



Home Office

Immigration Detention

A new definition of torture

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Introduction

The purpose of this session is to:

- provide a refresher on the adults at risk policy;
- tell you about a new definition of torture in the context of immigration detention which came into force on 2 July 2018;
- tell you about a new approach to looking at serious medical conditions;
- alert you to some possible changes to Rule 35 that may happen later in the year.



Detention Principles

- There is a presumption of liberty
- Detention should be for the purposes of removal
- Hardial Singh principle – We can detain lawfully only if there is a realistic prospect of removal within a reasonable timescale



Adults at Risk policy Background

- Implemented in September 2016
- Part of the Government's response to Stephen Shaw's review on the welfare of vulnerable people in immigration detention
- Added new categories of people who the Government believed were vulnerable in the context of immigration detention

Adults at Risk policy

Principles

- Strengthens the existing presumption of liberty
- If evidence suggests that the length of detention is likely to have a harmful effect on the individual, they should not be detained unless there are immigration considerations which outweigh any risk identified

Adults at Risk Policy Rationale

- The adults at risk policy is based on the idea that certain categories of people are at particular risk of harm within immigration detention due to their physical state, health or past experiences.



Adults at Risk policy

Indicators of Risk

- suffering from a mental health condition or impairment
- having been a victim of torture
- having been a victim of sexual or gender based violence, including female genital mutilation
- having been a victim of human trafficking or modern slavery
- suffering from post traumatic stress disorder
- being pregnant
- suffering from a serious physical disability
- suffering from other serious physical health conditions or illnesses
- being aged 70 or over
- being a transsexual or intersex person.
- **This list is not exhaustive**



Adults at Risk policy

Additional safeguarding provision

- There is no exhaustive list of conditions or experiences
- Any other relevant condition or experience that may render an individual particularly vulnerable to harm in immigration detention should be considered



Adults at Risk policy

Evidence levels

- **Level 1** - A self-declaration of being an adult at risk
- **Level 2** - Professional evidence (for example from a social worker, medical practitioner or NGO), or official documentary evidence, which indicates that the individual is (or may be) an adult at risk
- **Level 3** - Professional evidence (for example from a social worker, medical practitioner or NGO) stating that the individual is at risk and that a period of detention would be likely to cause harm



Adults at Risk policy

Balancing Factors

- How quickly removal is likely to be effected
- The compliance history of the individual
- Any public protection concerns

A new definition of torture applicable to immigration detention



Torture - EO Definition

*“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 and Others v SSHD [2013] EWHC 1236 (Admin)



Torture – UNCAT Definition

*“Torture is ‘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 is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a **public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’”*

Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)



Torture - EO Definition

“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 and Others v SSHD [2013] EWHC 1236 (Admin)



Torture – the new definition

“Any act by which a perpetrator intentionally inflicts severe pain or suffering on a victim in a situation in which the perpetrator has control (whether mental or physical) over the victim and, as a result of that control, the victim is powerless to resist”.



Torture

The three elements

- There are three elements to the definition of torture that must be met in each case:
- Severity
- Intent
- Powerlessness



Torture

Limb 1 - Severity

- Duration
- Physical effects
- Mental effects
- Respective ages of the perpetrator and victim
- State of the victim's health



Torture

Limb 2 – Intent

- Must be committed intentionally
- If it is apparent that the perpetrator has intended to cause pain and suffering to the victim, then the act should be regarded as torture (assuming it meets the severity and powerlessness tests)

Torture

Limb 3 – Powerlessness

- *“the situation of powerlessness must be something somewhat over and above that which is inherent in the mere fact that the individual has been unable to prevent the infliction of severe pain and suffering”*
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- Medical Justice & Ors v SSHD, EHRC intervening [2017] 2461 (Admin)



Limb 3 – Powerlessness

CONTROL

- Key element in rendering an individual powerless
- Physical powerlessness
- Mental powerlessness
- Relationship between perpetrator and victim may be a key factor in determining whether a situation of control existed
- Relative ages of perpetrator and victim may be a key factor in determining whether a situation of control existed



Torture

Limb 3 – Powerlessness

- Was the pain and suffering inflicted whilst the victim was under the perpetrator's control?
 - Deprived of their liberty or movements constrained?
 - Coerced into staying?
- Was this psychological control?
- Was a degree of power exercised by the perpetrator over the individual to the extent that they could not escape or defend themselves?



Rule 35 process - Overview



Rule 35

- Rule 35 is a key form of evidence in the adults at risk policy
- Form the basis of decisions by caseworkers on release or continued detention
- Important that Rule 35 reports provide immigration caseworkers with the information they need to make appropriate decisions

Rule 35(1)

- *The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.*
- Will automatically place the individual at level 3 of the adults at risk policy
- Important that they provide enough information to allow caseworkers to properly consider (where necessary) appropriate release arrangements.

Rule 35(2)

- *The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.*
- Does not automatically place the individual within the scope of the adults at risk policy.
- Important to provide information on relating health conditions (either causal or resultant), so that assessment in the context of AAR can be made.



Rule 35(3)

- *The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.*
- From 2 July 2018 should be based on new definition of torture.
- Important therefore that medical staff understand the new definition.
- Report should, as before, be submitted only if doctor has concerns that the individual may have been a victim of torture.

Rule 35 - Where a doctor has concerns that an individual's health is deteriorating

- When a Rule 35(3) report is completed, and the doctor has concerns that the individual's health is suffering in detention, there are two options:
- a) make it clear in the 35(3) report that this is the case; or
- b) complete a 35(3) report AND a 35(1) report.
- Either approach is acceptable, as long as the doctor's view on the impact of detention on the individual is clear.

Adults at Risk policy

“serious physical health conditions”

Adults at Risk policy

Serious physical health conditions

- An assessment must be made as to whether the condition is serious in terms of the policy
- All conditions can be serious or not serious – it depends on the physical manifestation of the condition in the individual
 - One person with diabetes may need to be put on the policy, whilst another does not
- Where there is insufficient information to make a determination but the caseworker believes a condition might be serious, the default position is to place the individual within the policy

Determining factors:

- Medication
- Mobility issues
- Complicating conditions
- Episodes/relapses
- Recent hospitalisation
- Any other relevant consideration



Role of doctors

- It would be helpful if doctors could provide as much relevant information as possible to help caseworkers to decide whether a medical condition is “serious”.



The future

- We will shortly be reviewing the Detention Centre Rules. As part of this we will be looking at Rule 35.
- We are planning to broaden the scope of Rule 35 so that it:
 - i. covers a broader range of vulnerabilities, in line with the adults at risk policy;
 - ii. can be completed by a wider range of health professionals.

Further Information

- Updated DSO 9/2016 and Adults at Risk policy caseworker guidance were published on 2 July 2018
- Both can be found through Horizon and Gov.uk

Home Office contact for Questions

- Removals, Enforcement and Detention Policy
DetentionPolicy@homeoffice.gsi.gov.uk