

## Immigration Detention and Psychological Torture and Ill-treatment

Submission to the UN Special Rapporteur on Torture on “Psychological Torture and Ill-Treatment”

November 2019

This submission by Freedom from Torture<sup>1</sup> and the Centre for Human Rights Law, SOAS, University of London draws on deliberations and findings of a workshop on immigration detention and torture co-hosted, on 5 November 2019, which formed part of the UK Prohibition of Torture Network events series.<sup>2</sup> It contends that immigration detention frequently has adverse mental health effects, which may reach the threshold of psychological ill-treatment (cruel, inhuman or degrading treatment) if not torture. The submission primarily focuses on the practice in the United Kingdom – where immigration detention does not have a time-limit - but has wider application to states that pursue similar policies and practices.

The deprivation of liberty in the immigration context constitutes a form of administrative detention that frequently lacks the legal safeguards and remedies characteristic of criminal justice systems. In the United Kingdom, both asylum seekers and other foreign nationals (including failed asylum seekers) liable to removal and deportation may be detained, particularly in designated immigration removal centres.<sup>3</sup> Individuals may be held for an indefinite length of time pending their removal from the United Kingdom; they should be released where there is no reasonable prospect of removal.<sup>4</sup> The uncertainty experienced is typically compounded by delays in asylum and immigration procedures, which are often dependent on the efficiency of Home Office casework, the lack of personal contact with decision-makers in what are bureaucratic procedures aimed at enforcing increasingly stringent immigration laws, and difficulties in effectively exercising one’s rights.

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<sup>1</sup> Freedom from Torture is a UK-based human rights organisation and one of the largest torture rehabilitation centres in the world. Each year we provide clinical services to more than 1,000 survivors of torture in the UK, the majority of whom are asylum seekers or recognised refugees.

<sup>2</sup> The workshop was co-hosted by Freedom from Torture, [www.freedomfromtorture.org](http://www.freedomfromtorture.org) and the SOAS Centre for Human Rights Law, [www.soas.ac.uk/human-rights-law](http://www.soas.ac.uk/human-rights-law) on 5 November 2019, a workshop report will be published in due course.

<sup>3</sup> For an overview, see House of Commons, Home Affairs Committee, *Immigration detention*, Fourteenth Report of Session 2017-19 (12 March 2019), available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/913/913.pdf>. On most recent developments, “The Home Secretary has announced that she will be upgrading the investigation by the Prisons Probation Ombudsman (PPO) into the abuse uncovered by the BBC’s 2017 Panorama at Brook House IRC into a full public inquiry. This comes six months after judges ruled that a public inquiry should be held and G4S staff compelled to give evidence. The Home Secretary’s announcement comes over 2 years after the abuse was publicly uncovered,” at <https://detentionaction.org.uk/2019/11/06/press-release-two-years-on-government-announces-a-full-inquiry-into-brook-house-abuse/>.

<sup>4</sup> House of Commons, *ibid.*, 56 ff. See also Enforcement and Instructions Guidance (EIG) Chapter 55.1.3 and Chapter 55.3.2.4, and *R (BABBAGE) v. SSHD* [2016] EWHC 148 (ADMIN).

A growing body of research demonstrates the detrimental mental health consequences of immigration detention.<sup>5</sup> These consequences are particularly pronounced for individuals who are already traumatised, such as torture survivors, and/or have other pre-existing mental health conditions. Persons who are healthy when entering immigration detention are also at risk of a deterioration of their mental health. This is on account of the fact that their deprivation of liberty on administrative grounds is linked to the – frequently uncertain and prolonged - outcome of an administrative procedure which takes place within a “hostile environment”<sup>6</sup> and may in turn have life changing consequences. It is for these reasons that the UNHCR, the UN Committee Against Torture and other bodies have called on states to have recourse to immigration detention only as an exceptional measure and for the shortest possible time, which entails that such detention should be of limited duration.<sup>7</sup>

#### 1. Detention of torture survivors and other vulnerable persons

The Quality Standards for healthcare professionals working with victims of torture in detention published by the Faculty of Forensic & Legal Medicine in the United Kingdom stress that:

