

Medical Justice Briefing on Amendment No 78, Illegal Migration Bill

Amendment to exempt people with medical reports from the detention ouster clause

The Lord Bishop of Durham and Baroness Lister of Burtersett

Amendment

“Clause 12, page 22, line 9, at end insert-

“(4A) Sub-paragraphs (2) and (3) do not apply where-

- (a) either-
 - (i) the Secretary of State has received a report in respect of the person under rule 35(4) of the Detention Centre Rules 2001 (SI 2001/238) or rule 6A(12) or 32(4) of the Short-Term Holding Facility Rules 2018 (SI 2018/409) (special illnesses and conditions); or
 - (ii) the Secretary of State has been provided with a report written by a relevant professional about the person’s physical or mental condition; and
- (b) the decision involves or gives rise to any question about whether the immigration officer or the Secretary of State has acted unlawfully in detaining or continuing to detain the person in light of the contents of the report mentioned in paragraph (a).

(4B) In sub-paragraph (4A) “relevant professional” means-

- (a) a registered medical practitioner;
- (b) a registered dentist within the meaning of the Dentists Act 1984;
- (c) a person registered as a nurse or midwife in the register maintained by the Nursing and Midwifery Council under article 5 of the Nursing and Midwifery Order 2001;
- (d) a registered professional within the meaning of the Health Professions Order 2001; or
- (e) a person registered as a social worker in a register maintained by–
 - (i) Social Work England;
 - (ii) Social Care Wales;
 - (iii) the Scottish Social Services Council; or
 - (iv) the Northern Ireland Social Care Council.”

Briefing

Medical Harms of Detention

The high rates of mental illness within immigration detention and the harmful impact that being in detention has on people’s mental health, are widely evidenced.¹ Research has consistently found immigration detention to have an adverse effect on mental health. Professor Mary Bosworth’s literature review for Stephen’s Shaw’s 2016 report to the Home Office on the Welfare in Detention of Vulnerable Persons summarises that *“literature from across all the different bodies of work and jurisdictions consistently finds evidence of a negative impact of detention on the mental health of*

¹ See Verhulsdonk, I., Shahab, M., & Molendijk, M. (2021) Prevalence of Psychiatric Disorders Among Refugees and Migrants in Immigration Detention: Systematic Review with Meta-analysis. *BJPsych Open* 7(6); Bosworth M. (2016) Appendix 5: The Mental Health Literature Survey Sub-Review. Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office; M von Werthern, K Robjant, Z Chui et al. (2018) The Impact of Immigration Detention on Mental Health: A Systematic Review, *BMC Psychiatry* 18: 382; and Royal College Psychiatrists [Position statement: The Detention of people with Mental Disorders in Immigration Detention](#) PS02/21, (April 2021).

detainees".² The severity of the mental health symptoms in detention has been found to correlate with the length of time spent in detention.³

The Royal College of Psychiatrists published a detailed position statement in 2021 stating that detained people with pre-existing vulnerabilities, such as mental health issues or survivors of torture and other forms of cruel or inhumane treatment⁴, were at particular risk of harm as a result of detention.⁵ The position statement concludes that IRCs were likely to precipitate a significant deterioration of mental health in most cases.

Torture survivors are known to be at a particularly high risk of suffering harm if detained. The Royal College of Psychiatrists position statement highlights the research evidence showing that *"a history of torture alone predisposes an individual to a greater risk of harm, including deterioration in mental health and increased risk of anxiety, depression and PTSD, than would be experienced in the general detained population"*.⁶

Evidence shows that the success of treating mental health conditions in detention is limited. As the Royal College of Psychiatrists state: *"treatment of mental illness requires a holistic approach and continuity of care; it is not just the treatment of an episode of mental ill health but an ongoing therapeutic input focusing on recovery and relapse prevention. Psychotropic medication by itself is very unlikely to achieve good outcomes unless it is given as part of a broader multi-modal therapeutic approach. Detention also severs the links with family and social support networks, adversely affecting recovery. For these reasons, the recovery model cannot be implemented effectively in a detention centre setting."*⁷

It is important to note that mental illness is not necessarily identified when an individual is first detained, and therefore how important the ability to challenge detention is. The gravity of what negative impacts detention can have has been identified in numerous court cases which have found detention of victims of torture, trauma and/or mentally ill people to be unlawful. Courts have further found individuals to have been subjected to inhuman and degrading treatment, in breach of Article 3 of the European Convention on Human Rights.

