BRIEFING NOTE[1]

***Medical Justice & Ors v SSHD, EHRC intervening* [2017] 2461 (Admin)**

1. In a judgment handed down on 10 October 2017, Mr Justice Ouseley declared that the use of a definition of torture based on the definition in Article 1 of the UN Convention Against Torture ("the UNCAT definition") in the Adults at Risk Statutory Guidance (AARSG) was unlawful, because it excluded from its ambit victims of torture covered by the definition in the previous policy who the evidence showed were particularly vulnerable to harm in detention, was contrary to the purpose of section 59 of the Immigration Act 2016 (IA 2016), and lacked a rational or objective evidence base.

2. The SSHD has not appealed the judgment and the final Order requires her, pursuant to section 59(6) IA 2016, to "review and reissue the [AARSG] within a reasonable period of time". In the interim, the final Order records that it is not unlawful for the SSHD to operate AAR Caseworker Guidance ("AARCG) dated 6 December 2016[2], which applies the definition of torture set out at §82 of *EO & Ors v SSHD* [2013] 1236 (Admin) ("the *EO* definition").

Background and context

3. There were two main aspects of the context of this case.

4. Firstly, the long-standing policy, introduced in the early 2000s, that those with "independent evidence of torture" should only be detained in very exceptional circumstances. In a series of cases, the courts had emphasised the central role of Rule 35 of the Detention Centre Rules 2001 ("DCR") in this policy framework, emphasising:
   (a) The relatively modest threshold for meeting the requirement for independent evidence of torture, which a Rule 35(3) report was capable of meeting[3];
   (b) That whilst "torture" was not defined in Rule 35(3) or EIG 55.10, it had a wider, practical meaning than that the technical UNCAT definition, which was designed for a different purpose (*viz* holding states to account in international law for the crime of torture) that was consistent with the purpose of the EIG 55.10 policy, namely to exclude, save for in very exceptional circumstances, groups that were presumed to be particularly vulnerable to being adversely affected by detention[4];
   (c) Once the threshold of independent evidence of torture was met, the burden shifted to the SSHD to demonstrate that the high threshold of very exceptional circumstances was met – past criminal offending, liability to enforced removal and a refusal to leave voluntarily would not, without more, meet this high threshold[5].

5. The second aspect of the context was the Shaw review[6], whose overall conclusion was that too many vulnerable migrants were being detained, and for too long. Shaw made a series of

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[1] Prepared by Jed Pennington of Bhatt Murphy, solicitor for Medical Justice and one of the individual claimants, JXL
[2] Amended in response to interim relief granted on 21 November 2016
[3] See *D & K v SSHD* [2006] EWHC 980 (Admin) and *AM (Angola)* [2012] EWCA Civ 521
[4] See *EO v SSHD* [2013] 1236 (Admin)
[5] See *Anam v SSHD* [2009] EWHC 2496 (Admin), *AM (Angola) v SSHD* [2012] EWCA Civ 521 and *Das v SSHD* [2014] EWCA Civ 45
[6] *Review into the welfare in detention of vulnerable persons*, 14 January 2016 https://www.gov.uk/government/publications/review-into-the-welfare-in-detention-of-vulnerable-persons

recommendations, including an expansion of the categories in EIG 55.10, including the addition of a catch all that covered detainees who were particularly vulnerable to harm but fell outside of the categories, and for the Rule 35 process to be replaced. The Government stated that it accepted "the broad thrust" of the Shaw review's recommendations, with its new AAR policy a key part of its response[7].

6. Subsequently, in response to pressure for improved safeguards and oversight of immigration detention during the passage of what became the Immigration Act 2016 (IA 2016), the Government introduced an amendment which became section 59 IA 2016, which requires the SSHD to issue guidance specifying matters which must be taken into account in determining whether a person would be "particularly vulnerable to harm" if held in immigration detention and, if so, whether that person should be detained.

7. In May 2016, a first draft of the AARSG was published. Medical Justice and other NGOs expressed a number of concerns about the draft guidance, including in relation to the proposed use of the UNCAT definition of torture; the requirement for professional evidence that a period of detention was probable to cause harm to be considered at the highest level of vulnerability level 3; and, moreover, that it appeared that it was only in level 3 cases that a detainee would receive protection equivalent to the "very exceptional circumstances" criterion in the EIG 55.10 policy.