Asylum seekers with a history of torture were identified as particularly vulnerable to negative mental health outcomes... Specific experiences of detention may trigger powerful and traumatising memories of torture experiences... powerful triggers ... [and] effects not only exacerbate greatly any pre-existing mental health problems, but also specifically elicit the symptoms due to their torture, thereby increasing the frequency and intensity of flashbacks, intrusive recall and nightmares, hypervigilance, irritability avoidance symptoms and withdrawal.<sup>8</sup>

Significantly,

Experiences of loss of agency and powerlessness are key to the consequent risk of further harm in detention, rather than the specific identity of the perpetrators. The extent of state responsibility for their experiences of serious harm may not be the determining factor in the impact of those experiences on their mental health, but for some victims of torture and ill treatment the effect is to make it very difficult for them to trust state officials thereafter, even in a different country.<sup>9</sup>

In recognition of the dramatic adverse health impact, as a general rule, persons who have undergone traumatic experiences, particularly torture and other forms of ill-treatment, should not be detained in immigration detention.<sup>10</sup> The detention of a torture survivor constitutes treatment that is prima facie harmful. The authorities therefore have a heightened obligation to identify torture survivors at the

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<sup>5</sup> M. Bosworth, ‘The impact of immigration detention on mental health: A literature review’, in *Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw* (January 2016) Appendix 5; M. von Werthern et al., ‘The impact of immigration detention on mental health: a systematic review’ (2018) 18 *BMC Psychiatry* 382; A. Gallagher, ‘The Impact of Immigration detention on the Mental Health of Adults’, at [http://create.canterbury.ac.uk/16429/1/Alanna\\_Gallagher\\_MRP\\_2017.pdf](http://create.canterbury.ac.uk/16429/1/Alanna_Gallagher_MRP_2017.pdf).

<sup>6</sup> S. York, ‘The “hostile environment”: How Home Office immigration policies and practices create and perpetuate illegality’ (2018) 32 *Journal of Immigration, Asylum and Nationality Law* 363.

<sup>7</sup> UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* (2012); UN Committee against Torture, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN doc. CAT/C/GBR/CO/6 (7 June 2019), para. 55(c).

<sup>8</sup> Faculty of Forensic & Legal Medicine, *Quality Standards for healthcare professionals working with victims of torture in detention* (May 2019) 5.

<sup>9</sup> *Ibid.*, 5.

<sup>10</sup> UNHCR, *Detention Guideline*, above note 7, 9.1.

earliest possible opportunity and arrange less harmful alternatives to detention.<sup>11</sup> This obligation entails a prior, effective examination of all persons liable to immigration detention as it is estimated that over 30% of asylum seekers have suffered torture.<sup>12</sup>

States must offer specialised treatment pursuant to their obligation to provide rehabilitation to torture survivors.<sup>13</sup> It is difficult to envisage conditions in immigration detention under which specialised medical treatment could offset the traumatic effect of the deprivation of liberty on torture survivors. Effectively, therefore, states must put in place a system that enables the identification of torture survivors at all stages in the context of immigration detention and provides for alternatives to detention. The lack of such a system not only exposes torture survivors to unacceptable harm, it also amounts to degrading if not inhuman treatment as it demonstrates a lack of regard for the vulnerability of the person concerned and an indifference to his or her suffering.<sup>14</sup>

Torture survivors are regularly detained for immigration purposes in the United Kingdom. Between January 2017 and December 2018, Freedom from Torture received over 170 referrals from people who disclosed torture and were being held in immigration detention.

The United Kingdom has two main policies and procedures in place to identify torture survivors or other vulnerable persons who should not be detained: Rule 35 of the Detention Centre Rules (Rule 35)<sup>15</sup> and the Adults at risk in immigration detention policy.<sup>16</sup> These policies have been harshly criticised for failing to provide a robust safeguard.<sup>17</sup>

The Adults at risk in immigration detention policy raises the evidential threshold by introducing three levels of evidentiary burden and a range of “immigration factors” against which a decision not to detain is balanced. Information obtained by Freedom from Torture through a Freedom of Information Act (FOIA) request showed that between September 2017-18, there were 11,993 instances where detainees have been found to be “at risk”. By contrast, there were only 1,005 decisions to release people from detention due to being identified as an adult at risk.<sup>18</sup>

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<sup>11</sup> See on UK Case Law in this regard, N. Tsangarides, “‘The Second Torture’: The immigration detention of torture survivors” (Medical Justice 2012) 33ff, at <http://www.medicaljustice.org.uk/wp-content/uploads/2016/03/the-second-torture-full-version.pdf>

<sup>12</sup> Quality Standards, above note 8, at 3.

