Medical Justice
seeking basic rights for detainees

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BRIEFING: RULE 35 SAFEGUARD IN DETENTION

Written evidence submitted by Medical Justice to the Shaw Review

1. Summary: Failure to properly implement Rule 35 has contributed to significant harm of detainees. There is much evidence that it is rarely an effective mechanism for ensuring that the interests of those unfit for detention, or whose continued detention would be injurious to their health, can be safeguarded. Medical Justice calls for
   - an independent and comprehensive audit of the Rule 35 process on practice both by healthcare staff and Home Office caseworkers.
   - comprehensive training of all staff and subcontractors in the proper implementation of Rule 35.

2. Background: Every year, 30,000 people are held in Immigration Removal Centres (IRCs) and other facilities across the UK. Medical Justice believes that:
   - IRCs, and the conditions of detention, are so detrimental to the health and wellbeing of those detained that the only way to remedy this situation is to close the IRCs.
   - all detainees must have access to NHS equivalent treatment.
   - vulnerable detainees should not be detained.

3. About Medical Justice: Medical Justice is the only organisation in the UK to send independent volunteer clinicians in to all the IRCs across the UK. The doctors document detainees' scars of torture and challenge instances of medical mistreatment. We see more than 600 cases each year and have gathered a sizeable, unique and growing medical evidence base. Evidence from our casework is the platform for our research into systemic failures in healthcare provision, the harm caused to detainees by these shortcomings, as well as the toxic effect of immigration detention itself. We and others use our research to secure lasting change to the detention regime through policy work, strategic litigation and by raising awareness of the conditions inside places of immigration detention.

4. Rule 35 Reports: The Detention Centre Rules provide a limited safeguarding mechanism for vulnerable detainees - the Rule 35 reporting procedure. *"The purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention. The information contained in the report needs to be considered in deciding whether continued detention is appropriate in each case."*(55.8A)[1] A Rule 35 report must be completed by a doctor after seeing someone[2]:

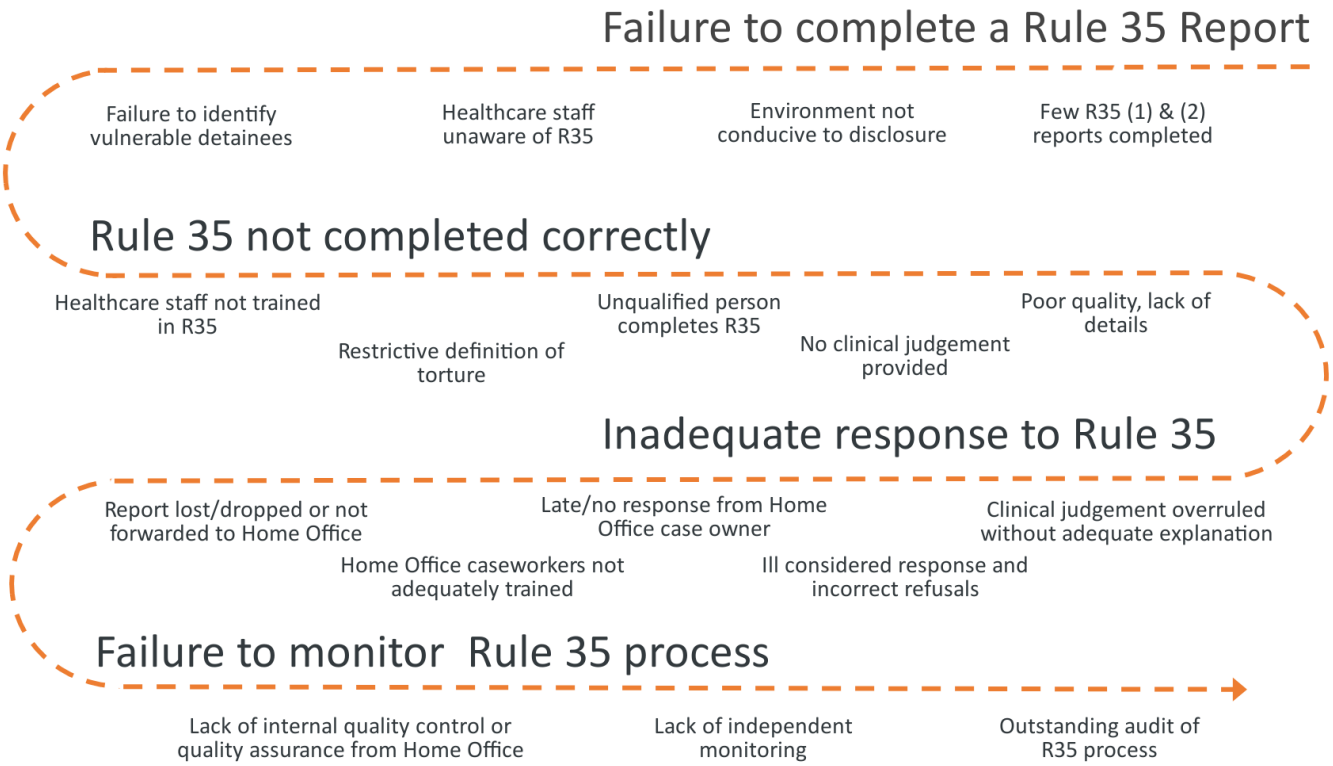
   (1) whose health is likely to be injuriously affected by continued detention or any conditions of detention.

