%20e.dit.pdf>

¹² For further information, please see our recent submission to the JCHR: <https://www.freedomfromtorture.org/document/submissions/10136>

What other factors played a part?

Home Office internal regional targets for removals undoubtedly played a role in the Windrush generation's experience. These targets, (as well as other targets such as, 'productivity targets' net migration, voluntary returns and removal targets), have also been a key factor in poor decision making and the over use of detention because targets dehumanise people and reduce them to statistics.

In the past few years, some whistleblowers from the Home Office have spoken out. For example, one stated how Home Office initial training was centred around "how to explain that you disbelieve someone's story", explaining, "we have always been moulded from day one to be sceptical".¹³ Recently, three former staffers spoke out about the harsh, even abusive, attitude towards applicants, including the use of "intimidation tactics" during interviews.¹⁴

The Home Office must move away from a culture of targets and immigration control towards a culture of protection. It is only through doing this that applicants can be treated fairly and with dignity, rather than with suspicion and scepticism.

What lessons can the Home Office learn to make sure it does things differently in future?

The Home Office must acknowledge that the problems identified, notably the impossibly high standard of proof and incorrect use of detention powers, are not unique to the Windrush generation: they are systemic and impact on other cohorts of Home Office applicants.

There is a need to restore trust in Home Office decision-making. This will require a commitment to transparency with greater data reporting and sharing. Poor record keeping means the Home Office cannot even say how many of the Windrush generation were wrongfully detained or removed. A commitment to examine why there continues to be such a high overturn rate at appeal for asylum seekers is also required.

The Home Office should review the documentation requirements and what levels of flexibility exist in the system or not. Documentation was a huge stumbling block for members of the Windrush generation and is also problematic for many asylum applicants and torture survivors. The Home Office needs to simplify the system, enable flexibility and take a more humane approach.

The Windrush scandal exposed the dangers of abusing the power to detain and the ineffectiveness of the safeguards in place. Individuals should not be deprived of their liberty without good reason and adequate safeguards. Regretfully, torture survivors and other vulnerable people are not guaranteed this under the current regime. Given the lack of safeguards, the Home Office should place a moratorium on detaining those who are vulnerable.

Are corrective measures now in place? If so, please give an assessment of their initial impact.

Whilst corrective measures have been put in place for victims identified, it is unclear how many others from the Windrush Generation have not been identified or come forward yet.

¹³ <https://www.theguardian.com/public-leaders-network/2017/apr/08/asylum-caseworkers-home-office-cuts-syria-war>

¹⁴ <https://www.theguardian.com/uk-news/2018/feb/11/lottery-asylum-system-unjust-home-office-whistleblowers>

However, without acknowledging and addressing the systemic nature of the issues identified associated with the Windrush generation, corrective measures will solely be superficial, temporary and confined to one particular group.

What (if any) further recommendations do you have for the future?

1. An independent public audit of the application of the standard of proof in asylum decision-making specifically, to be undertaken by an independent body with the requisite legal expertise such as the Office of the UN High Commissioner for Refugees.
2. This independent public audit should enjoy the full cooperation of the Home Office. Survivors of torture, those with experience of providing expert evidence in asylum claims and legal and other civil society organisations in the refugee field should be among those given an opportunity to provide evidence.
3. The Home Office should roll-out a full day of training on the handling of forensic evidence to all asylum caseworkers working on such cases. Leadership from the Director of Asylum Operations and asylum casework managers is essential as a means of ensuring this training translates into asylum decisions for torture survivors that are “right the first time”.
4. This leadership should involve regular communications to senior caseworkers and caseworkers about the importance of improved decision-making in cases involving medical evidence of torture, reinforced by systems – including routine oversight, quality audits of decisions and remedial action if problems continue – capable of demonstrating to Ministers, Freedom from Torture and other stakeholders whether practice is improving or not.
5. Torture survivors should not be detained under any circumstances. They should be prioritised in future plans for alternatives to detention.
6. Statutory Instruments 2018/410 and 2018/411 should be annulled immediately with administrative guidance subsequently amended.
7. 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.
8. Independent monitoring and rigorous oversight of the use of immigration detention. This should include an independent review of decisions to detain, unlawful detention cases as well as the implementation of the Adults at Risk policy and the Rule 35 process.
9. Greater Home Office transparency in data reporting and sharing, particularly in relation to the detention of torture survivors and vulnerable people; and an analysis of high asylum appeal overturn rates.
10. Review and simplification of documentation requirements.