

Statement of Reasons

1. This application for judicial review concerns the lawfulness of the new definition of torture introduced by an amendment to Rule 35 of the Detention Centre Rules, a revision to the Adults at Risk Statutory Guidance issued under section 59 of the Immigration Act 2016 and the introduction of Short-Term Holding Facilities (“STHF”) Regulations 2018. The statutory instruments implementing these decisions were laid before Parliament on 27 March 2018 and came into force on 2 July 2018. They were the Detention Centre (Amendment) Rules 2018 (SI/411/2018), Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2018 (SI/410/2018) and the Short-Term Holding Facilities Regulations 2018 (SI/409/2018).

2. The new definition under challenge was introduced following Ouseley J’s judgment in *R (Medical Justice) v SSHD* [2017] 4 WLR 198. It is set out in a new Rule 35(6) of the Detention Centre Rules 2001:

“(6) For the purposes of paragraph (3), “torture” means any act by which a perpetrator intentionally inflicts severe pain or suffering on a victim in a situation 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”.

3. Medical Justice challenged the new definition of torture for being unlawful on the following three grounds:

4. **Ground 1:** The new torture definition is *ultra vires*, contrary to the statutory purpose of s. 59 IA 2016, which is to identify and protect those who are particularly vulnerable to harm if detained: §§54-66 of the Grounds.

5. **Ground 2:** The Defendant failed to carry out a fair and lawful consultation before introducing the changes: §§ 67-73 of the Grounds.

6. **Ground 3:** The Defendant breached his public sector equality duty by failing to have due regard to the matters in section 149 of the Equality Act 2010 (“EA 2010”): §§74-80 of the Grounds.

7. The Defendant resisted the claim on grounds that:

7.1. the new definition of torture was to implement Ouseley J’s judgment in *Medical Justice* and is rational and lawful.

7.2. There was no legal duty to consult the Claimant or anyone else. The Defendant did all that it had ever said it would do – i.e. it engaged with the Claimant to obtain its views and took those views into account.

7.3. The requirements of the PSED were met by the Policy Equality Statement published on 28 March 2018.

8. On 12 September 2018, further to a contested oral hearing on permission, Moulder J granted the Claimant permission to proceed with its application for judicial review to a substantive hearing. There is a dispute between the parties as to the nature of the Claimant’s challenge as expressed at that oral permission hearing and as found in the Claimant’s judicial review claim.

9. By letter dated 25 October 2018, in light of that dispute, the Defendant (amongst other things) reiterated its position that there is no material difference between the concepts of 'powerless to resist' referred to in Rule 35(6) of the Detention Centre Rules 2001 and 'powerlessness' referred to the Caseworker Guidance contained in Chapter 55b of the Enforcement Instructions and Guidance, and that no difference was intended. The Defendant also reiterated an "intention to lay further statutory instruments before Parliament to amend Rule 35 of the Detention Centre Rules following a forthcoming review of the Rules" and stated that "we can replace the words 'powerless to resist' with 'in a situation of powerlessness' so as to put the matter beyond any doubt."

10. Further to this and subsequent correspondence between the parties, agreement has been reached on a stay of these proceedings on the following basis:

11. First, the Caseworker Guidance (EIG 55b) and the Detention Services Order on Rule 35 shall be amended forthwith to make clear beyond doubt that, to satisfy the new definition of torture in Rule 35(6), it is sufficient to show that there was a situation of powerlessness. The revised guidance shall be promulgated to caseworkers and doctors and published. The wording to be included in the relevant guidance is as follows:

There is no difference between 'powerless to resist' and 'powerlessness.' The proper approach is to consider whether the detainee was in a situation of powerlessness.

12. The agreed amendment is without prejudice to the Claimant's position as to whether it is appropriate to retain 'powerlessness' as an ingredient of the definition of torture. It is also without prejudice to the Defendant's position that the amendment is unnecessary because it is already sufficiently clear that there is no difference between 'powerless to resist' and 'powerlessness' and the guidance already asks caseworkers to apply a 'powerlessness' test.

13. Second, it is noted that the Defendant has already committed to a broad review of the Detention Centre Rules. That review will take into account further recommendations from Stephen Shaw.

14. As part of that review, the Defendant will consult on any proposals for amendments to the Detention Centre Rules.

15. The Defendant intends to propose, when it undertakes its broad consultation on the Detention Centre Rules, a clarification to the definition of torture replacing 'powerless to resist' with 'in situation of powerlessness' within the Detention Centre Rules. The Defendant is mindful that responses to the consultation may include comments about the revised wording which will need to be considered appropriately.

16. The Defendant intends to complete the review and consultation and lay the amendments to the Detention Centre Rules by July 2019 but that is subject to there being sufficient Parliamentary time.

17. The Defendant will prepare a further equality impact assessment related to amendments to the Detention Centre Rules.

18. The correspondence relating to the terms of this Order and Statement of Reasons, and the Order and Statement of Reasons may be made public.