

Briefing on 'Adults at risk in immigration detention' draft policy'

In response to Shaw's "Review into the Welfare in Detention of Vulnerable Persons" the Home Office have developed a draft "Adults at risk in immigration detention" policy which aims to reduce the number of vulnerable people detained and the length of time they are detained before removal. The policy is not open for consultation but the Home Office have invited comments from stakeholders.

The 'Adults at risk' policy has been introduced as the main vehicle for remedying the current lack of effective safeguards to protect vulnerable people from being inappropriately detained and harmed by detention. It is therefore crucial that it works effectively to achieve its aim. Medical Justice are concerned that the policy in the current draft format will fail to achieve its stated aim and may in fact lead to an increase in both numbers of vulnerable people detained and the duration of detention. Our comments and suggestions are set out below and we hope the Home Office will take these into consideration before laying the policy before Parliament.

We welcome the commitment to reducing the number of vulnerable people in detention as well as limiting the duration of detention before removal. The harm caused by detention to vulnerable migrants has long been known and has been established beyond doubt by the Shaw review. An overhaul of the mechanisms that prevent vulnerable people from being detained in the first place as well as the mechanisms for ongoing monitoring and safeguarding is urgently needed.

We welcome the fact that the 'Adults at risk' policy recognises the significance of self-declaration of vulnerability for the first time since many vulnerable people at risk of detention do not have professional evidence of their vulnerability readily available.

We also welcome the intention to introduce a more holistic view rather than working of a 'checkbox list' of vulnerabilities, to ensure that vulnerable people are consistently identified.

However, we have serious concerns about how this policy will work in practice – it is difficult to comment without sight of the accompanying guidance which will presumably set out how the policy will be implemented. From the framework provided we have six main areas of concern:

i. *Reduced protection for survivors of torture.*

It has long been accepted that detention is likely to have a detrimental effect on torture survivors, and consequently, the previous policy excluded those with independent evidence of torture from detention (except in very exceptional circumstances). Torture survivors needed to show independent evidence of torture, but there was no requirement to additionally provide evidence of harm caused by detention (or in the case of those not yet detained, evidence that, if they were to be detained in future, they would be likely to be harmed by detention). Despite this, our experience as well as numerous inspectorate reports and court judgments showed that this safeguard failed to adequately protect torture survivors.

The new draft policy appears to further weaken the protection afforded to this group by raising the evidential burden required to be regarded as 'highest risk'. In addition to producing

evidence of torture, torture survivors will have to show that a period of detention is likely to cause harm. Healthcare provision in detention has been shown to be insufficient with victims of torture and those suffering from mental health issues often going undiagnosed and undocumented. Given the problems there have been for many years with sourcing appropriate training for medical practitioners in IRCs and inadequately prepared Rule 35 reports, it is likely that many torture survivors who are suffering harm in detention will not be able to obtain good evidence of their suffering. Medical Justice have a long waiting list of detainees in need of assistance with documenting evidence of torture and risk as do the medical foundations.

In addition, the policy relies on the UN-CAT definition of torture which limits torture to acts by, or with the acquiescence of, public officials. As established by EO & Ors. [2013] EWHC 1236 (Admin)¹ torture in application of detention policy must be regarded as that defined by Burnett J as: *“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.”* As a result, the categories set out in this policy seem to represent a narrowing of the protections for vulnerable people in, or entering, detention.

Victims of torture should always be considered in the highest category of vulnerability and the policy must be updated to reflect the wider definition of torture set by Judge Burnett in EO.

ii. *Need for evidence on the likelihood a person would suffer harm if detained:*

We have long been concerned about the effect of the phrase *‘which cannot be satisfactorily managed in detention’* and similar qualifiers, which were added to the wording of the policy on detention in EIG 55.10 in 2010. Following this change in policy there were 5 cases where it was found that detention of a mentally ill person had amounted to unhuman and/or degrading treatment. As Jeremy Johnson QC found in his sub-review to the Shaw Review *‘(...) the nature of the findings and the pattern of findings as between the different cases (take together with some observations made in cases where no Article 3 breach has been found) do tend to suggest that these cases may be symptomatic of underlying systemic failings’*. Shaw recommend the phrase *‘which cannot be satisfactorily managed in detention’* should be removed from the policy.