Moreover, the Home Office have still not remedied the unlawful failure to provide adequate safeguards including mental health advocates for those who seriously mentally and may lack mental capacity contrary to s 20 of the Equality Act 2010.⁸

Clinical Safeguards in Detention

Given the long-standing clinical evidence of the adverse impact that immigration detention has on health and the limitations of successfully treating mental illness in detention, it has long been stated Home Office policy not to normally detain particularly vulnerable people, including those with pre-

² Bosworth M. (2016) Appendix 5: The Mental Health Literature Survey Sub-Review. Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office.

³ M von Werthern, K Robjant, Z Chui et al. (2018) The Impact of Immigration Detention on Mental Health: A Systematic Review, BMC Psychiatry 18: 382.

⁴ This includes sexual violence and gender-based violence.

⁵ Royal College Psychiatrists (April 2021) [Position statement: The Detention of people with Mental Disorders in Immigration Detention](#) PS02/21 18.

⁶ Royal College Psychiatrists (April 2021) [Position statement: The Detention of people with Mental Disorders in Immigration Detention](#) PS02/21 13.

⁷ Royal College Psychiatrists (April 2021) [Position statement: The Detention of people with Mental Disorders in Immigration Detention](#) PS02/21 3.

⁸ See R (VC) v Secretary of State for the Home Department [2018] EWCA Civ 57 and R (ASK) v SSHD [2019] EWCA Civ 1239.

existing mental illnesses and survivors of torture. A statutory regime of clinical screening for people who are at risk of harm in detention and for healthcare professionals to report concerns has been a cornerstone of the safeguarding regime of immigration detention since 2001.⁹

Currently, the main safeguarding reporting provisions are set out in the Detention Centre Rules 2001¹⁰ (DCR 2001) and in the Short-Term Holding Facility Rules 2018¹¹ (STHF 2018).

Rule 35 of the DCR 2001 places a statutory obligation on GPs in Immigration Removal Centres (IRCs) to formally report safeguarding concerns to the Home Office 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*".

The IRC GP undertakes their safeguarding role by completing a Rule 35 report based on their clinical assessment which is sent to the Home Office and triggers a review of whether the detained person should be released. Rule 32 of the Short-Term Holding Facility Rules 2018 replicates the Rule 35 mechanism for short-term holding facilities but permits a wider range of clinical professionals to complete such reports. Rule 6A(12) of the Short-Term Holding Facility Rules 2018 provides that in holding rooms, healthcare professionals in residential holding rooms (RHRs) are only required to identify "*any immediate risk to the detained person's health*", rather than report information set out in the three limbs specified in Rule 35 DCR 2001 and Rule 32 STHF Rules 2018.

These will collectively be referred to as clinical safeguarding reports in this briefing.

[The Home Office's Responsibility to Consider the Risk of Harm](#)

Once a clinical safeguarding report completed under any of the Rules cited above is sent to the Home Office, this triggers an urgent review of the detained person's detention with a view to considering release. The Home Office's decision whether to release someone from detention, in response to a clinical safeguarding report, is taken in accordance with their policy, Adults at Risk in Immigration Detention.¹² This policy provides that vulnerable adults at particular risk of harm in detention should not normally be detained and can only be detained when "*immigration factors*" outweighs the presumption to release.¹³

The Adults at Risk in Immigration Detention policy has a wide approach to considering who may be vulnerable in detention. The policy identifies certain indicators of whether an individual may be particularly vulnerable to harm, and therefore at risk in detention, including people suffering from mental health conditions (including post-traumatic stress disorder), victims of torture, sexual or gender-based violence, potential victims of human trafficking or modern slavery and pregnant women.¹⁴

The policy relies on professional evidence of the risk of harm of detention to ensure vulnerable adults are identified and their detention is reviewed by Home Office caseworkers.¹⁵ Such evidence of the risk of harm outlined in the policy may come from a variety of sources including:

⁹ [Detention Centre Rules 2001](#) SI 2001 no 238.

