Joint Human Rights Committee
Inquiry into the Human Rights of Asylum Seekers in the UK

Written Evidence from Medical Justice[1]

19 December 2022

Q4: Are the rules on detention and processing, and the treatment of detained asylum seekers, consistent with the UK's human rights obligations?

1. Introduction

1.1 Immigration detention represents a serious interference with an individual's human rights[2]. There is a growing consensus that it is harmful to health of those subjected to it[3]. It is also well-recognised, including by the Home Office itself, that some people – such as survivors of torture, trafficking and those with serious mental health conditions like Post-Traumatic Stress Disorder (PTSD) and depression – are particularly vulnerable to suffering such harm when detained[4]. People seeking asylum are known to have a higher incidence of these vulnerabilities[5]; their detention is therefore of clear concern.

1.2 Given the risks involved, legislation and policies exist that purport to limit the detention of people with vulnerabilities. In Medical Justice's experience however this so-called 'safeguarding' system is both fundamentally flawed and poorly operated. The consequence is that many vulnerable people – including those seeking asylum – are neither identified nor routed out of the detention system, and instead are subjected to the unnecessary and in some cases irrevocable harm it entails.

1.3 Medical Justice has been highlighting the problems of detention, including the treatment of vulnerable detained people, for many years and our concerns extend beyond the topics discussed in this submission[6]. However, for reasons of space we focus here

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[1] Medical Justice is UK charity offering independent medical advice and assessments to people held in immigration detention. Further details about our work is available at www.medicaljustice.org.uk

[2] Joint Committee on Human Rights (2019), *Immigration detention – Sixteenth Report of Session 2017–19*, 28

[3] For a summary of research on the effect of immigration on mental health for example, see Medical Justice (2022) *Harmed Not Heard: Failures in Safeguarding for the Most Vulnerable People in Immigration Detention*, 11-12

[4] Home Office (2022) Adults at risk in immigration detention: version 8 (first published 26 May 2016, came into force 12 September 2016, version 8 published 1 November 2022), 6-14. See also Royal College of Psychiatrists (2021) Detention of people with mental disorders in immigration removal centres (IRCs): Position Statement.

[5] See for example Royal College of Psychiatrists (2021) Detention of people with mental disorders in immigration removal centres (IRCs): Position Statement, 7-8

[6] Medical Justice published its first research report, *Beyond Comprehension and Decency*, in 2007. All Medical Justice reports are available at https://medicaljustice.org.uk/what-we-do/research/

on three key elements of the safeguarding system: the Adults At Risk in Immigration Detention (AAR) policy, Rules 34 and 35 of the Detention Centre Rules (DCR) 2001, and the Detention Gatekeeper. We also highlight an ongoing lacuna in terms of the treatment of detained people who, due to severe mental ill-health and/or cognitive impairments, may lack decision-making capacity.

1.4 For a comprehensive discussion of the failures and impacts of detention, we encourage the Committee to consult the evidence gathered by the Brook House Inquiry[7] - the first public inquiry into immigration detention in the UK - including that submitted by Medical Justice as a Core Participant[8].

2. a) Adults at Risk policy

2.1 The Home Office introduced the AAR policy following the government-commissioned Shaw Review of 2016[9]. While the policy's stated intention is "a reduction in the number of vulnerable people detained and a reduction in the duration of detention before removal"[10], its introduction has in fact resulted in more vulnerable people being detained, for longer.

2.2 A key reason for this is that the AAR policy requires people to produce evidence of their vulnerability in detention which, once received, the Home Office categorises into one of three "levels"[11]. It is important to note here that the "evidence levels" refer to the type of evidence produced, not the extent of the risk that the person faces, nor the level

[7] The Brook House Inquiry was set up by the Home Secretary in November 2019 to investigate the shocking mistreatment of detained individuals at Brook House immigration removal centre (IRC), shown in the BBC's 2017 Panorama programme '*Undercover: Britain's Immigration Secrets*'. In order to fulfil its task to make meaningful recommendations, the Inquiry has looked at current institutional practices and culture at Brook House, within G4S and the Home Office up to the present day. It has gathered a huge amount of evidence, all of which is available at https://brookhouseinquiry.org.uk/. Medical Justice is producing a summary of the key points arising from the evidence which may serve as a useful introduction for the Committee – it will shortly be available here.