   (2) they suspect of having suicidal intentions.

   (3) they are concerned may have been the victim of torture.

4.1 The Rule 35 report is then submitted to the Home Office caseworker who must review and respond within a set time frame. An internal Home Office audit found that only 35% of rule 35 reports completed were responded to within the given time frame whilst 33% were not responded to at all. Where a response was received only 9% of detainees were released from detention[3].

5. **General criticism**: The implementation of Rule 35 has been plagued by widespread, and well-documented[4], failings resulting in vulnerable detainees being harmed by detention. In the case of [Detention Action v SSHD] Justice Ouseley found that "*Rule 35(3) reports are not the effective safeguard they are supposed to be (…). The ineffectiveness of this safeguard may be caused by the quality of the reports, the quality of the response as to whether they amount to independent evidence of torture. But I am persuaded that Rule 35 (3) reports do not work as intended."*[5 §133] The ruling was in the context of the Detention Fast Track system though Rule 35 applies to all detainees. Similar concerns were raised by the Home Affairs Select Committee[6]and the United Nations Committee Against Torture in May 2013, with one Committee member suggesting the Rule 35 process has become an *"empty paper pushing exercise"*[7].



6. SPECIFIC SHORTCOMINGS

6.1 **Failure to identify vulnerable detainees:** In order for Rule 35 to function as a safeguard for vulnerable detainees IRC healthcare must effectively identify such individuals. However, ongoing healthcare failings such as a lack of training, brief consultations, poor use of interpreters, poor clinical assessments, inadequate mental health services and a lack of clinical governance[8] hinder such identification. There is no way of knowing how many vulnerable detainees who should have a Rule 35 report completed, do to receive one. However, a recent study completed at Yarl's Wood by Women for Refugee Women found that 72% of detainees reported being survivors of rape and 85% stated that they had been either raped or tortured[9]. A Home Office audit[3] found only 3% of detainees had a Rule 35 report completed and Home Office statistics[10] for the second quarter of 2014 shows less than 10% detainees did. These rates have not changes significantly over the last two years[11]. These numbers indicate a sizeable proportion of vulnerable detainees may fail to be picked up by this safeguard. It is important to remember that these are some of the most vulnerable detainees in detention, so this failing potentially has very serious consequences.

