BRIEFING NOTE

CHALLENGE TO THE ADULTS AT RISK DETENTION POLICY

Introduction

1. This note is to update practitioners and NGOs working with immigration detainees further to a hearing in the Administrative Court on 21 November 2016. In summary, permission to apply for judicial review has been granted in nine claims whose focus is to challenge the adoption of the restrictive[1] definition of torture in article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (UNCAT) in the Home Office's detention policies from 12 September 2016. The court has directed a full judicial review hearing (4 day time estimate) in March 2017. The Court also granted interim relief in the form of replacing the UNCAT definition of torture with the broader definition in the pre-12 September 2016 policies, on a date to be decided.

Background to the challenges

2. From the early 2000s until 12 September 2016, it was Home Office policy not to detain those with independent evidence of torture except in very exceptional circumstances. In Rules 34 and 35 of the Detention Centre Rules (2001), Parliament introduced safeguards within the detention system designed to ensure the effective operation of these policies. These rules provide for a mandatory medical examination within 24 hours of a detainee entering a detention centre and require detention centre doctors to report to the Home Office when there are concerns that a detainee may be a victim of torture (rule 35(3)), may be injuriously affected by detention (rule 35(1)) and where a detainee is suicidal (rule 35(2)).

3. There have been longstanding concerns that Rules 34 and 35 do not operate as intended and that there has been a systemic failure by the Home Office to properly apply its policy that those with independent evidence of torture should not be detained except in very exceptional circumstances. In 2012, 5 individuals supported by Medical Justice brought challenges to their detention. One of the issues that the Court was required to rule upon was what "torture" meant in Chapter 55.10 of the Enforcement Instructions and Guidance (EIG) and .Rule 35(3) of the Detention Centre Rules. The Home Office argued the UNCAT definition, which in simple

[1] By "restrictive" the claimants do not advance their case on the basis that the UNCAT definition does not encompass non-state torture. But some victims of non-state torture who meet the definition at paragraph 82 of *R (EO) v SSHD* [2013] EWHC 1236 (Admin) will not meet the UNCAT definition and still more victims of non-state torture will not be protected by the policy because of incorrect applications of the UNCAT definition by doctors and Home Office caseworkers. Similarly, when we refer to the "broader" *EO* definition, we use the word "broader" because the *EO* definition will, either because of its scope or its application by doctors and Home Office caseworkers, afford protection to more victims of non-state torture than the UNCAT definition.

terms requires the harm to be inflicted by or with the acquiescence of a State; the claimants argued that the definition should not depend on the identity of the perpetrator, rather the focus should be on the severity of the harm inflicted. The Helen Bamber Foundation contributed witness evidence, including from Helen Bamber herself (*"whose experience and expertise in the field is unrivalled"*, *EO* para 81), which explained that the identity of the perpetrator is irrelevant to the issue of whether a survivor of torture is likely to be adversely affected by detention and that there is no significant difference between the therapeutic needs of victims of state torture and torture by non-state agents. The judge (Burnett J) found that: *"In the result the word "torture" in the detention policy means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based upon discrimination of any kind."* (*EO*, para 82)

4. The criticisms of the operation of the policy continued and culminated in Stephen Shaw's review into the detention, published on 14 January 2016. The review concluded that the safeguards for vulnerable people were insufficient to protect them and that overall detention was used too frequently and for too long. He made a total of 64 recommendations, including adding to the categories of vulnerable individuals identified in EIG 55.10 and for the Home Office to *"immediately consider an alternative to the current rule 35 mechanism"*, which was not doing what it was intended to do, namely to protect vulnerable people in detention. Rule 35 should also apply to detainees held in prisons.

5. Part of the Government's response was the announcement of a new "adults at risk" detention policy. It was said that this would *"build on"* the existing policy framework in EIG 55.10. In addition to the existing categories of vulnerable individuals identified in EIG 55.10, additional categories would be added (including victims of sexual violence, female victims of gender-based violence[2], those with a diagnosis of PTSD, those with learning difficulties, transsexual people) and recognised as *"indicators"* that the individual was at risk of harm in detention. In addition, there would be a dynamic catch-all provision, which recognised that there may be individuals with other conditions or experiences which make them vulnerable to harm in detention. At no point did the Home Office mention, still less consult upon, changing the definition of torture to the UNCAT definition. During the course of 2015, there had been

[2] The Shaw review recommended that victims of gender-based violence be recognised as vulnerable, but the Home Office confined this to female victims of gender-based violence.

training for detention centre doctors which referred to the *EO* definition, and there was a consultation on Rule 35 report and response templates, which also referred to the *EO* definition.