8. On 21 July 2016 the AARSG was laid before Parliament. In August 2016, Regulations providing for the policy to come into force on 12 September 2016 were laid[8]. There was limited debate in Parliament on the AARSG before it came into force, largely because it was laid shortly before the summer recess to come into force shortly after summer recess. On 12 September 2016, more detailed caseworker guidance (AARCG) was published[9], together with a revised Detention Services Order on the Rule 35 process[10], which purported to define "torture" in Rule 35(3) by reference to the UNCAT definition.

9. On 1 September 2016 a group of NGOs sent a letter to the Home Office repeating their concerns about the AARSG, including in relation to the use of the UNCAT definition, evidence levels and balancing.

The proceedings

10. On 21 September 2016, Bhatt Murphy sent a JR pre-action letter on behalf of Medical Justice, proposing to challenge the AARSG, including on the basis that the use of the UNCAT definition of torture and the effect of evidence levels together with the guidance on balancing vulnerability against immigration factors would fundamentally weaken the protection against detention afforded by the EIG 55.10 for victims of torture. The Home Office responded on 12 October 2016 and Medical Justice lodged its claim for judicial review on 21 October 2016. Subsequently, a number of individual claimants, two represented by Bhatt Murphy and five by Duncan Lewis, lodged individual claims for unlawful detention which included generic challenges to the policy.

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[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492227/gov_paper__2_.pdf
[8] *Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2016/847*
[9] *Adults at risk in immigration detention*
[10] DSO 9/2016, *Detention Centre Rule 35*

11. On 15 November 2016 Mitting J granted Medical Justice permission to apply for judicial review. At a hearing on 21 November 2016, Ouseley J granted the seven individual claimants permission to challenge the AARSG, joined their claims to Medical Justice as lead claims, and ordered an expedited substantive hearing. He also granted the Duncan Lewis claimants' application for interim relief, suspending the use of the UNCAT definition of torture in the AARSG with the *EO* definition of torture to be operated pending the final hearing.

12. During the course of the proceedings, the SSHD made a number of concessions, including making changes to the AARSG and the Rule 35 DSO, and agreeing not seek to use the UNCAT definition of torture unless the court ruled that it was lawful to do so in the AARSG and amend Rule 35 Detention Centre Rules by laying an amendment to the statutory instrument before Parliament. The SSHD also conceded that there were casework errors in all seven individual claims such that their detention had been unlawful, and that casework errors in the period after the AARSG was implemented were widespread, albeit that it was claimed that notwithstanding the errors the decision to detain would have been the same in the overwhelming majority of cases, including the seven cases before the court.

13. Ouseley J observed that "Medical Justice made much same points in these proceedings during the consultation on the AARSG, published in draft in May 2016: the new definition of torture did not come from any evidence-based distinction between the effects of state and non-state infliction of severe pain, and there was no justification for the exclusion, as they saw it, of certain forms of non-state violence from the safeguards of the policy" (§52).

14. Medical Justice and the individual claimants filed detailed evidence showing that the use of the UNCAT definition of torture excluded people who were particularly vulnerable to harm in immigration detention from the ambit of the policy (§§76-122).

The judgment

15. The first issue Ouseley J decided was that the meaning of "torture" in Rule 35(3) had been determined by the court in *EO*. The AARSG was premised on the definition being consistent between Rule 35(3) and the SG. The AARSG could not amend Rule 35(3), which could only be amended by a further statutory instrument. (§§124-130)

16. Secondly, Ouseley J rejected the SSHD's argument that the indicators of risk in AARSG was not exhaustive, so that victims of *EO* torture who do not meet the UNCAT definition of torture but are particularly vulnerable to harm are covered by the policy. The list was exhaustive and the caseworker "errors" set out in the SSHD's evidence, namely that victims of *EO* torture should have been treated as falling within the policy, "were in part not errors at all; they were partly the result of a correct interpretation of unlawful Guidance on the exhaustive nature of the indicators". (§§131-145)

17. The consequence of the interpretation that the AARSG had an exhaustive list of indicators of vulnerability was that some individuals who the evidence showed were particularly vulnerable to harm in immigration detention were excluded from the ambit of the policy. This was contrary to the statutory purpose of section 59 IA 2016, which did not allow the SG "to exclude some particularly vulnerable people" (§149). Further, the distinction between UNCAT and *EO*

victims of torture had "no rational or evidence base" – the evidence relied on by the SSHD to justify the distinction was "not of the same calibre or range" as that relied upon by the claimants. A third reason why the use of the UNCAT definition of torture in the AARSG was unlawful is that it is irrational to expect an IRC doctor to reach a judgement on whether a detainee's account meets the definition, because it would require the doctor to make legal and political judgements beyond his or her expertise as a doctor (§§162-163).