6.2 **Lack of training:** In 2012, when a revised policy and guidance was being developed, UKBA policy makers assured NGOs that there would be new training for both home office and IRC doctors. However this appears not to have been rolled out across the detention estate and further training is needed. Informally, IRC staff has informed Medical Justice that they have not been offered training and that they do not know how to access training. Rule 35 was discussed by Home Office staff and IRC clinicians at the NHSE IRC healthcare workshop on 29/09/14. It was evident from the discussion that many of the IRC clinicians present lacked basic knowledge about the process, for example about who should complete the reports (the GP), and what to include in a report. Healthcare staff report receiving responses which state that Rule 35 report does not constitute independent evidence of torture, and they was a belief that this was because they were IRC doctors and therefore not independent. However, the most likely reason for such a response is that the report did not include a clinical opinion. As healthcare staff were unaware of this they would not have been able to adequately respond to the responses if there were continuing concerns. There is an ongoing need for more training to address this and other areas of confusion around Rule 35. Several clinicians expressed an interest in training.

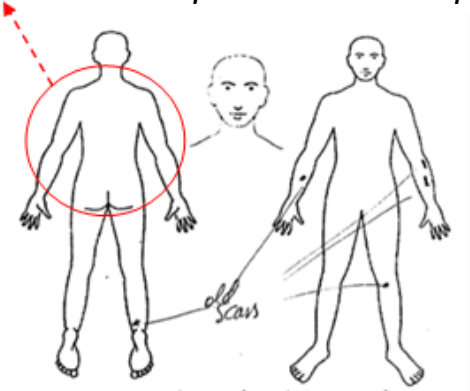
6.2.1 The 2013 HMIP inspection of Yarl's Wood found that "*none of the health services staff had been trained in the recognition of alleged acts of trauma or torture, and this was evident in the varied quality of Rule 35 reporting*"[12 p.42]. In addition, the Colnbrook and Harmondsworth IRC Health Needs Assessment 2013 states "*The Lead GP has been trained in how to carry out a "Rule 35" assessment; this training was provided by the UKBA. It is not clear what training has been provided to other staff and the training received by the lead GP was not cascaded. The clinicians who went on this training reported that they found it confusing with no clear instruction given about how to apply it in practice.*" This report comes two years after the tragic death of Brian Dalrymple at Colnbrook IRC. The Coroner's inquest ruled that medical neglect had contributed to his death. Mr Dalrymple's underlying mental health issues were never diagnosed by the IRC healthcare units and no rule 35 report completed. During the inquest it emerged that the GP "*had had no induction training, did not realise he could access wing records, and most extraordinarily had never heard of Rule 35"*[13].

6.3 **Narrow definition of torture:** Following [EO v SSHD][14], a case of 5 linked torture cases whose detention was ruled unlawful by the High Court after Rule 35 reports failed to affect their release, the Home Office conceded that the definition of torture applied should go beyond torture perpetrated by, or acquiesced to, by public officials (e.g. the United Nations Convention Against Torture (UNCAT) definition[15]). A broader definition centred on the severity of ill-treatment suffered which includes acts of domestic, sexual and community violence by any actor should be applied. However, Medical Justice still finds that many doctors appear to apply the UNCAT definition in practice. One client who disclosed a history of multiple-perpetrator rape by a violent gang was told her situation did not warrant a Rule 35 report. In the medical notes the doctor concludes: *"rape – private. No rule 35"*. Similarly, no rule 35 reports were completed in cases where detainees reported homophobic attacks or domestic abuse. Another client who reported being the victim of an 'honour crime' was told to '*go and google torture'* – presumably a reference to the fact that as the ill treatment did not come at the hands of state actors the ill treatment did not amount to torture. This confusion contributes to Rule 35 reports being delayed, or not completed at all, for vulnerable detainees who continue to be inappropriately detained.