¹⁰ [Detention Centre Rules 2001](#) SI 2001 no 238.

¹¹ [Short-term Holding Facility Rules 2018](#) SI 2018 409

¹² This policy has statutory force as set out in s59 of the Immigration Act 2016.

¹³ 'Immigration control factors' is defined widely and can include compliance issues such as having failed to agree to voluntary return, previous failure to comply with immigration bail conditions, restrictions on release from detention and conditions of temporary admission.

¹⁴ Home Office (2023) [Adults at risk in immigration detention](#) Version 9.0.

¹⁵ Home Office (2023) [Adults at risk in immigration detention](#) Version 9.0.

- A clinical safeguarding report completed under Rule 35 DCR 2001 or Rule 32 STHF 2018.
- Independent medical evidence, such as an external medico-legal report.
- Social work professionals.

Current Legal Framework: Decisions to Detain and the Ability to Challenge Potentially Unlawful Decisions

At present, the Home Office has broad statutory powers of administrative immigration detention. There are no particular groups who are excluded from the power to detain and no time limit to detention. Evidence of any harmful effect of detention upon a detained person is central to the legality of their detention.

Judicial review is the key means to challenge a decision to maintain detention where professional evidence of the harm of detention is not given the appropriate weight by those responsible for reviewing whether the person should be released. In this situation, without the intervention of the court, a vulnerable person can continue to be detained and the risk of harm of detention can materialise so that the individual suffers clinical harm as a direct result of their detention. Without judicial review, the statutory system of safeguarding policies and procedures approved by Parliament and designed to reduce the risk of harm, may become meaningless as there would be no check or scrutiny of Home Office's decisions.

The Context of Home Office Decision-Making in Immigration Detention

The ability to judicially review the lawfulness of decisions to detain is particularly important given the regular publication of independent systemic evidence showing that Home Office safeguarding policies are not consistently followed. This concern has been often raised by the Independent Chief Inspector of Borders and Immigration (ICIBI) who had been commissioned by to provide an annual assessment of the of the Adults at Risk in Immigration Detention policy.¹⁶

The ICIBI's first annual review of the Adults at Risk policy (published in 2020) revealed concerns from the Independent Monitoring Board *"about [Home Office] case owners, who were not medically trained, overruling information from doctors about continued detention being detrimental to a detainee's condition"*.¹⁷

The ICIBI's most recent Adults at Risk inspection, his third annual inspection also noted difficulties with Home Office caseworkers' approach when reviewing the detention of vulnerable persons, finding that these *"were of varying quality"*.¹⁸ Issues were found with how the Adults at Risk in Immigration Detention policy was being applied, for example occasionally favouring immigration risk and harm/offending risks over vulnerability factors and relying on unrealistic stated timescales for removal as a justification for maintaining detention.¹⁹

¹⁶ Home Secretary's Oral Statement to Parliament on 24/8/18: <https://www.gov.uk/government/speeches/home-secretary-statement-on-immigration-detention-and-shaw-report>

¹⁷ Independent Chief Inspector of Borders and Immigration (2020) [Annual inspection of 'Adults at Risk in Immigration Detention' \(2018–19\)](#) para 8.170.

¹⁸ Independent Chief Inspector of Borders and Immigration (2023) [Third annual inspection of 'Adults at risk in immigration detention' June-September 2022](#) para 7.25.

¹⁹ Independent Chief Inspector of Borders and Immigration (2023) [Third annual inspection of 'Adults at risk in immigration detention' June-September 2022](#) paras 7.25-7.27.