6. Another aspect of the context is the challenges to the detained fast track process (DFT). These cases led to the Home Office seeking to take steps to remedy the deficiencies in the DFT system identified by the court. As Medical Justice explain in their witness statement, whilst there continue to be concerns about the operation of the Rule 35 process, in late 2015 and during the course of 2016 there were some improvements in the quality of Rule 35 reports and Home Office responses. There continued to be some inadequate reports but, in general, reports were more detailed and included more reasoning. There were also improvements in the quality of Home Office responses to Rule 35 reports, and this coincided with an increase in the numbers of individuals released through the Rule 35 process. For example, for the year ending June 2016, 30% of Rule 35 reports led to detainees being released from detention, whereas in 2013 and in the first half of 2014, approximately 9% of rule 35 reports led to releases. The statistics show a significant increase in the numbers of Rule 35(3) reports and releases in response to Rule 35(3) reports: in Q3 2014 376 Rule 35(3) reports were raised and there were 52 Rule 35(3) releases, whereas in Q2 2016 there were 802 Rule 35(3) reports and 314 Rule 35(3) releases.

7. In May 2016 the Home Office published a first draft of its *"adults at risk"* policy. This stated that *"having been a victim of torture"* would *"indicate"* that the individual was at risk of harm in detention under the policy. However, a footnote stated that *"torture"* meant the UNCAT definition. NGOs protested that this would have the effect of excluding some individuals currently protected by EIG 55.10 from the protection of the adults at risk policy and that it would disproportionately affect certain groups, notably women and male victims of serious violence on account of their sexuality. In response, the Home Office stated that victims of non-state torture not found to be covered by UNCAT might be protected by other indicators of risk, for example victims of sexual violence, female victims of gender-based violence and victims of trafficking. It was however accepted that some individuals who benefit from the protection of EIG 55.10 would not be protected by the adults at risk policy.

8. Section 59 of the Immigration Act 2016 required the Secretary of State to lay a draft of the adults at risk policy before Parliament and provided for it to be brought into force by Regulations. In July 2016, a further draft of the adults at risk policy was laid before Parliament, which defined torture by reference to the UNCAT definition. It was laid shortly before the summer recess and the Home Office did not explain that the policy adopted a more restrictive definition of torture than current policy. On the contrary, Ministers repeatedly stated

in Parliament that the policy would build on existing policies and provide greater protection to vulnerable individuals. Regulations providing for it to be brought into force on 12 September 2016 were laid in August 2016.

9. On 12 September 2016 the Home Office withdrew EIG 55.10, the Rule 35 Detention Services Order (DSO) and the Rule 35 Process policy, which contained detailed guidance on when Rule 35 reports should be accepted as independent evidence of torture. More detailed guidance for Home Office caseworkers was published, EIG 55b, and new DSO 9/2016. DSO 9/2016 sought to define *"torture"* in Rule 35(3) of the Detention Centre Rules by reference to the UNCAT definition, and instructs doctors not to make a Rule 35(3) report unless this definition is met.

The claims

10. On 21 September 2016 Medical Justice sent a pre-action letter proposing to challenge the aspects of the adults at risks and associated policies implemented on 12 September 2016 which have the effect of weakening the protections from detention for victims of torture (according to the *EO* definition). Further pre-action letters followed by individuals represented by Duncan Lewis and Bhatt Murphy. In the individual cases, it appeared that doctors were applying the *EO* definition when preparing Rule 35(3) reports, but in most of the cases Home Office caseworkers responded simply that the individuals fell outside of the adults at risk policy because the torture did not meet the UNCAT definition. More recently, doctors have declined to send a Rule 35(3) report on the basis that the individual's account of torture did not in the doctor's opinion meet the UNCAT definition.

11. On 24 October 2016 Medical Justice lodged judicial review proceedings which challenged the adults at risk statutory guidance and associated policies.[3] The grounds challenge the adoption of the UNCAT definition, including on the basis that it is contrary to the statutory purpose of section 59 IA 2016, and that it disadvantages those with protected characteristics and is discriminatory and in breach of the duty to have due regard to the equality obligations under the Equality Act 2010. Two individual female victims of trafficking represented by Bhatt Murphy also lodged claims.[4]

[3] CO/5386/2016

[4] JXL CO/5626/2016 and SN CO/5630/2016

12. Separately, on 2 November 2016, 5 individual claimants represented by Duncan Lewis lodged judicial review claims which challenged the adoption of the UNCAT definition of torture, including on the basis that it was irrational and contrary to the EU Reception Directive.[5]

