

VULNERABLE INDIVIDUALS IN DETENTION

11 June 2019

Graham Denholm

Welcome

Pre-12 September 2016

- Enforcement Instructions & Guidance, Chapter 55, section 55.10
- Still relevant to many historic false imprisonment claims
- Test of “*very exceptional circumstances*”
- Included:
 - Individuals in respect of whom there was “*independent evidence of torture*”
 - Serious medical conditions / mental illness / disability where condition could not be “*satisfactorily managed in detention*”
 - Victims of trafficking

The Shaw report (January 2016)

- Report on *Review into the Welfare in Detention of Vulnerable Persons*
 - Identified “*shortcomings in both the identification of vulnerability and in the policies designed to maintain wellbeing*”
 - Rule 35 mechanism not working
 - Accepted detention harmful to mental health
- Proposals, *inter alia*
 - Expand categories of vulnerable people covered by policy
 - Prohibition on detaining pregnant women
 - Remove reference to “*satisfactory management*”
 - Home Office should consider alternative to Rule 35 mechanism
 - Expand Rule 35 (or its successor) to detainees in prison

Pregnant women

- Immigration Act 2016, s.60 (in force from 12 July 2016)
 - Pregnant women can only be detained in very limited circumstances for up to 72 hours, or 7 days if additional period authorised personally by a Minister of the Crown
 - Additional policy guidance in EIG 55a *Detention of Pregnant Women*

Children

- Statutory prohibition on detaining unaccompanied children for more than 24 hours, and then only in very limited circumstances
- See Immigration Act 1971, Sch 2, para 16 / 18A (as amended by Immigration Act 2014)

Age dispute cases (EIG 55.9.3.1)

- Home Office “*will accept an individual as under 18*” unless
 - (a) Doc evidence that over 18
 - (b) Merton compliant age assessment
 - (c) Appearance and demeanour strongly suggests over 25 (previously “*significantly over 18 years of age*”) (see *BF (Eritrea)* [2019] EWCA Civ 872 – earlier version of criteria (b) unlawful because failed to properly take into account very wide margin of error)
 - (d) Past claim to be an adult + various other factors, including (c) (i.e. pointless provision)

Adults at Risk

- Adults at Risk policy replaced EIG 55.10 on 12 September 2016
- Framework
 - Statutory guidance under s.59 IA 2016: *Guidance on Adults at Risk in Immigration Detention* (most recently updated July 2018)
 - Caseworker Guidance: *Adults at Risk in Immigration Detention* (currently at v5.0, published 6 March 2019).

Adults at Risk

- Overarching principles:
 - Presumption that “***adults at risk***” (as defined) should not be detained,
 - Presumption can be defeated by “***immigration factors***” (broadly, compliance and criminality)
 - The weight that a person’s vulnerability attracts depends on the level of evidence (from least to most): **Level 1** (self-reporting); **Level 2** (professional evidence that “adult at risk”); **Level 3** (as Level 2, but states detention likely to cause harm).

Adults at Risk

- Note that Home Office *Immigration Bail* guidance identifies *Adults at risk in immigration detention* as a relevant matter to be taken into account in a bail decision under Schedule 10, para 3(2) (see (f): “*such other matters as the Secretary of State or the First-tier Tribunal thinks relevant.*”)

Adults at Risk: Who is “*at risk*” - general

- Who is “*at risk*”? (Stat Guidance, para 11) (Red = added to reflect Shaw)
 - Those with a mental illness or impairment (may include serious learning difficulties)
 - Victims of torture, as defined
 - Victims of sexual or gender-based violence (including FGM)
 - Victims of trafficking
 - Suffering from PTSD
 - Pregnant women
 - Those with a serious physical disability
 - Those with other serious physical health conditions / illnesses
 - Aged 70+
 - Being transsexual or intersex
- “*not intended to be exhaustive*”
- Each category subject to extensive gloss in the caseworker guidance

Adults at Risk: Who is “*at risk*” – “*torture*”

- What is “*torture*”, for the purposes of the AAR policy?
 - Originally adopted UNCAT definition (limited to torture by state agents)
 - Successful challenge in *Medical Justice & Ors v SSHD* [2017] 4 WLR 198
 - Caseworker Guidance (p.7): “**any act by which a perpetrator [1] intentionally inflicts [2] severe pain or suffering on a victim in a situation in which— (a) the perpetrator has control (whether mental or physical) over the victim, and (b) as a result of that control, [3] the victim is powerless to resist.”**

Adults at Risk: Who is “*at risk*” – “*torture*”

- Intention and severity are clear.
- Powerlessness? Guidance (p.9) says “*key elements*” are
 - “*custody or physical control*”
 - “*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.*”
- “*somewhat over and above that which is inherent in the mere fact that they were unable to prevent the situation*” (whatever that means)

Adults at Risk – Levels of Evidence

- Level 1 (Stat Guidance, para 9)

“a self-declaration of being an adult at risk - should be afforded limited weight, even if the issues raised cannot be readily confirmed. Individuals in these circumstances will be regarded as being at evidence level 1”

Adults at Risk – Levels of Evidence

- **Level 2 (Stat Guidance, para 9)**

“professional evidence (e.g. from a social worker, medical practitioner or NGO), or official documentary evidence, which indicates that the individual is an adult at risk - should be afforded greater weight. Individuals in these circumstances will be regarded as being at evidence level 2”

But note that Freedom from Torture & Helen Bamber Foundation reports which meet this definition are to be treated as Level 3 evidence.