[8] Medical Justice has taken part in the Inquiry as a Core Participant. All our evidence submitted to the Inquiry is available at: https://medicaljustice.org.uk/brook-house-inquiry/medical-justices-evidence/. Of particular relevance to this submission is our Casework Manager Theresa Schleicher's First Witness Statement, which discusses the history/development of the Adults at Risk statutory framework and defects in the systems of safeguards for vulnerable people in detention: https://medicaljustice.org.uk/wp-content/uploads/2022/04/First-witness-statement-of-Theresa-Schleicher-with-1-annex-signed-28.01.22-Copy.pdf-copy.pdf

[9] Stephen Shaw (2016) *Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office;* Home Office (2022) *Adults at risk in immigration detention: version 8* (first published 26 May 2016, came into force 12 September 2016. Version 8 published 1 November 2022)

[10] Home Office (2021) *Statutory Guidance: Adults at risk in immigration detention* (original guidance laid in Parliament in draft on 21 July 2016, came into force on 12 September 2016. Revised guidance laid before Parliament in draft on 21 March 2018 and came into force on 2 July 2018. The current version was published on 21 May 2021), para 1

[11] The first evidence level (level 1) is a declaration by the detained person about their medical or other aspects of their history that would indicate they have an indicator of risk. Level 1 evidence is afforded limited weight in detention decisions. The second evidence level (level 2) is where a professional person (e.g. a medical practitioner) has provided information that the detained person has an indicator of risk. Level 2 evidence is afforded greater weight. The third evidence level (level 3) is where a professional has provided evidence has an indicator of risk and that detention is likely to cause them harm. Level 3 evidence is afforded significant weight. Home Office (2022) *Adults at risk in immigration detention: version 8*, 15

of harm that might result. The AAR policy then allows the Home Office to weigh the evidence against "immigration control factors"[12] before deciding whether the vulnerable person can be placed into, or remain in, detention.

2.3 Thus, the AAR policy places an increased evidential obligation on vulnerable people, whilst also widening the discretion of Home Office caseworkers to subject them to detention. Regardless of their actual degree of vulnerability, only those persons who are able to produce the 'highest' level of evidence will receive the greatest protection against detention. There are many reasons why people may not be able to obtain such evidence, including lack of access to advice and support, language barriers, or indeed the impact of their vulnerability itself. Indeed, it is often those who are most vulnerable and most at risk in detention, such as those who lack mental capacity, who will find the process of producing such evidence most difficult.

2. b) Rule 34 and 35 of DCR 2001

2.4 The DCR 2001 provide a statutory obligation to IRC healthcare departments to identify vulnerability and communicate it to the Home Office. The foundation of the safeguarding regime rests on the role of the general practitioner (GP)[13].

2.5 Under Rule 34 DCR 2001, individuals must be offered an appointment with a GP within twenty-four hours of entering detention[14]. At the appointment the doctor is required to undertake a mental state and physical examination of their patient.

2.6 During the consultation, or at any subsequent meeting, under Rule 35 DCR 2001 the GP has specific reporting obligations to the Home Office if the patient is identified as being at risk in detention. Rule 35 requires GPs to formally report safeguarding concerns report safeguarding concerns where they (1) consider someone's health is likely to be "injuriously affected" by detention; (2) suspect someone "may have suicidal intentions"; or (3) have concerns that someone "may have been a victim of torture"[15].

2.7 The systemic defects in the Rules 34 and 35 safeguards are well-known and long-standing, and have been reported by many including Medical Justice, parliamentary committees, Stephen Shaw in his two Reviews, and by the Courts[16]. Failures exist at every stage of the process and include:

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[12] Home Office (2022) *Adults at risk in immigration detention: version 8*, 20. The factors are laid out in Home Office (2021) *Statutory Guidance: Adults at risk in immigration detention*, para 1

[13] Rule 33(1) of the Detention Centre Rules 2001 states all IRCs must have a registered general practitioner.

[14] Detention Centre Rules 2001, Rule 34

[15] Detention Centre Rules 2001, Rule 35

[16] See for example *R (ID and K) v Secretary of State for the Home Department [2006] EWHC 980 (Admin)*; *R (E0 and Ors) v Secretary of State for the Home Department [2013] EWHC 1236 (Admin)*

- The health screening failing to elicit a history of torture and prompt a Rule 35 assessment;

- Rule 34 medical examinations not being completed at all, or partially with either no physical or mental state examination, and therefore not triggering Rule 35 reports;

- Rule 35 reports failing to identify a significant number of torture survivors, body maps not completed documenting scarring, reports being completed by nurses, and reporting failing to consider impact of detention on the person's health;

- Few Rule 35(1) or 35(2) reports being done even in circumstances of known self-harm or mental state deterioration in detention;

- The Home Office failing to respond to Rule 35 reports at all or within prescribed timeframes. When responses were provided, the Home Office disputing the credibility of the account despite the medical evidence and maintaining detention without considering the evidence or impact of detention on the detained person's health adequately or at all[17]

2.8 A recent analysis of the cases of 45 highly vulnerable Medical Justice clients detained in immigration removal centres (IRCs) across the UK provided clear examples of these issues[18]. It is yet further evidence of how the Rule 34 / 35 process is not providing an effective safeguard for vulnerable people once they are detained.

2. c) Pre-detention screening: Detention Gatekeeper

[17] See Theresa Schleicher (2022) *Brook House Inquiry: First Witness Statement*, paras 49-71. Theresa is Casework Manager at Medical Justice.