13. In summary grounds of defence in Medical Justice's claim, the Home Office argued that the adults at risk policy moved away from a category-based approach to vulnerability and that those who are most vulnerable to harm in immigration detention would be better protected than by EIG 55.10. The grounds argue that it is justified to afford greater protection to victims of victims of torture who meet the UNCAT definition, as their experiences mean that they are more likely to be adversely affected by detention. If victims of non-state torture who are found not to meet the UNCAT definition are or are likely to be harmed by detention, other parts of the adults at risk policy provides protection. The Detention Centre Rules did not define *"torture"*, it is to be defined by reference to the Home Office's detention policy in force at any time; alternatively, the definition had been amended by Parliament in approving the adults at risk policy pursuant to section 59 IA 2016. On 15 November 2016, Mitting J granted permission to apply for judicial review, observing that *"The claim raises important issues which need to be definitively determined, soon."*

14. In relation to the 5 individual Duncan Lewis claims and the 2 individuals represented by Bhatt Murphy, the Home Office conceded that the individual responses to Rule 35(3) reports had been unlawful on the basis that they had not properly applied the adults at risk guidance. No further detail as to the nature of the concessions was provided and the AOS stated that the claims would be contested but should not proceed as test or lead cases because of the concessions.

15. A case management hearing (CMC) came before Ouseley J on 22 November 2016. It was the Home Office's position that because of the concessions made in the individual cases, they should not proceed to a full hearing, only Medical Justice's challenge should. Further, on 11 November 2016, the Home Office had made changes to DSO 9/2016, so that doctors should consider sending a Rule 35(1) (detention injurious to health) report as an alternative to a Rule 35(3) report where in the doctor's opinion the UNCAT definition is not met. Where a doctor is unsure as to whether an account meets the UNCAT definition, the doctor should send a Rule 35(3) report and leave it to the Home Office caseworker to decide whether the definition is met. The Home Office's submissions for the CMC stated that the concessions in the 7 individual claims before the court revealed *"difficulties"* in the application of the policy; this had led the

[5] HT CO/5533/2016, MO CO/5529/2016, OO CO/5535/2016, MJ CO/5534/2016, PO CO/5532/2016

Home Office to examine all 340 Home Office caseworker decisions in response to Rule 35(3) reports since the policy came into force, with the intention *"to make new decisions in each of the cases where an error was made in applying the new policy and the person remains in detention"*. In response to enquiries made by Duncan Lewis, NHS England confirmed that there had been no training for detention centre doctors on the new policies since they were implemented on 12 September 2016, though a training day for detention centre clinicians is scheduled for January 2017.

16. At the CMC, Ouseley J ordered as follows:

    a. That the Medical Justice claim, the 5 Duncan Lewis individual claims and the 2 Bhatt Murphy individual claims be listed for a full judicial review hearing with a 4 day time estimate in March 2017, to consider the challenges to the policy and its application in the individual claims. Permission was also granted in the 7 individual claims.

    b. The 5 Duncan Lewis' Claimants' application for interim relief, which was supported by Medical Justice, was granted, so that *"torture"* in the adults at risk policy DSO 9/2016 (which in turn sought to define it in Rule 35(3)) is to have the definition at paragraph 82 of *EO* (see para 3 above). The date for this to have effect is to be decided by the judge.

    c. Medical Justice's application for a costs capping order (pursuant to CPR 46.17 and sections 88-89 of the Criminal Justice and Courts Act 2015) was granted, so that its liability for costs is limited to £10,000, with a reciprocal cap limiting the recovery of counsel and solicitors to those charged by Treasury counsel and GLD.[6]

Medical Justice, JXL and SN are represented by Stephanie Harrison QC and Shu Shin Liu of Garden Court instructed by Jed Pennington, Hamish Arnott and Jane Ryan of Bhatt Murphy.

The 5 Duncan Lewis claimants are represented by Chris Buttler and Ayesha Christie of Matrix instructed by a team of solicitors led by Toufique Hossain and Lewis Kett of Duncan Lewis.

Both teams would be grateful for information about the operation of the adults at risk policy since 12 September 2016, particularly in relation to victims of non-state torture. Please email t.schleicher@medicaljustice.org.uk, j.pennington@bhattmurphy.co.uk, lewisk@Duncanlewis.com, ToufiqueH@Duncanlewis.com.

[6] In accordance with the approach in *Medical Justice* [2010] EWHC 1425 (Admin), *Detention Action* [2014] EWHC 2245 (Admin) and [2015] EWHC 1689 (Admin), and the Howard League and Prisoners' Advice Service challenge to cuts to scope to legal aid for prison law category cases.