Adults at Risk – Levels of Evidence

- Level 3 (Stat Guidance, para 9)

“professional evidence (e.g. 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 – for example, increase the severity of the symptoms or condition that have led to the individual being regarded as an adult at risk - should be afforded significant weight. Individuals in these circumstances will be regarded as being at evidence level 3”

Adults at Risk – Levels of Evidence

- Medical evidence should normally be accepted, but note caveat re past credibility concerns (Caseworker Guidance, p.13)

*“...caseworkers should not usually disagree with medical evidence unless there are very strong reasons for doing so - for example, **a finding by an independent tribunal that rejects the same evidence or credibility concerns arising from other sources (such as an asylum casework decision)**. Such matters may be taken into account in deciding the weight that should be afforded to evidence and could result in a reconsideration of the weight of the evidence.”*

Adults at Risk – Levels of Evidence

- Note also that Medico-legal reports from Helen Bamber Foundation and Freedom from Torture which evidence torture will be treated as Level 3 evidence (even if they only meet the Level 2 definition, it seems) (caseworker guidance, p.10):

“Individuals with such a report which indicates that the individual has been a victim of torture will be regarded as meeting level 3 evidence under the policy, providing the report meets the required standards.”

Adults at Risk – Levels of Evidence

- Reports under Rule 35(3) (or 32(3) of the STHF Rules) “*will normally amount to at least*” Level 2 evidence (caseworker guidance, p.21)
- Current pro forma Rule 35(3) report specifically asks doctors to comment on the impact of detention in Section 6 (see DSO 09/2016, *Detention centre rule 35 and Short-term Holding Facility rule 32*).

Adults at Risk – Immigration factors

- Prospective length of time in detention: “In any given case, it should be possible to estimate the likely duration of detention required to effect removal. This will assist in determining the risk of harm to the individual” (caseworker guidance, p.14)
- Public protection issues: FNO? Seriousness of past offences? NOMS assessments available? National Security case? Facing deportation on other “*conducive*” grounds? (caseworker guidance, p.15)
- Compliance issues: will detention be required to effect removal? Is the individual at risk of absconding? (caseworker guidance, p.14)

Adults at Risk – Immigration factors

Guidance on Level 1 cases (caseworker guidance, p.16)

- Can detain if
 - “*date of removal can be forecast with some certainty*”
 - “*any public protection issues are identified*”
 - “*there are indicators of non-compliance with immigration law which suggest that the individual will not be removable unless detained*”

Adults at Risk – Immigration factors

Guidance on Level 2 cases (caseworker guidance, p.16-17)

- Can detain if
 - “*date of removal is fixed, or can be fixed quickly, and is within a reasonable timescale and the individual has failed to comply with reasonable voluntary return opportunities*”
 - “*present a level of public protection concerns that would justify detention, for example, if they meet the criteria of **foreign criminal as defined in the Immigration Act 2014** or there is a relevant national security or other public protection concern*” (i.e. 1+ year sentence)
 - “*negative indicators of non-compliance which suggest that the individual is **highly likely** not to be removable unless detained*”

Adults at Risk – Immigration factors

Guidance on Level 3 cases (caseworker guidance, p.17)

- Can detain if
 - *“removal has been set for a date in the immediate future, there are no barriers to removal, and escorts and any other appropriate arrangements are (or will be) in place to ensure the safe management of the individual’s return and the individual has not complied with voluntary or ensured return”*
 - *“the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence, or there is a serious relevant national security issue or the individual presents a current public protection concern”*

Issues in practice

- ? Less protective in some cases than EIG 55.10
- Failing to recognise evidence that a person is “*at risk*”
- Miscategorising evidence – L3 evidence treated as L2
- Refusing to accord independent expert evidence its correct level
- Maintaining detention on erroneous grounds in cases where L2 or L3 evidence of risk is accepted

Issues in practice

- Relying on Adults at Risk guidance
 - **What evidence do you already have?** Rule 35 report? Medical reports from other contexts? Doctors' letters? Medical records? Probation reports? Review with care.
 - **Home Office approach?** Not "*at risk*"? At risk, but wrong level? Right level identified but detention justified? Why? Sustainable?
 - **What next?** Further evidence? Reps? Bail application? Judicial review?
 - **Further evidence?** Serve what you already have? HBF / FFT? Medical Justice? Independent evidence from psychiatrist / psychologist / scars expert / other specialist (e.g. in cases of specific illness or particular disability)

Thank you for listening

© Copyright Landmark Chambers 2019

Landmark Chambers

Registered office:
180 Fleet Street, London
EC4A 2HG | DX: 1042 (LDE)

London

+44 (0) 20 7430 1221

Birmingham

+44 (0) 121 752 0800

Contact

clerks@landmarkchambers.co.uk

www.landmarkchambers.co.uk

 @Landmark_LC