6.4 **Under-reported psychological presentation:** Rule 35 reports often focus on the physical evidence of torture and fail to consider or record evidence of psychological trauma. One client who reported being anally raped whilst in prison in his country of origin was seen by an IRC doctor who documented severe psychological symptoms in his medical notes and recommended an urgent mental health assessment. The doctor carried out a physical examination but, finding no anal fissure, concluded "*no independent evidence of torture, no rule 35 report*". This is despite the Istanbul Protocol[16] stating that such physical evidence is present in less than 30% of cases of anal rape. The failure to complete Rule 35 reports on the basis of psychological presentation may be contributing to low numbers of Rule 35 reports in IRCs and the failure to comment on psychological presentations in completed Rule 35 reports reduces the quality of these reports.

6.5 **Poor quality Rule 35 reports:** HMIP inspections found that Rule 35 reports were "*often insufficient or formulaic, and gave limited assurance that the needs of individuals had been fully considered*"[17 p.5] and lacked diagnostic judgements[12]. The 2013 HMIP inspection of Colnbrook IRC stated: "*The reports did not comment on the consistency between scarring and a method of torture. For example, one detainee claimed he was burnt on his back with cigarettes. While the scarring was documented, the doctor did not provide a comment on whether the scarring was consistent with cigarette burns.*"[18 p.29] Medical Justice research on Rule 35 in IRCs, 'The Second Torture'[4] found similarly poor quality. Out of 50 cases reviewed: 46% of reports were completed by nurses despite policy specifying they be completed by a doctor, 49% were incomplete, 49% were missing a body map for documenting scars, many of the reports failed to identify signs of torture, failed to express an opinion, comment on severity or failed to comment on the impact on the detainee's health. Only one out of 50 detainees was released as a result of a Rule 35 report and the average length of time spent in detention was 226 days. The health impact of the detention of such vulnerable individuals was undeniable and dramatic as the study found that 23% went on hunger strike (50% of whom required hospitalisation), 34% experienced suicidal ideation, 16% attempted suicide, 83% self-reported that detention had a negative impact on their mental and physical health, 11 detainees were transferred to hospital as acute emergencies and there was one near death event[4]. Not only does poor quality Rule 35 reports lead to vulnerable detainees lingering inappropriately in detention but it can also impact the outcome of their asylum claims as Rule 35 reports are often relied upon as evidence, or lack thereof, of torture. As in the case below:

> "P informed healthcare at Yarl's Wood that she had been mentally and physically tortured whilst imprisoned by police in her country of origin. The GP in Yarl's Wood completed a Rule 35 failing to record a large portion of P's scars, to offer a professional opinion or to comment on the clinical consequences of continued detention. The Home Office case worker dismissed the report as the GP had *"not suggested that your detention is inappropriate".*
>
> P was seen by an independent doctor who found "*numerous parallel scars on both halves of the back(…) The scars on the back (…) are highly consistent with the history of being whipped repeatedly with a bamboo stick. (…)* ***I am concerned that these scars on the back do not appear to have been reported in the Rule 35 report in Yarl's Wood medical notes".***
>
> P's asylum application was initially refused partly due to lack of evidence of torture but this decision was overturned on appeal as a result of improved medical evidence."



IRC GP scar diagram for Rule 35 report for P

6.6 **Very few Rule 35 reports lead to release:** In the second quarter of 2014 457 Rule 35 reports were completed for 452 detainees leading to the release of 45 detainees which gives a release rate of less than 10% as a result of Rule 35 reports[19]. HMIP reports that *"there was little evidence of the effectiveness of Detention Centre Rule 35 procedures"* and that *"responses from caseworkers were often dismissive and* ***none*** *of those we reviewed led to release."*[20 p.67] The Independent Monitoring Board at Harmondsworth reported *"in 2012 there were 125 (109 in 2011) 'unfit for detention' reports made to UKBA relating to Harmondsworth detainees, of which only 12 (5 in 2011) resulted in the detainee being released from detention.* ***We are amazed that a doctor's judgement is overruled by case owners in 9 cases out of 10. These words and numbers do not in themselves tell the story of the real suffering endured."***[21 p.13]