[18] The clients' histories included severe trauma, significant mental health issues, and being at risk of suicide. Many (37) were identified as survivors of torture. The data showed for example that: a) 100% of the individuals were assessed by Medical Justice clinicians as being at clinical risk of harm caused by detention. Moreover, 82% had already experienced a deterioration in their mental state by the time they were seen. Yet not one had received a Rule 35(1) report from the IRC healthcare department, as they should have done, to identify them to the Home Office as being at risk of harm; b) 87% had suicidal and/or self-harm thoughts recorded by a Medical Justice clinician at their assessment – yet none received a Rule 35 (2) report identifying them as being at risk of suicide; c) 67% had no communication of any type by the IRC healthcare department to the Home Office explicitly addressing the risk to their health from detention, prior to their assessment by a Medical Justice clinician; d) only 51% saw a GP within the required 24 hours of admission to the IRC. Where identified as needing a Rule 35 safeguarding report, the average wait for an appointment was 29 days – one person's appointment took 119 days; and e) the Home Office released just 1 of the 45 clients when given information about their vulnerability under safeguarding processes. See Medical Justice (2022) *Harmed Not Heard: Failures in Safeguarding for the Most Vulnerable People in Immigration Detention*, 21-34.

2.9 Effective pre-detention screening is a vital frontline safeguard against the detention of vulnerable people, a fact recognised in the 2016 Shaw Review[19]. In response to Shaw's recommendation in this area, the Home Office introduced the Detention Gatekeeper (DGK). The DGK has responsibility for assessing and authorising referrals for entry into detention[20].

2.10 Medical Justice has serious concerns about the design and operation of the DGK. These concerns include that the DGK is an internal function within the Home Office and is reliant on information provided by Home Office caseworkers; that it does not invite relevant evidence, particularly clinical evidence of vulnerability, to be submitted for consideration prior to detention; and that it has no ability to make clinical assessments on the likely impact of detention[21]. Further, in Medical Justice's experience, even where such evidence is available it is applied inconsistently in decision-making. As a result, the DGK often fails to review the suitability of individuals for detention effectively[22].

2. d) Treatment of detained people who may lack decision-making capacity

2.11 As is clear from the above, people with vulnerabilities are regularly placed into and remain in detention in the UK. This includes people who, due to severe mental ill-health and/or cognitive impairments, may lack decision-making capacity.

2.12 There are no independent advocacy arrangements for people in detention. In *VC*[23] in 2018 and in *ASK / MDA* in 2019[24] the Court of Appeal found that the absence of such arrangements discriminated against mentally ill detained people. Yet despite the rulings, the Home Office has put no effective arrangements in place.

2.13 The continued absence of independent advocacy has serious implications: it means there is no way for a detained person who may lack capacity to be assisted to participate effectively in relevant decisions. This in turn limits their ability to access medical treatment and/or legal advice and to challenge their detention. It is a gap that must be urgently addressed.

3. Concluding remarks – expansion of detention estate

[19] See Stephen Shaw (2016) *Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office*, 97-99
[20] ICIBI (2021) *Second annual inspection of 'Adults at risk in immigration detention' July 2020 – March 2021*, 37
[21] Stephen Shaw (2018) *Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons: follow up report*, paras 7.16 and 7.25
[22] For a fuller discussion see *Brook House Inquiry: Closing Submission of Bhatt Murphy Core Participants*, paras 102-104.
[23] *R (on the application of VC) v Secretary of State for the Home Department [2018] EWCA Civ 57*
[24] *R (ASK) v Secretary of State for the Home Department, R (MDA) v Secretary of State for the Home Department [2019] EWCA Civ 1239*

3.1 In light of the failures highlighted above, Medical Justice is deeply concerned by the government's ongoing expanision of the detention estate, including the opening of Derwentside IRC in late 2021[25], the proposed re-opening of Campsfield and Haslar IRCs[26], and the use and planned expansion of quasi-detention facilities such as that operating at Napier Barracks[27]. This expansion is a clear reversal of the commitment to reduce detention made by the government after Shaw Review of 2016. Given the wealth of evidence demonstrating the harm that detention causes, it is an extremely worrying development and one which we hope the Committee will oppose.

[25] Home Office (2021) *Factsheet: Derwentside Immigration Removal Centre*
[26] The Guardian (2022) *Home Office to reopen immigration detention centres with £399m deal*
[27] Such sites replicate many of the features and impacts of detention, as evidenced extensively in for example APPG on Immigration Detention (2021) *Report of the Inquiry into Quasi-Detention - December 2021*. It may be useful for the Committee to note that the establishment of such facilities is set to become far easier as a result of provisions in the Levelling-Up and Regeneration Bill 2022, currently making its way through Parliament. If enacted, the provisions will allow the government to circumvent local planning processes when seeking to develop Crown Land sites, such as former military bases, if the project in question is deemed to be of "national importance". For further information, please see: Asylum Matters, Medical Justice and Helen Bamber Foundation (2022) *Written Evidence to the Levelling Up and Regeneration Bill Committee*.