<sup>13</sup> CAT, *General Comment No.3: Implementation of article 14 by States parties*, UN doc. CAT/C/GC/3 (19 November 2012), para. 15, and Quality Standards, *ibid.*, at 26: “Pending release, detained victims of torture can access appropriate services or treatment equivalent to that available in the community.”

<sup>14</sup> See further E. Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge, 2018).

<sup>15</sup> Home Office, *Detention services order 09/2016 Detention centre rule 35 and Short-term Holding Facility rule 32, Version 6.0*, (25 February 2019), at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/781418/dso-09-2016-detention-centre-rule-35-v6.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781418/dso-09-2016-detention-centre-rule-35-v6.0.pdf).

<sup>16</sup> Home Office, *Adults at risk in immigration detention*, 6 March 2019, at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/784634/adults-at-risk-policy-v5.0ext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784634/adults-at-risk-policy-v5.0ext.pdf)

<sup>17</sup> UN Committee against Torture, *Concluding observations*, above note 7; REDRESS, *The UK’s Implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*, March 2019, at <https://redress.org/wp-content/uploads/2019/05/UK-Implementation-of-UNCAT-REDRESS-March2019-Web.pdf>; Home Affairs Committee, *Immigration detention inquiry*, 21 March 2019, at <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/913/913.pdf>,

<sup>18</sup> Freedom of Information Request 50506.

A system such as in the United Kingdom creates and perpetuates a harmful environment for traumatised persons; it adopts a restrictive definition of torture,<sup>19</sup> a problematic “adults at risk policy” that does not automatically lead to the exemption of traumatised persons from detention, fails to ensure that doctors carry out timely and adequate examination leading to the identification of torture survivors and other traumatised persons, and does not result in the timely release of torture survivors from immigration detention.<sup>20</sup> It has resulted in the deterioration of mental health of torture survivors and preventable suffering in disregard of persons’ vulnerability and dignity, amounting to a form of ill-treatment.

## 2. Indefinite detention

Indefinite (also referred to as indeterminate) detention refers to deprivation of liberty with no time limit or fixed release date. Indefinite immigration detention is known to have detrimental health consequences on account of the anxiety, despair and hopelessness that it engenders.<sup>21</sup> This impact worsens with the length of detention.<sup>22</sup> Even brief periods of indeterminate detention can trigger adverse psychological reactions due to the uncertainty and helplessness they generate.<sup>23</sup> In recognition of these harmful effects, most states, and the European Union, have introduced time limits in immigration detention.<sup>24</sup> Human rights bodies and other states have called on states that operate indefinite detention regimes, such as Australia and the United Kingdom, to introduce time limits so as to comply with their obligations under international human rights treaties, particularly the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>25</sup> The European Court of Human Rights has adopted a procedural approach to indefinite detention in cases of the deprivation of liberty of counter-terrorism suspects and life imprisonment. Indefinite detention does, according to this jurisprudence, not amount to a breach of article 3 of the European Convention on Human Rights if effective remedies are in place to challenge the legality of detention so that it cannot “be said that the applicants were without any prospect or hope of release”.<sup>26</sup> The Human Rights Committee has found indefinite detention in Australia in breach of the International Covenant on Civil and Political Rights, considering “that the combination of the arbitrary character of the authors’ detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious

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<sup>19</sup> Home Office, *Detention services order 09/2016 Detention centre rule 35 and Short-term Holding Facility rule 32*, above note 15.

<sup>20</sup> See reports and inquiries listed in Home Affairs Committee, *Immigration detention*, above note 3, at footnote 6; and see reports listed above at note 17.

<sup>21</sup> ECtHR [GC], *A and others v. the United Kingdom*, Appl. No. 3455/05, 19 February 2009, para. 130: “The Court considers that the uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position. Furthermore, it is probable that the stress was sufficiently serious and enduring to affect the mental health of certain of the applicants. This is one of the factors which the Court must take into account when assessing whether the threshold of Article 3 was attained.”

<sup>22</sup> Quality Standards, above note 8, at 3.