6.6.1 A freedom of Information request in August 2013 (FOI 2786) showed very low numbers of detainees released from detention after having a Rule 35 report completed. The table below relates to rule 35 (1) reports – detainees who are being injuriously affected by detention. It is

astonishing that, in such a vast majority of cases where IRC doctors have found individuals to be harmed by continued detention, this has not led to release. Of course detention can continue when someone is being injuriously affected by detention in very exceptional circumstances but this seems to be becoming increasingly common.

	Q1 2012	Q2 2012	Q3 2012	Q4 2012	Total 2012	Q1 2013
Rule35(1) reports in 2012	34	31	9	24	98	16
Detainees relating to the R35 reports	31	29	7	22	89	16
Detainees released	1	2	-	1	4	0

Table 1. Number of Rule 35 reports filed vs number of detainees released as a result

6.7 Very few Rule 35(1) & Rule 35(2): It appears that very few IRC clinicians do Rule 35 (1) or Rule 35 (2) reports, when detainees are at risk of suicide or likely to be injuriously affected by detention. Medical Justice frequently see cases where IRC clinicians have recorded in the medical records that they consider the detainee to be 'unfit for detention' or that their 'medical needs cannot be met in detention', but no Rule 35 report is done. Often alternative reporting procedures, e.g. IS91 RA Part C form, a form intended for reporting a change in circumstances to Detainee Escorting and Population Management Unit (DEPMU), gets used instead. IS91 RA Part C forms do not get reported to the Home Office case worker directly and does not lead to a mandatory review of detention. Its use and effectiveness is not audited by the Home Office. It is therefore an unsuitable tool for managing and monitoring the safeguarding of vulnerable detainees. Medical Justice is concerned that the low number of rule 35 reports does not reflect the number of seriously ill detainees seen by our doctors in detention. If no Rule 35 report is completed and actioned these detainees may remain in detention where their health will continue to deteriorate. The below table shows the number of Rule 35(3) reports and the total of Rule 35 reports completed for Yarl's Wood in 2013 and, despite the rounding, it is clear that as few as 1% of Rule 35 reports are Rule 35(1) or (2)[22].

Yarl's Wood 2013	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Rule 35 (3)	40	30	35	35	60	70	40	50	50	40	55	45	555
All Rule 35	40	30	35	35	60	70	40	50	50	40	55	45	560

Note: Figures rounded to the nearest five and may not sum to the totals shown

6.8 Decision making process: A completed Rule 35 report should trigger a review of the detainees continued detention by the Home Office Case Worker. Few lead to release. However, the reasoning behind continued detention is often contrary to policy, providing reasons such as:

- '*the doctor has not indicated that you are unfit for detention or recommended your release'*;
  However, for rule 35(3) there is no requirement for the doctor to say that, it's about whether there is concern that the detainee has been tortured
- '*your scars are not diagnostic'*
  However, there is no requirement for scars to be diagnostic - 'Diagnostic' is a term applied in the Istanbul Protocol, there is no expectation of Rule 35 reports to apply the Istanbul Protocol. The term applies to scars where no there is no possible alternative explanation and very few scars will meet this threshold.
- *'we do not propose to remove you to [country where torture is alleged to have occurred]'*;
  However, this is irrelevant, Rule 35 is about suitability for detention not where a detainee may or may not be removed to
- '*report does not amount to independent evidence'*;

Rule 35 reports should not merely repeat the detainees account but should offer a clinical opinion. The clinical opinion, if present, qualifies as independent evidence. The fact that this is often missing is an issue that could be addressed with further training. It would be advantageous if the response from the Home Office caseworker contained further information, beyond 'not independent evidence', in order to enable doctors to provide further information or clarification as needed.