Overall, the ability of individuals to access judicial review of their detention is important given that detention is an environment which may be harmful for many people's mental and physical health and where there is ongoing evidence that systems of safeguarding may be flawed.

Implications of the Illegal Migration Bill

Clause 12 of the Illegal Migration Bill stipulates that the High Court cannot review the lawfulness of the decision to detain a person detained under immigration powers, for the first 28 days.

Clause 12(4) limits the High Court's jurisdiction in judicial review proceedings, during the first 28 days of detention, to only being able to judicially review situations where the Home Office acts in bad faith or "*in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice*".

In the first 28 days, the Bill only allows for detention to be challenged through applying for a writ of *Habeus Corpus*, which specifically concerns only whether there is a power to detain. It does not concern whether the power to detain was exercised lawfully or whether the Home Office has breached their own policies.

There is, therefore, an exclusion of any form of effective judicial scrutiny of the lawfulness of exercising the power to detain during the first 28 days of detention. This aims to make it virtually impossible for vulnerable people in detention to challenge the Home Office's decision to maintain detention in response to a Rule 35 report or medical evidence. This ouster clause will preclude unlawful detention challenges in the first 28 days, regardless of whether the detained person is suffering a serious mental illness. It risks rendering the Rule 35 DCR 2001 and Rule 32 STHF 2018 processes meaningless; as there would be no check or scrutiny of Home Office's decisions

The impact of this is that vulnerable people will be left to languish in detention, even when detention is unlawful or in breach of Home Office's own policies and where the individual is being clinically harmed by their detention. They will not have the ability to access domestic courts to challenge unlawful detention or breach of Home Office's own policies.

For example, the Home Office may decide to continue the detention of a survivor torture with post-traumatic stress disorder, despite a Rule 35 DCR 2001 or a Rule 32 STHF 2018 report. However, this decision may be in breach of the Home Office's own guidance, for example if the medical evidence was not given sufficient weight compared to immigration factors under the AAR policy. At present, this individual can judicially review the decision to maintain their detention. However, under the proposed legislation, whilst they could ask the Home Office to exercise their discretion to release them, for instance, based on medical evidence, if this is refused, there could potentially be nothing they can do to challenge that situation for the first 28 days of detention. They would be entirely at the whim of the official making that decision.

Given the evidence above, the mental health of the survivor of torture is likely to be deteriorating and being harmed in detention.

Effect of the amendment

This amendment, tabled by the Bishop of Durham and Baroness Lister, would make an exception to the general ouster of judicial review during the first 28 days of detention, where:

- (1) a person has been the subject of a report from the medical practitioner at the immigration removal centre or Short-Term Holding Facility to the effect that their health is likely to be

injuriously affected by continued detention or any conditions of detention, that they have suicidal intentions, or that the medical practitioner is concerned that they may have been the victim of torture, or;

- (2) a person has been the subject of a report written by certain health professionals about their physical or mental condition, and in either case;
- (3) the person seeks to challenge by judicial review the decision to detain or continue to detain them despite that report.

Suggested questions to ask the Minister during debate:

1. Does Home Office no longer accept findings of the Stephen Shaw's 2016 Review²⁰ that detention of those who are vulnerable, in particular those who have a history of torture/trauma and experiencing mental illness are at particular risk of harm in detention, which underpinned section 59 of the Immigration Act 2016 and indeed policy going back to 1998?
2. The Home Office's own policy contains a clear presumption against detention, particularly for those who are "particularly vulnerable to harm in detention". Will the minister confirm that Clause 12 removes a vital remedy for vulnerable people to challenge the lawfulness of their detention?
3. How can the minister justify curtailing the ability to challenge the lawfulness of detention when it is known that detention is an environment which may be harmful for many people's mental and physical health and where there is ongoing evidence of the flaws in the safeguarding systems?

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²⁰ Stephen Shaw (2016) [Review into the Welfare in Detention of Vulnerable Persons](#).