BRIEFING NOTE – SETTLEMENT IN: *R (Medical Justice) v SSHD*, CO/2382/2018

1. In this judicial review Medical Justice challenged the definition of torture introduced by the Home Office in response to Ouseley J's judgment handed down in October 2017 (*R (Medical Justice & Ors v SSHD* [2017] 4 WLR 198), which held that the use of a definition of torture based on Article 1 of the United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment (UNCAT) was ultra vires s59 Immigration Act 2016 (IA 2016). This was in essence because it had the effect of excluding victims of ill-treatment by non-state agents whom available evidence established are particularly vulnerable to harm in immigration detention; and because a catch-all provision, as drafted, did not prevent this group from being excluded from the protection by the Adults at Risk policy (AAR). During the course of those proceedings, the Home Office had conceded that the definition of torture in Rule 35 Detention Centre Rules (DCR) was as found by the court in *R (EO & Ors) v SSHD* [2013] EWHC 1236 (Admin) at §82 ('the *EO* definition') and that the definition of torture in the AAR guidance and Rule 35 would need to be aligned.

2. In early 2018 the Home Office proposed to respond to Ouseley J's judgment by developing a new definition of torture based on the judge's observations that the evidence before him pointed it being ill-treatment inflicted in a situation of powerlessness that was a reliable indicator of vulnerability to harm in immigration detention. There is no evidence that the Home Office considered replacing the torture category with a more inclusive ill-treatment category, as had been advocated by NGOs in their responses to Stephen Shaw's further review. In addition, revised wording for the catch-all was proposed, intended to make clear that the categories of vulnerability in the AAR were not closed, and that other cases of vulnerability should be considered. The Minister approved her officials' plan and they proceeded with a short process of consultation[1] with selected stakeholders.

3. The Home Office initially proposed wider amendments to Rule 35, to widen the categories of vulnerability to more closely reflect the AAR guidance, but on the basis that reports could be prepared by any member of healthcare staff (e.g. nurses, healthcare assistants and healthcare managers, in addition to doctors). However, during the course of the consultation the Home Office withdrew these wider changes and instead only proceeded with changes it said were necessary to respond to Ouseley J's judgment. Medical Justice would have welcomed the widening of the indicators of vulnerability in Rule 35 to reflect the categories in the AAR guidance, but is opposed to healthcare staff other than doctors completing Rule 35 reports.

4. Medical Justice and other NGOs objected generally to the Home Office's consultation process, on the basis that it was rushed and did not allow sufficient time for them to be able to participate meaningfully; that a limited range of stakeholders had been consulted with, with organisations with medical and other expertise (such as the British Medical Association, the Equality and Human Rights Commission, REDRESS) excluded; and that the changes should await Stephen Shaw's further review, due to be presented to the Government in March or April 2018.

[1] It was the Home Office's position in the litigation that it was under no duty to consult, and that this was a limited process of 'engagement'.

5. Following the Home Office's rushed and inadequate consultation process, in March 2018 draft revised AAR statutory guidance was laid before Parliament pursuant to s59 IA 2016; and statutory instruments were also laid that would introduce the revised definition of torture in Rule 35 DCR and the equivalent provision in the new Short Term Holding Facility Rules (STHFRs). The revised definition of torture is contained in Rule 35(6) DCR (and the equivalent provision in the STHFRs):

'For the purposes of [Rule 35(3) DCR] '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.'

6. On 18 May 2018 Medical Justice sent a pre-action letter which requested that the proposed changes be withdrawn pending publication of Stephen Shaw's further review and a proper consultation with a wider range of stakeholders. On 8 June 2018 the Home Office replied that any judicial review would be defended, refusing to take the requested steps. The judicial review was issued on 15 June 2018. Medical Justice's grounds were: (1) the revised definition of torture was ultra vires s59 IA 2016, because the question of whether a victim of torture is able to fight back against the perpetrator is irrelevant to the issue that the AAR guidance had to address, namely vulnerability to harm in immigration detention; (2) there had been a breach of common law consultation requirements; and (3) the changes had been made by the Minister without due regard to her equality duties under s149 Equality Act 2010. Medical Justice sought an urgent hearing before the changes were brought into force on 2 July 2018.

7. An urgent hearing listed in July 2018 was adjourned by Mostyn J on the Home Office's application[2]. At a contested one day oral hearing on 12 September 2018 Moulder J granted Medical Justice permission on all grounds and directed an expedited full hearing, also granting Medical Justice's application for a costs capping order.[3]

8. In the meantime, on 24 July 2018 Stephen Shaw's further review was published[4] and in response, amongst other things, the Government announced that it would formally consult on further changes to the DCR and the AAR guidance to address the findings and recommendations in Mr Shaw's further review. It was also announced that the Home Office would commission an annual review of the working of the AAR policy by the Independent Chief Inspector of Borders and Immigration (ICIBI).