<sup>23</sup> See for instance, M. Griffiths, ‘Living with Uncertainty: Indefinite Immigration Detention’ (2013) 1 *Journal of Legal Anthropology* 263 and G. J. Coffrey, I. Kaplan, R.C. Sampson & M. M. Tucci, ‘The meaning and mental health consequences of long-term immigration detention for people seeking asylum’ (2010) 70 *Social Science & Medicine* 2070; Gallagher, above note 5, 79.

<sup>24</sup> See European Law Institute, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law* (2017), particularly 179-180. See further ECRE, *The detention of asylum seekers in Europe: Constructed on shaky ground?* (2017), at [https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief\\_Detention-1.pdf](https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief_Detention-1.pdf)

<sup>25</sup> CAT, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN doc. CAT/C/AUS/CO/4-5 (23 December 2014), para.16; CAT, *Concluding observations*, above note 7, para. 55(c).

<sup>26</sup> *A and others v. UK*, above note 21, at para. 131, citing the case of *Kafkaris v. Cyprus* [GC], Appl. No. 21906/04, 12 February 2008, para. 98.

psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.”<sup>27</sup> If indefinite detention is considered in itself arbitrary, its known adverse psychological consequences raise a prima facie case of ill-treatment.<sup>28</sup> This is particularly the case where the asylum and immigration system in which it operates does not provide effective remedies and/or is dehumanising by treating the person concerned as a mere object of an immigration policy based on generic deterrence paradigms that are indifferent to individual suffering.<sup>29</sup>

### 3. Immigration detention and mental health

The Quality Standards for healthcare professionals working with victims of torture in detention state that:

Psychologically, detention can lead to:

- Anxiety and depression
- Over the longer term, passivity, hopelessness and despair
- Loss of self-esteem and mood changes are well recognised as consequences of immigration detention which serves administrative and not criminal justice purposes
- Extreme fear and anxiety may also trouble immigration detainees who can be held for an unknown period while also at risk of being removed to a country where they fear for their own safety.<sup>30</sup>

Further,

Research for the Shaw review concluded that the predominant forms of mental disorders (in immigration centres) were depression, anxiety and PTSD. The key predictors of negative psychological outcomes of detention include:

- Duration of detention
- Pre-existing trauma
- Pre-existing mental and physical health problems and
- Poor healthcare services in detention.<sup>31</sup>

High rates of depression, anxiety and PTSD in immigration detention can be explained by the high rates of pre-migration trauma and the post-migration adversities linked to the asylum seeking process, particularly the so-called 7 Ds identified as critical factors: “Discrimination, Detention, Dispersal, Destitution, Denial of the right to work, Denial of healthcare, and Delayed decisions on asylum applications.”<sup>32</sup> A series of stressors aggravate the impact of detention, including “loss of liberty,

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<sup>27</sup> *M.M.M. v. Australia*, UN doc. CCPR/C/108/D/2136/2012 (28 October 2013), para. 10.7.

<sup>28</sup> This applies at the very latest from the point at which it can no longer be justified. See ECtHR, *J. N. v United Kingdom*, Appl. No. 37289/12, 19 May 2016; *M. V. v. United Kingdom*, Appl. No.49734, 1 September 2016, and *R (VC) v. SSHD* [2018] EWCA Civ 57.

<sup>29</sup> See on this point also Coffrey et al., above note 23, 2077.

<sup>30</sup> Quality standards, above note 8, 5.

<sup>31</sup> *Ibid.* (footnote omitted)

<sup>32</sup> T. Filges, E. Montgomery, and M. Kastrup, ‘The impact of detention on the health of asylum seekers: a protocol for systematic review’ (2018) 28 *Research on Social Work Practice* 399, 401.

uncertainty over deportation, unpredictable events, social isolation, fear of abuse by staff, riots, forceful removal, hunger strikes, self-harm, the indefinite period of detention, a culture of disbelief, and the absence of specialist psychiatric service.”<sup>33</sup> Detention is experienced “as a dehumanising environment characterised by confinement, deprivation, injustice, inhumanity, insolation, fractured relationships, and mounting hopelessness and demoralisation” and is known to have a harmful effect on self-perception and core values.<sup>34</sup> It is aggravated by the administrative and bureaucratic nature of immigration detention, in contrast to functioning criminal justice systems governed by procedural safeguards and rule of law principles.

