Medical Justice v Secretary of State for the Home Department **[2017] EWHC 2461 (Admin), [2017] 4 WLR 198**

Facts

This case concerned the lawfulness of the definition of torture used by the Secretary of State for the Home Department in the guidance and policies on placing vulnerable adults in immigration detention. This challenged the guidance on adults at risk in immigration detention ('AARSG'), which specifies what matters should be considered when deciding whether to detain vulnerable people in immigration detention and was issued under s.59 of the Immigration Act 2016. The policies at issue were Chapter 55b of the Enforcement Instructions and Guidance which provides guidance on the AARSG to Home Office staff (including case workers) and the Detention Services Order 9/2016 which concerned the operation of the rule 35 process under the Detention Centre Rules (2001/238) ('the Detention Centre Rules'). All of these came into force in September 2016.

The Detention Centre Rules provide that every detained person must be given a physical and mental health examination by a medical practitioner within 24 hours of being admitted to the immigration detention centre. Rule 35 specifically states that the medical practitioner must 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. This includes any person who may have been a victim of torture. When the person is a victim of torture, the report issued is called a rule 35(3) report.

The new Detention Services Order 9/2016 stated that the definition of torture for the purposes of the AARSG, the Home Office Enforcement Instructions and Guidance and the Detention Centre Rules was Article 1 of the United Nations Convention Against Torture ('UNCAT'). This definition of 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.[1]

The only deviation from this definition in the Detention Services Order 9/2016 is to add that this definition of torture includes 'such acts carried out by terrorist groups exploiting instability or civil war to hold territory.'

The claimants argued that the use of UNCAT definition of torture was unlawfully restrictive as it excluded those who were victims of torture by non-state actors, that there was no rational justification for this restriction and that it was contrary to the definition of torture in rule 35 of the Detention Centre Rules.

Held

1. On the question of whether the new definition of torture was contrary to the definition of torture in rule 35 of the Detention Centre Rules:

The previous decision of *EO v Secretary of State for the Home Department* ([2013] EWHC 1236 (Admin)) interpreted the definition of torture for rule 35 and relevant policy documents to be broader than the UNCAT definition and that it included torture perpetrated by non-state actors. The *EO* decision had not been appealed and the Detention Centre Rules had not been amended so the definition of torture for those Rules has been authoritatively determined by a Court. The Secretary of State cannot alter, implicitly or explicitly, the meaning of a statutory instrument by issuing policy documents.

Thus the Detention Services Order 9/2016 was unlawful in that it advised medical practitioners that no r 35(3) report was required where their concerns did not meet the UNCAT definition of torture. It was also unlawful in the way that it influenced Home Office staff decisions on what action should be taken in respect to r 35(3) reports.

2. On the question of whether the AARSG contained an exhaustive list of indicators of particular vulnerability such that some instances of vulnerability falling outside Convention torture but within the *EO* torture definition were excluded from the indicators of vulnerability:

[1] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1.

Even though this had not been the Secretary of State's intention, the failure to make any specific reference to other circumstances in which torture might be inflicted within the *EO* definition meant that AARSG did contain an exhaustive list which had the effect of excluding some instances of vulnerability falling within the *EO* definition of torture.

3. On the question of whether the AARSG was unlawful because either the purpose of s.59 of the Immigration Act 2016 had not been satisfied by the limited definition of torture or because it created a distinction between UNCAT torture and *EO* torture in regards to vulnerability in detention without rational evidence for that distinction:

The purpose of s.59 of the 2016 Act was to provide focused guidance on those who were particularly vulnerable to harm in detention. There is no statutory basis for omitting a group that would be vulnerable to harm in detention from this guidance. By adopting the limited UNCAT definition of torture, the AARSG excluded those who fell short of the UNCAT definition but within the *EO* definition of torture who would be vulnerable to harm in detention. It thus fell short of its statutory purpose and is unlawful.

The AARSG is also unlawful because it creates a distinction between UNCAT torture and *EO* torture in regards to vulnerability in detention without rational justification for that distinction. The distinction is created by the reference in the definition to the identity of the perpetrator but, according to the evidence put forward, whether the perpetrator is a state actor or not is irrelevant to whether the person will be particularly vulnerable in detention.

The severe pain and suffering endured as well as the powerlessness of the situation are the relevant elements of the torture for determining vulnerability in detention.

Finally, the adoption of the UNCAT definition was unlawful because it required medical practitioners to make judgments as to whether the perpetrators were state actors or terrorist groups. This is likely to be outside their expertise and knowledge. Detainees are unlikely, without the assistance of a lawyer or expert, to be able to make this judgment either. This makes it unreasonable and irrational for the investigation to be left to the medical practitioner’s discussion with a detainee.

Comment

In the last few years the Home Office's approach to immigration detention has come under heavy criticism. The *Detention Action* litigation in 2015 resulted in the suspension of an unlawful detained fast track system which had led to the detention of vulnerable people including victims of torture and trafficking.[2] That same year Channel 4 News filmed undercover in immigration removal centres and revealed a regime of abuse and mistreatment.[3] The Shaw Review, conducted by the former Prison and Probation Ombudsman, Stephen Shaw, found that the safeguards to prevent vulnerable people being routed into detention were inadequate and that immigration detention was being overused.[4] Despite this background, the Home Office choose not to consult on its decision to adopt the more restrictive UNCAT definition in its new adults at risk policy and ignored NGO protests when this decision did come to light.

After these provisions came into force in September 2016, the Home Office conducted its own research into the operation of this policy and found that there had been case worker errors in around 50% of a sample of 340 cases.[5] Since the widespread use of immigration detention began in the UK in the late 1990s and early 2000s[6], a significant number of vulnerable people have been unlawfully detained and the effects on them may be long-lasting and incredibly damaging. For example, one of the claimants in *Medical Justice*, Mr PO, spoke after the judgment stating that he was pleased with the outcome but that the detention had 'left a scar in my life that will never be healed.'[7] Thus, although this case represents a victory against an unclear and unfair policy, it also exemplifies the failure of the Home Office to learn from the mistakes of the past and adopt fair and clear polices on immigration detention using an evidence-based approach.

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[2] See Amanda Spalding 'Leaving Saadi behind? The future of the UK's detained fast track process' (2016) 30 Journal of Immigration, Asylum and Nationality Law 159.

[3] 'Yarl's Wood: undercover in the secretive immigration detention centre' (*Channel 4 News*, March 2015) <https://www.channel4.com/news/yarls-wood-immigration-removal-detention-centre-investigation> accessed 31 October 2017 ; 'Harmondsworth undercover: I don't want to die here' (*Channel 4 News*, March 2015). <https://www.channel4.com/news/harmondsworth-immigration-detention-centre-undercover-video> accessed 31 October 2017.

[4] Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Person* (Cm 9186, January 2016)<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf> accessed 31 October 2017.

[5] *Medical Justice v Secretary of State for the Home Department* [2017] EWHC 2461, para 55.

[6] Home Office, *Fairer, Faster and Firmer – a modern approach to immigration and asylum* (Cm 4018, July 1998) <https://www.gov.uk/government/publications/fairer-faster-and-firmer-a-modern-approach-to-immigration-and-asylum> accessed 31 October 2017.

[7] 'High Court rules Government redefinition of torture in immigration detention policy is unlawful' (*Medical Justice*, 10th October 2017)< http://www.medicaljustice.org.uk/high-court-rules-government-redefinition-of-torture-in-immigration-detention-policy-is-unlawful/> accessed 31 October 2017.

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