

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (GUIDANCE ON DETENTION OF VULNERABLE
PERSONS) REGULATIONS 2018

2018 No. 410

AND

THE DETENTION CENTRE (AMENDMENT) RULES 2018

2018 No. 411

1. Introduction

- 1.1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1. The Government wants to make clear, in both definition and scope, how victims of torture ought to be protected within immigration detention. This follows a judgment handed down by the High Court on 10 October 2017 in the case of *R (Medical Justice et al.) v SSHD [2017] EWHC 2461 (Admin)*. The judgment concerned the definition of torture used in making decisions about the immigration detention of people who claim to have been tortured. The Detention Centre (Amendment) Rules 2018 and the Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2018 give effect to the Court's judgment by amending the definition of torture in statutory guidance and Rules.
- 2.2. The Detention Centre (Amendment) Rules 2018 amend rule 35 of the Detention Centre Rules 2001 to include a definition of 'torture' for the purposes of immigration detention.
- 2.3. The Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2018 amend the statutory guidance entitled "Immigration Act 2016: Guidance on adults at risk in immigration detention", laid before Parliament on 23 August 2016 by the Secretary of State under section 59(4) of the Immigration Act 2016. Revised draft statutory guidance was laid before Parliament on 21 March 2018.
- 2.4. The guidance specifies the matters to be taken into account when determining the detention of vulnerable persons under immigration legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1. None.

Other matters of interest to the House of Commons

- 3.2. As this instrument is subject to the negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1. Section 153 of the Immigration and Asylum Act 1999 requires the Secretary of State to make rules for the regulation and management of immigration removal centres. Pursuant to this obligation, the Detention Centre Rules 2001 came into force on 2 April 2001.
- 4.2. Rule 35(3) of the Detention Centre Rules 2001 places a requirement on a medical practitioner to report to the centre manager about any individual “who he is concerned may have been the victim of torture”.
- 4.3. The amendment to the Detention Centre Rules defines what is meant by “torture” for the purposes of rule 35(3).
- 4.4. Section 59 of the Immigration Act 2016 requires that the Secretary of State issues guidance specifying matters to be taken into account by a person to whom the guidance is addressed in determining whether a person is particularly vulnerable to harm if they were to be detained or remain in detention. Such guidance was last laid before Parliament on 23 August 2016 and came into force on 12 September 2016.

5. Extent and Territorial Application

- 5.1. The instrument extends to the United Kingdom.

6. European Convention on Human Rights

- 6.1. As the statutory instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1. The adults at risk in immigration detention policy was part of the Government’s response to a review of the welfare of vulnerable people in immigration detention, conducted by Stephen Shaw CBE and published in January 2016. The policy was introduced by section 59 of the Immigration Act 2016. This created the statutory concept of those “particularly vulnerable to harm”. It required the Secretary of State to issue guidance specifying matters to be taken into account in determining whether a person would be “particularly vulnerable to harm” in immigration detention. This guidance is known as the “Adults at Risk in Immigration Detention Statutory Guidance” and was published in July 2016. The adults at risk in immigration detention policy recognises the dynamic nature of vulnerability. It strengthens the existing presumption against the detention of those who are particularly vulnerable to harm in detention.
- 7.2. The guidance sets out a list of indicators of risk, which includes torture. It also contains a “sweeping-up” provision intended to capture those individuals who may

be particularly vulnerable to harm in detention, but who are not covered by the listed indicators.

- 7.3. The Government is making these statutory instruments to give effect to the High Court's judgment, which was handed down in October 2017. In summary, the Government is amending the Detention Centre Rules 2001 to change the definition of torture. This new definition of torture is also contained in the Short-term Holding Facility Rules 2018 (SI 409/2018), which are being made at the same time. In addition, the statutory guidance is being amended in two ways: to make the cross reference to the new definition of torture in rule 35(6) of the Detention Centre Rules; and to address the judge's observation that the "sweeping-up" provision was not working (as the Government intended) to capture those individuals who may be particularly vulnerable to harm in detention, but not covered by the specific indicators of risk listed.
- 7.4. At the same time, a policy equality statement on the whole adults at risk policy is being published on gov.uk, having been approved by the Minister for Immigration.

Detention Centre (Amendment) Rules 2018

- 7.5. The Detention Centre Rules 2001 regulate the operation and management of immigration removal centres. Rule 35(3) requires a medical practitioner examining an individual to report on "any detained person who he is concerned may have been the victim of torture". In January 2013, the Home Office revised the Detention Centre Rules Process Guidance to make clear to case workers that "torture" was to be understood by reference to the way in which it was defined in Article 1 of the United Nations Convention against Torture. This definition has become known as "UNCAT torture".
- 7.6. At that time proceedings were brought by a number of individual litigants in *EO and Others v SSHD [2013] EWHC 1236 (Admin)*. In its judgment, the Court found that torture should be defined as:

"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 intimidating or coercing him or a third person, or for any reason based upon discrimination of any kind."