As recognised in jurisprudence, a failure to consider the impact of detention on a claimant’s mental health and to provide adequate mental health care may amount to a breach of the prohibition of torture and ill-treatment.<sup>35</sup> In the context of the United Kingdom, the prohibition of torture and ill-treatment stipulated in article 3 of the European Convention on Human Rights imposes an obligation to provide persons deprived of their liberty with the requisite medical assistance.<sup>36</sup> In the case of mentally ill persons, their vulnerability and their difficulty if not inability to exercise their rights need to be taken into consideration in any assessment of their treatment with the state’s obligation under article 3.<sup>37</sup> Considering the recognised adverse mental health effects of immigration detention, even in the absence of any pre-existing conditions, states must provide individually tailored, specialised services to persons in immigration detention or release them if they are not transferred to a hospital or mental health clinic. The failure to operate an effective screening system and to provide adequate mental health care amounts to degrading treatment where it shows a lack of respect for individuals, and results in conditions of detention that fail to meet the standards developed in human rights jurisprudence and set out in relevant instruments.<sup>38</sup>

#### 4. Conclusion

Policies relying on detention as a means of immigration enforcement will by their nature result in the deprivation of liberty of a large number of individuals who are vulnerable, traumatised and generally not fit to be detained. Immigration detention frequently results in a deterioration of mental health constituting psychological pain and suffering. The severity of the mental health effects varies but is closely linked to pre-existing trauma, duration of detention, and the lack of legal safeguards and an efficient and fair administration of the asylum and immigration system.

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<sup>33</sup> Medical Justice, *Mental Health in Detention: Written evidence submitted by Medical Justice to the Shaw Review* (May 2015) 4.

<sup>34</sup> Coffrey et al., above note 23, 2077. See further K. Robjant, R. Hassan and C. Katona, ‘Mental health implications of detaining asylum seekers: systematic review’ (2009) 4 *The British journal of psychiatry : the journal of mental science* 194. See also Refugee Council of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (undated), at <https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/1604-Indefinite-Detention-Mental-Illness.pdf>

<sup>35</sup> *ARF v Secretary of State for the Home Department* [2017] EWHC 10 (QB). *R (on the application of MD) v Secretary of State for the Home Department* [2014] EWHC 2249 (Admin). See further J. Pennington, ‘Deplorable Failure, Bureaucratic Inertia and Callous Indifference: The Immigration Detention of Mentally Ill People by the UK Border Agency’ (2013) 27 *Journal of Immigration Asylum and Nationality Law* 41 and <http://rightsni.org/2011/08/uk-breaches-article-3-echr-in-its-treatment-of-immigration-detainee/>

<sup>36</sup> See e.g. *Keenan v United Kingdom* (2001) 33 EHRR 38CtHR, para. 111; *Premistry v Russia* (2016) 62 EHRR 18, para. 73.

<sup>37</sup> See *R (VC) v SSHD* [2018] EWCA Civ 57.

<sup>38</sup> See in particular Rule 25 and Rule 33 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN doc. A/RES/70/175 (8 January 2016).

Administrative immigration detention of traumatised persons, particularly torture survivors, amounts to a form of psychological ill-treatment. States must put in place an effective identification system and provide alternatives to detention in respect of this group of persons.

Indefinite detention results in profound powerlessness and should be prohibited on account of its adverse psychological consequences. As a preventive measure, such a ban should be imposed irrespective of its actual duration as even a few days of such uncertainty can have significant adverse effects on a person's mental health.

The adverse health impact of immigration detention is typically enhanced by asylum and immigration systems that lack transparency, adequate decision-making, effective access to justice and/or respect for fundamental rule of law principles. The nature and operation of such systems is therefore a relevant factor in assessing whether immigration detention, and treatment therein, is compatible with the prohibition of torture and ill-treatment.

We urge the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to recognise that administrative immigration detention of vulnerable persons, particularly torture survivors, amounts to a form of psychological ill-treatment, and call on states to end the immigration detention of torture survivors and ensure they are prioritised in alternatives to detention. Further, to request states in which policies and practices do not provide adequate safeguards to undertake immediate improvements to their policies relating to identifying and safeguarding vulnerable people in detention, including by adopting a policy of a presumption not to detain vulnerable individuals except in very exceptional circumstances and by adopting the UNCHR's definition set out in the detention guidelines in relation to torture survivors in detention, namely "victims of torture or other serious, physical, psychological, sexual or gender based violence or ill-treatment".