

137. Following judgment, the Home Office was ordered to take steps to review and reissue the AAR Statutory Guidance within a reasonable period of time. This was done in March 2018 but again included another unlawful version of the torture definition which required detainees to demonstrate powerlessness to resist in order to be treated as a victim of torture for the purposes of the AAR statutory framework. Further to another challenge brought by Medical Justice (CO/2382/2018), the Home Office agreed to further amend the definition.

***No Change to Rule 35 DCR***

138. Despite Shaw's call for radical reform of the Rule 35 safeguard. The only change made was to the templates relating to Rule 35 which were separated out for each of the three limbs of Rule 35 and made significantly more complex. I understand there was also training for doctors working in IRCs.

139. Medical Justice had provided a joint response with the Helen Bamber Foundation on similar draft templates and the training material in 2015 expressing concerns about the following:

- a. The templates and slides suggested that doctors were expected to document torture in detail. This approach went beyond what was required under Rule 35(3), which only required doctors to have "*concerns*" that a person may have been a victim of torture to complete a report to send to the Home Office. Whilst guidance was useful to ensure better quality Rule 35 reports, the level of detail apparently demanded from medical practitioners was unnecessarily onerous and time-consuming. This risked creating an obstacle to reports being completed, and inadvertently raised expectations of a Rule 35 being more akin to an MLR rather than a report recording concerns and indicators of vulnerabilities to trigger the protection of the strong presumption against detention. There was also a risk that doctors would wrongly think that specific medical evidence would be needed to corroborate the detainee's account before completing a Rule 35(3) report, when no such requirement existed.
- b. In respect of the Rule 35(1) template, we were again concerned by the high level of detail required in order to establish whether a person's health was "likely to be injuriously affected by continued detention or any conditions of detention" as well as the requirement on the doctor to make reasoned prognoses, timescales for deterioration and the ongoing effect of detention. An exact prognosis was not required under Rule

35(1) in order to report on whether a detainee was likely to be injuriously affected by continued detention. It also did not direct doctors to take account of the absence of social care and specialist medical treatment available in detention as factors going to the question of likely injurious harm.

- c. As for Rule 35(2), given its purpose of reporting suspicions of suicidal ideation, the absence of any reference to mental health assessments seemed to us to be a serious omission. The template also did not link up with the ACDT process, which was the default way to manage self-harm and suicide risk in IRCs.
- d. The requirement that doctors express an additional view as to the impact of detention was of serious concern, went beyond what was required under Rule 35 and also contradicted long-standing recognition that detention was likely to be inherently harmful to victims of torture or other forms of serious ill treatment as well as to those with pre-existing mental ill-health and suicidal risks.

140. We also had concerns about draft templates for Home Office responses to Rule 35. The response templates appeared to direct caseworkers to expect very specific detailed information being available about the effects of detention within a specific period time, and expect doctors would be in a position to give precise views as to prognosis, likely timescales for deterioration and harm caused by continued detention, when these well exceed what is asked of the doctor under the Rule 35 process. This was problematic given long-standing concerns about the Home Office's dismissive approach to doctors' opinion about the suitability for detention.

141. The HMIP and other independent oversight bodies had also raised concerns about continued delays in getting a Rule 35 report due to *"long waiting times for GP appointments and delays in Home Office processing of reports."*<sup>42</sup> The response templates did not address these problems, and in our view, increased the risk of continued poor Rule 35 responses given the unrealistic expectations as to what information a Rule 35 report ought to contain.

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<sup>42</sup> See [HMIP \(January 2017\) Report on an unannounced inspection of Brook House IRC: 31 October - 11 November 2016](#).

information but a complete picture and what is required is substantial analysis of the content of the Rule 35 reports and responses from the Home Office has never been made available.

145. Data we have taken from the quarterly statistics and information obtained from FOIA requests consistently show the following consistent trends regarding the Rule 35 process:

146. **Rule 35(1) / Rule 35(2) not used at all or under-used:** Data from our FOIAs show that in every quarter from 2013 – 2019 (7 years), very few Rule 35(1) reports and even fewer Rule 35(2) reports across all of the detention centres. In 2017, for example, a total of 2759 Rule 35 reports were completed across all IRCs, of which only 94 (3.4%) were Rule 35(1) reports and 7 (0.3%) were Rule 35(2) reports, the rest (2658, 96.3%) were Rule 35(3) reports. These proportions were no different in the previous two years 2015 and 2016. See Table 1 below.

**Table 1: Breakdown of Rule 35 reports across IRCs from 2015-2017 and release rates**

Type of R35	2015	2016	2017
<b>Rule 35(1)</b> (% of all R35s)	83 (3.1%)	85 (3.2%)	94 (3.4%)
<b>Rule 35(2)</b> (% of all R35s)	13 (0.5%)	6 (0.2%)	7 (0.3%)
<b>Rule 35(3)</b> (% of all R35s)	2554 (96.4%)	2594 (96.6%)	2658 (96.3%)
<b>Total R35s</b>	2650	2685	2759
<b>R35(1) releases</b> (% of reports)	35 (42.2%)	32 (37.6%)	64 (68.1%)
<b>R35(2) releases</b> (% of reports)	323.1%	1 (16.7%)	0 (0%)
<b>R35(3) releases</b> (% of reports)	392 (15.3%)	910 (35.1%)	481 (18/1%)
<b>Total R35 releases</b>	430	943	545
<b>% released because of Rule 35</b>	16.2%	35.1%	19.8%

147. At Brook House, no Rule 35(2) reports were raised at all for the three years, 2015 – 2017. Only 2 Rule 35(1) reports were raised in 2015, 11 in 2016 and 8 in 2017. Nearly all Rule 35

reports were under the third limb. Even where a Rule 35(1) report was raised, the person did not always get released. In 2017, for example, only 2 out of 8 detained persons with a Rule 35(1) report were released as a result of a report stating that they were likely to be injuriously harmed by detention. (See Table 2 below).

148. During the two quarters of 2017 (April to September 2017) covering the relevant period for the Inquiry, the breakdown of Rule 35 reports (Table 2 below) showed that only one of five people who received a Rule 35(1) report were released as a result of the Home Office being informed that their health was likely to be injuriously harmed by continued detention.

**Table 2: Breakdown of Rule 35 reports at Brook House for 2017**

Type of R35	Q1 (Jan-Mar 2017)	Q2 (April – June 2017)	Q3 (July– Sept 2017)	Q4 (Oct-Dec 2017)
<b>Rule 35(1)</b>	2	3	2	1
<b>Rule 35(2)</b>	0	0	0	0
<b>Rule 35(3)</b>	105	65	54	90
<b>Total R35s</b>	107	68	56	91
<b>Detainees to which R35 related (% of detainees at Brook House)</b>	106	67 (5.5%)	56 (5.5%)	91
<b>Total detainees at BH for the period</b>	1252	1200	1004	806
<b>R35(1) releases (% of reports)</b>	0 (0%)	1 (33%)	0 (0%)	1 (100%)
<b>R35(3) releases (% of reports)</b>	13 (12.4%)	14 (21.5%)	4(7.4%)	13 (14.4%)
<b>Total releases</b>	13	15	4	14
<b>% released following R35(1)/(3) per quarter</b>	12.3%	22%	7.1%	15.4%
<b>% released because of R35 for the relevant period (Q2 &amp; Q3)</b>		15.3%		