18. Having concluded that the use of the UNCAT definition in the AARSG was unlawful, Ouseley J stated that the SSHD was not obliged to adopt the *EO* definition (§171). He observed that "At the heart of the expert evidence called by the Claimants is the view that the crucial determinant of torture-related vulnerability to harm in detention is the situation of powerlessness in which the severe pain and suffering are inflicted, and not the identity of the perpetrator." (§172)

The future

19. The judgment contains food for thought for the future on a number of important issues.

20. First, the AARSG did not implement Shaw's recommendations. Shaw recommended a policy that built on the presumptive categories in EIG 55.10 with additional presumptive categories of vulnerability, plus a catch all to cover those who are particularly vulnerable to harm not covered by the presumptive categories, and the removal of some of the qualifications to unsuitability in EIG 55.10 (§21). In their evidence, the Home Office officials made clear that it had been their intention to move away from the "exempt categories approach" in EIG 55.10 to a "case by case assessment as to whether an individual needs to be detained in order to effect removal, based on the evidence of vulnerability available in their particular case" (§44). It is unclear what thought was given to how detainees would obtain the evidence required by Home Office caseworkers to secure release, as opposed to simply being categorised as vulnerable, and the risk of this approach giving too much discretion to caseworkers and consequent inconsistent decision-making.

21. Second, Rule 35 has not "caught up" with the policy. Shaw had recommended that the Home office should consider an alternative to the Rule 35 mechanism. Currently, there is a significant lacuna in the mechanism for IRC doctors to report clinical concerns that detainees fall within one of the presumptive categories of vulnerability, with only torture victims covered by Rule 35(3). Under the current policy framework there is a "level 2 lacuna" for: detainees with mental health conditions including PTSD; victims of sexual or gender based violence or victims of trafficking or modern slavery that do not qualify as *EO* torture; detainees with serious physical disabilities; detainees with other serious physical health conditions; detainees who are 70 years or older; trans or intersex persons; and detainees who fall within the catch-all. Ouseley J made clear that alternative reporting mechanisms, namely Rule 35(1) and the IS91 RA Part C risk assessment process, do not fill this lacuna – Rule 35(1) has a significantly higher threshold than a Rule 35(3) report and is normally treated as level 3 evidence; and the IS91 RA Part C process is "more a source of release than a trigger for thought about suitability for detention and weighing countervailing factors" (§166). The AAR framework is incapable of protecting vulnerable detainees if the detention system does not have a reporting mechanism which produces the evidence that caseworkers require to identify and make properly informed decisions about whether vulnerable migrants should be detained or should remain in detention.

22. It is submitted that Shaw's conclusions and recommendations can only be met by an exempt categories + catch all policy, with a threshold for detention once a person falls within one of the categories equivalent to the very exceptional circumstances criterion in the previous EIG 55.10 policy, combined with a replacement for the Rule 35 mechanism which mirrors the policy. As stated above, the Secretary of State is required to review and re-issue the AARSG, and this provides an opportunity to advocate for improvements to the policy beyond remedying the illegality identified by the court.

23. Third, definitions of torture throw up difficult issues. This is the second time the SSHD has been to court and lost in seeking to narrow the definition of torture in her detention policies. Ouseley J agreed with some of the SSHD's criticisms of the *EO* definition, but made clear that whatever definition is used, it must be capable of being applied by both medical practitioners and Home Office caseworkers. A possible solution may be to adopt UNHCR's guidance that "Victims of torture or other serious physical, psychological or sexual violence… should generally not be detained"[11].

24. Fourth, this case does not resolve the issue of whether the AARSG affords lesser protection to victims of torture because of the combination of evidence levels and the guidance and approach to immigration factors. However, the likely further hearing to deal with the claims for unlawful detention in the seven individual cases and Shaw's follow-up review may provide opportunities for this issue to be considered further.

[11] *UNHCR Detention Guidelines 2012, Guideline 9.1*
http://www.unhcr.org/uk/publications/legal/505b10ee9/unhcr-detention-guidelines.html