This definition became known as "EO torture".
- 7.7. In July 2016 the "Immigration Act 2016: Guidance on adults at risk in immigration detention", was published. It specifically referred to "torture" as that being "defined in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)". The reason for the Home Office doing this was that the EO definition allowed for acts of harm to be regarded as "torture" when, by any rational measure, they would not be regarded as such (for example, an individual being injured in a fight with a neighbour).
- 7.8. The definition of torture was set out in full in a Home Office Detention Services Order (DSO 09/2016), which stated:

"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.’ (Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).) It includes such acts carried out by terrorist groups exploiting instability or civil war to hold territory.”

- 7.9. The reference to acts carried out by terrorist groups is not part of the UNCAT definition, but was added following a discussion between the then Immigration Minister, the non-governmental organisation Freedom from Torture, and Sir Keir Starmer MP, who had raised the issue in Parliament.
- 7.10. The Adults at Risk Statutory Guidance was challenged in *R (Medical Justice et al.) v SSHD [2017] EWHC 2461 (Admin)*. On 26 November 2016, Ouseley J ordered interim relief to the effect that the EO definition of torture should be substituted for the UNCAT definition in the Detention Centre Rules, the Adults at Risk Statutory Guidance, the Enforcement Instructions and Guidance, and DSO 9/2016. The Government made the necessary amendments, with effect from 7 December 2016. This meant, effectively, that the EO definition was reinstated and the UNCAT definition dis-applied.
- 7.11. The final judgment in that case was handed down on 10 October 2017. The Court found that the EO definition of torture applied to rule 35(3) of the Detention Centre Rules, as well as related Home Office documents. That decision had not been appealed and the Detention Centre Rules had not been amended. The meaning of torture had been authoritatively decided by a Court (in the EO case) and it had not been open to the Secretary of State for the Home Department to alter the meaning of a statutory instrument by issuing policy statements. Therefore, “torture” in rule 35 continued to have the meaning set out in the EO case.
- 7.12. The Court in the Medical Justice case made several observations on the definition of torture. It found that any definition of torture should focus on why the circumstances in which it was inflicted may create particular vulnerability to harm in detention, including the “powerlessness” experienced by the individual. The Court found that neither the UNCAT nor the EO definition of torture was particularly fit for that purpose.
- 7.13. In January 2018, the Home Office decided that a new definition of torture (for the purposes of immigration detention) should be formulated, taking into account the Court’s findings in *R (Medical Justice et al.) v SSHD*, and that such a definition should be placed on a statutory footing in order to avoid any ambiguity going forward.

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- 7.14. The statutory guidance on adults at risk in immigration detention laid before Parliament on 23 August 2016 specifically defined torture for the purposes of immigration detention as being that defined in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the UNCAT definition).

- 7.15. In *R (Medical Justice et al.) v SSHD*, the Court found that that the guidance was unlawful in limiting the definition of torture to the UNCAT definition. The Court also determined that paragraphs 11 and 12 of the guidance did not include a general “sweeping-up” provision, as was accepted to be the intent, but instead constituted an exhaustive list.
- 7.16. A revised definition of torture has been placed on a statutory footing by way of rule 35(6) of the Detention Centre Rules 2001 and the statutory guidance is being amended to reflect that revision.
- 7.17. The statutory guidance is also being amended in light of the Court’s comments to fully reflect the original intent that there should be a “sweeping-up” provision within the guidance that can capture those who may be particularly vulnerable to harm in detention, but who are not covered by the specific indicators of risk listed.

Consolidation

- 7.18. The Detention Centre (Amendment) Rules 2018 make only a limited amendment to the Detention Centre Rules 2001, and so consolidation is not considered to be appropriate.
- 7.19. The Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2018 bring into force revised guidance and so the issue of consolidation does not arise.

8. Consultation outcome

- 8.1. There is no statutory requirement for consultation on the amendment to the Rules or the Regulations making a change to the statutory guidance that aim only to give statutory effect to the Court’s judgment in respect of how torture is defined. However, the Home Office has discussed the proposal with interested non-governmental organisations (NGOs). The Home Office has considered comments made by NGOs and has committed to engaging with them as the detailed guidance and training for decision makers are developed.

9. Guidance

- 9.1. Non-statutory guidance on how to interpret and apply the definition of torture will be made available to immigration decision makers and published on gov.uk.

10. Impact

- 10.1. A regulatory impact assessment has not been produced for this instrument as the impact on business and voluntary sectors of the changes to the guidance would be small, and such an assessment would therefore be disproportionate.

11. Regulating small business

- 11.1. The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1. The implementation of the provisions of these amendments will be subject to regular monitoring, and the Detention Centre Rules will be reviewed later in 2018.

13. Contact

13.1. Ian Cheeseman at the Home Office can answer any queries regarding the instrument. Email: IanR.Cheeseman@homeoffice.gsi.gov.uk