9. The Home Office served detailed grounds of defence and evidence and indicated a willingness to explore settlement. Following negotiations, a settlement was agreed in the form of a consent order and statement of reasons, under which the claim would be stayed pending the Home Office taking the steps stipulated in the statement of reasons. These steps included:

[2] Due to the Home Office's preferred counsel not being available.

[3] Medical Justice's liability for costs was limited to £10,000, with a limit on the Home Secretary's liability of £70,000 with hourly rates tied to those charged by Government counsel and solicitors.

[4] https://www.gov.uk/government/publications/welfare-in-detention-of-vulnerable-persons-review-progress-report

a. To forthwith publish amended AAR caseworker guidance clarifying that to qualify as torture under Rule 35(6) DCR it is sufficient for individuals to demonstrate severe ill-treatment in 'a situation of powerlessness', and not that the individual had to be 'powerless to resist'.

b. As part of the wider consultation on the DCR, the Home Office would propose a revised definition of torture, replacing the 'powerless to resist' criterion with 'powerlessness'. The Home Office recognised that, during the course of the consultation, those responding may make comments on the definition of torture and agreed that these 'will need to be considered appropriately'.

c. In addition, there will be an 'equality impact assessment related to amendments to the Detention Centre Rules'.

10. The Court has now stayed the claim until 19 July 2019 to allow the Home Office to take these steps. The stay affords Medical Justice the opportunity to restore this judicial review in the event of non-compliance by the Home Office.

11. It is understood that the Home Office is in the process of re-writing the DCR and that revised draft rules will shortly be published and there will be a 12 week consultation period. It is also understood that the Home Office is considering making changes to the AAR guidance in response to Stephen Shaw's further review, including the recommendation that the level 2 risk category be sub-divided. Meanwhile, the Independent Chief Inspector of Borders and Immigration has commenced his first annual review of the AAR policy and has made a call for evidence with a deadline for responses of 14 February 2019[5].

12. Medical Justice and their legal team suggest that NGOs may wish to consider the following points arising out of this judicial review:

a. Although the Home Office was careful to avoid committing to including the definition of torture in their consultation on the DCR, the form of words in the statement of reasons means that they will have to consider whether to retain their preferred definition in the light of comments made by NGOs in responses to the consultation.

b. There is no evidence that when the Home Office decided to proceed with its preferred definition of torture that they considered an alternative to the torture category, as had been proposed by a group of NGOs in their responses to Stephen Shaw's further review and during the consultation process, namely a broader and more inclusive category based on the UNCHR guidelines[6]. There are significant concerns that 'powerlessness' is not an appropriate criterion, because it is an imprecise term that invites subjective interpretation, potentially leading to confusion and inconsistent assessments by doctors in Rule 35 assessments and Home Office caseworkers.

[5] https://www.gov.uk/government/news/call-for-evidence-adults-at-risk-in-immigration-detention

[6] For example, ILPA advocated replacing the torture category with 'victims of torture or other serious, physical, psychological, sexual or gender based violence or ill-treatment'.

c. The Home Office indicated during the course of the judicial review that it was 'minded' to proceed with its amendment to Rule 35 which would allow any member of the healthcare team to prepare Rule 35 reports – so nurses, healthcare assistants and healthcare managers. It would be sensible to support an amendment that would allow qualified doctors other than GPs to prepare Rule 35 reports (e.g. psychiatrists), but not other members of the healthcare team, as this would lead to reports having even less evidential value.

d. Although widening Rule 35 raises concerns about the capacity and resources in IRCs to complete reports, the reporting mechanism does need to better reflect the wider categories of vulnerability in the AAR policy and so we would suggest that this is supported.

e. That detainees with independent evidence of torture should be better protected under the AAR policy; they could for example be automatically level 3 (as pregnant women are) or, at least, if level 2 is to be divided in the upper part of level 2.

13. In responses to the ICIBI AAR review and the DCR/AAR consultation, NGOs may also wish to raise wider issues about the AAR policy, including: in level 2 cases it seems to be too easy to balance out evidence of vulnerability with immigration factors; and the requirement for evidence that detention will probably cause serious harm to qualify as level 3 evidence sets the bar too high and is not an appropriate way of assessing vulnerability to harm in detention.

14. This note is being circulated alongside the orders made by the court; the agreed statement of reasons; selected correspondence that led to the statement of reasons being agreed; Medical Justice's grounds and reply to summary grounds of defence; the Home Office's detailed grounds of defence; and the index to the JR bundles (copies of the witness statements can be provided on request).

Medical Justice was represented by Ben Jaffey QC and Shu Shin Luh, instructed by Bhatt Murphy Solicitors.

4 February 2019