The current draft policy is intended to replace the wording of EIG 55.10. While we are pleased these qualifiers are not being included in the Adults at risk policy we are concerned that the use of the word *‘suffer’* and the focus on evidence to show that the person would be likely to suffer harm in detention are likely to have a similar effect. A policy which sets out to identify and protect vulnerable adults at risk should be prospective, in so far as it aims to identify categories of people who are vulnerable to suffering harm in detention and ensuring they are not exposed to this risk through inappropriate detention. People with indicators of risk such as a mental illness, disability and history of torture are very likely to suffer harm in detention. Requiring evidence of the likely risk that they will suffer harm risks encouraging a *‘wait and see’* approach where vulnerable people are detained and allowed to deteriorate, so that evidence of that deterioration can then be considered.

iii. *Lower threshold for maintaining detention for those accepted to be ‘at risk’:*

The policy represents a departure from the language of existing policies which state that detention may be maintained for vulnerable individuals in *‘very exceptional circumstance’*.

¹ EO & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 1236 (Admin) (17 May 2013)

Instead the 'adults at risk' policy focuses on '*immigration factors*' (these include various factors such as the length of detention', public protection issues and compliance issues). As the factors considered in the 'adults at risk' policy go far beyond conditions which can reasonably be considered very 'exceptional circumstances', this represents a lowering of the threshold for detaining people accepted to be 'at risk'. This could have the effect of undermining the protection the policy aims to provide and may in fact lead to more vulnerable people being inappropriately detained.

This is particularly concerning as we have recently noticed an increase in decision to maintain detention following a Rule 35 report being accepted as 'independent evidence of torture' with 'very exceptional circumstances' being alleged in circumstances which are far from exceptional, such as the person having made a late claim for asylum. A late claim and other poor 'immigration factors' may well be a direct effect of a person's vulnerability and the trauma experienced.

It is important to remember that several of the cases where breaches of Article 3 were found concerned people who claimed asylum late, whose asylum claims were initially refused or who had criminal convictions.

iv. *How will evidence of vulnerability be obtained?*

In absence of further guidance it must be assumed that the policy as it stands relies heavily on the Rule 35 process to reveal vulnerability in those already detained. The shortcomings of this process are well known and without addressing these inadequacies it is difficult to imagine how the policy will function effectively.

The policy is intended to prevent vulnerable people from being detained in the first place. It is not clear how vulnerability is going to be detected before the person enters detention. The recognition that vulnerable people should not be detained '*even if this is self declared*' is important in this context. However, in many cases it is likely that a risk at 'level 1' would be outweighed by other factors – it is therefore important to obtain professional evidence of vulnerability before a decision is made whether to detain the person. For the policy to provide effective protection for vulnerable persons, when a person is found to be at 'level 1' risk, it is crucial that the Home Office investigates the level of risk to ascertain whether in fact the person may be at high risk, before deciding whether a risk is outweighed by other factors. Such a person should not be detained and allowed to deteriorate in detention so that professional evidence of harm caused by detention may later be obtained and considered. This kind of practice was in the past what led to the Article 3 cases of 'inhuman and degrading treatment' in the first place.

v. *Pregnant women:*

We welcome the stipulation that pregnant women should always be regarded as highest risk. Further policy is required regarding the detention of pregnant women and the steps that need to be taken before, in very exceptional circumstances, a pregnant woman would be detained. In line with the terms of the settlement reached in the case of PA we expect a wide consultation on this issue and look forward to contributing to it.

vi. *Balancing harm against immigration factors*

The Article 3 cases, the Shaw review and the mental health literature review by Mary Bosworth establish beyond doubt the damage that is caused by detention. This harm remains regardless of immigration factors. So, any balancing of vulnerability against immigration factors is done in recognition of this harm and the fact that the longer detention is maintained the greater the harm. If the State is to cause harm to individuals there must be an extremely compelling reason to do so – it does not seem to us that factors such as a poor immigration history can justify such harm.

We are disappointed that the Home Office have chosen not to carry out a formal consultation on this vital policy but hope that these comments will be taken into consideration in finalising the policy.

The policy was drafted in the aftermath of the Shaw review as a response to the 64 recommendations made by this report, yet we are concerned that the policy does not seem to address the concerns raised by the review. A robust mechanism that ensures that vulnerable people are not detained and that those who become vulnerable in detention are identified and released must be put in place. We are concerned that the ‘adults at risk’ policy relies heavily on mechanisms already in place, such as existing screening and safeguarding practices as well as legal protections embodied in the presumptions of liberty and limited duration of detention. As these protections were already in place before the Shaw review concluded that protections for vulnerable people were inadequate we are concerned that the policy in its current manifestation fails to increase protection for vulnerable people and to achieve the ‘significant and transformative’ reform promised by the Minister for Immigration, James Brokenshire, following the Shaw Review.

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