None of the above reasons are valid reasons for continued detention according to Home Office policy. One HMIP inspection found that "*Responses were prompt, but dismissive. For example, a female detainee claimed she was tortured in Iran. The caseworker stated that one of the reasons for refusing to release her was: 'You arrived without a valid travel document', ignoring the substantive issue."*[18] Another noted "*Case workers generally replied promptly but the focus was on maintaining detention. In one case, a case worker had accepted that a detainee had been tortured but had maintained detention as their condition could be managed satisfactorily; this was inconsistent with Home Office policy."* [12]

6.8.1 In one case a detainee requested a rule 35 report soon after his arrival at the IRC but this was not done for over one month as the IRC was unsure whether ill-treatment in a third country amount to torture for the purpose of rule 35. The detainee reported (and has medical evidence which supports his account) both torture in his country of origin and ill-treatment in a European country he passed through on his way. In their response to the report the caseworker cited as one reason for maintaining detention that the detainee had already been detained for 40 days and had not raised the report earlier. This is of course inadequate for two reasons: (1) late reporting of trauma is not unusual; and (2) in this case the delay was due to the healthcare unit and not the detainee.

6.8.2 *Clinical assessment overruled*: Even when Rule 35 reports are completed to a high standard Home Office caseworkers frequently overrule[6, 17] the clinical assessments of doctors who have found that detention could injuriously affect the detainee's health. The HMIP review of healthcare at Yarl's Wood in 2006 found that Home Office caseworkers were unresponsive to *"an alleged history of torture or adverse medical consequences of continued detention. When clinical concerns were raised, the information was not systematically addressed or actioned. Nor was independent medical opinion sought or adhered to"*[23 p.6] and as *"there was no system to seek the opinion of an independent medical specialist (…) in some cases [Home Office] caseworkers, with no declared medical qualification, appeared to be making their own clinical judgments"*[23 p.11]. The same problems persist in IRCs to this day.

6.9 No Rule 35 in prisons: There is no Rule 35 in prisons, meaning that there is no process to implement EIG 55.10 which applied both in IRCs and in prisons. This risks putting detainees held in prisons under immigration powers at risk of significant harm. In Medical Justice's opinion this is of great concern, as there is no reason to think that detainees vulnerable to suffer harm as a result of detention would not suffer the same level of harm whether detained in an IRC or a Prison. Prison staff are possibly even less likely to have received training in identifying signs of trauma and torture. In addition, as the prison estate has an obligation to incarcerate convicted prisoners and those on remand, who make up the vast majority in prison, it may not occur to healthcare, or other staff, that they should be advocating for the release of immigration detainees who are injuriously affected by detention or fulfil other Rule 35 criteria.

6.10 Outstanding audit: The Home Office had promised a full audit of rule 35, including the quality of reports and the reasons given by caseworkers for overruling the recommendations of doctors. The audit was scrapped in favour of a quality marking standard exercise which was due to be completed in January 2014. Medical Justice is disappointed at the new format for the auditing exercise as it does not address vital questions around the decision making process and why doctor's recommendation are so often overruled by caseworkers.

REFERENCES

1. HO, *Home Office Enforcement Instructions and Guidance. Version 10 (June 2014 update). https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307995/Chapter55.pdf*. 2014.
2. HO, *Detention Centre Rules. http://www.legislation.gov.uk/uksi/2001/238/made*. 2001.
3. HO, *Home Office. Detention Centre Rule 35 Audit. 4th of February 2011. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257174/det-centre-rule-35-audit.pdf*. 2011.
4. MJ, *The Second Torture: The immigration detention of torture survivors. Medical Justice. http://www.medicaljustice.org.uk/images/stories/reports/2ndtfull.pdf*. 2012.
5. *Detention Action v Secretary of State for the Home Department, [2014] EWHC 2245 (Admin), United Kingdom: High Court (England and Wales), 9 July 2014, available at: http://www.refworld.org/docid/53bd255a4.html [accessed 13 August 2014]*. 2014.
6. HAC, *The work of the UK Boarder Agency (July - September 2012). Fourthenth Report of Session 2010-2013. House of Commons Home Affairs Committee. http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/792/792.pdf*. 2013.
7. FfT. *Freedom from Torture. "High Court Confirms Failings of Rule 35: Detention of Torture Survivors Ruled Unlawful", (May 17 2013) http://archive-org.com/page/3256606/2013-12-04/http://www.freedomfromtorture.org/news-blogs/7329 (accessed 22/07/14)* 2013.
8. MJ, *GENERAL HEALTHCARE FAILINGS IN DETENTION. Written evidence submitted by Medical Justice to the APPG on Immigration Detention*. 2014.
9. WRW, *Detained: women asylum seekers locked up in the UK. Women for Refugee Women. http://refugeewomen.com/wp-content/uploads/2014/01/WRWDetained.pdf*. 2014.
10. HO. *Home Office Immigration Statistics*. 2014; Available from: https://www.gov.uk/government/collections/immigration-statistics-quarterly-release (Accessed 11/07/2014).
11. *Written question 208963: Mr Andrew Smith 10-09-2014. Rule 35. http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2014-09-10/208963/*. 2014.
12. HMIP, *Report on an unannounced inspection of Yarl's Wood Immigration Removal Centre by HM Chief Inspector of Prisons, (17–28 June 2013 & 30 Sept – 1 Oct 2013), http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/yarls-wood/Yarls-Wood-2013.pdf*. 2013.
13. Jones & Allen Hodge. *"Inquest into US citizen's death in immigration custody finds neglect" (accessed 22/07/2014), http://www.hja.net/news/press-releases/civil-liberties/inquest-us-citizen%E2%80%99s-death-immigration-custody-finds-neglect*. 2014.
14. *EO & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 1236 (Admin) (17 May 2013). http://www.bailii.org/ew/cases/EWHC/Admin/2013/1236.html*. 2013.
15. UNCAT, *General Assembly resolution 39/46 of 10 December 1984 (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), http://www.un.org/ga/search/view_doc.asp?symbol=a/res/39/46*. 1984.
16. OHCHR, *Professional Training Series No. 8/Rev.1, Office of the United Nations High Commissioner for Human Rights, Geneva. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf*. 2004.
17. HMIP, *Report on an unannounced full follow-up inspection of Harmondsworth Immigration Removal Centre, November 2011. http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2011.pdf*. 2012.
18. HMIP, *"Report on an unannounced inspection of Colnbrook Immigration Removal Centre" 28 January – 8 February 2013. http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/conbrook/colnbrook-irc-2013.pdf*. 2013.
19. HO, *Immigration Enforcement Q2 2014. https://www.gov.uk/government/publications/immigration-enforcement-data-august-2014 (accessed 08/09/2014)*. 2014.
20. HMIP, *HM Chief Inspector of Prisons for England and Wales Annual Report 2012–13. http://www.justice.gov.uk/downloads/publications/corporate-reports/hmi-prisons/hm-inspectorate-prisons-annual-report-2012-13.pdf*. 2013.
21. IMB, *Annnual Report Harmondsworth Immigration Removal Centre, "Monitoring fairness and respect for people in custody", March 2013, Independent Monitoring Board. http://www.justice.gov.uk/downloads/publications/corporate-reports/imb/annual-reports-2012/harmondsworth-2012.pdf*. 2012.
22. *Home of Commons Hansard, 12 Mar 2014 : Column 270W "Immigrants:Detainees" http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140312/text/140312w0003.htm#140312w0003.htm_spnew2*. 2014.
23. HMIP, *Inquiry into the quality of healthcare at Yarl's Wood Immigration Removal Centre (20-24 February 2006) by HM Chief Inspector of Prisons. http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/yarls-wood/yarls_wood_inquiry_final-rps.pdf*. 2006.