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RULE 35 SAFEGUARD IN DETENTION

Written evidence submitted by Medical Justice to the APPG on Immigration Detention

- 1. Summary:** Failure to properly implement Rule 35 has contributed to significant harm of detainees. There is much evidence that it is rarely an effective mechanism for ensuring that the interests of those unfit for detention, or whose continued detention would be injurious to their health, can be safeguarded. MJ calls for
 - an independent and comprehensive audit of the Rule 35 process on practice both by healthcare staff and Home Office caseworkers.
 - comprehensive training of all staff and subcontractors in the proper implementation of Rule 35.
- 2. Background:** Every year, 30,000 people are held in Immigration Removal Centres (IRCs) and other facilities across the UK. MJ believes that:
 - IRCs, and the conditions of detention, are so detrimental to the health and wellbeing of those detained that the only way to remedy this situation is to close the IRCs.
 - all detainees must have access to NHS equivalent treatment.
 - vulnerable detainees should not be detained.
- 3. About Medical Justice:** MJ is the only organisation in the UK to send independent volunteer clinicians in to all the IRCs across the UK. The doctors document detainees' scars of torture and challenge instances of medical mistreatment. We see more than 600 cases each year and have gathered a sizeable, unique and growing medical evidence base. Evidence from our casework is the platform for our research into systemic failures in healthcare provision, the harm caused to detainees by these shortcomings, as well as the toxic effect of immigration detention itself. We and others use our research to secure lasting change to the detention regime through policy work, strategic litigation and by raising awareness of the conditions inside places of immigration detention.
- 4. Shortcomings in services:** There are serious shortcomings in detainees' access to services within detention e.g. lack of access to legal advice (*BID briefing*^[21]), lacking mental health provision (*MJ mental health*^[22] *briefing*) and general healthcare (*MJ healthcare*^[23] *briefing*). This submission will focus on the failings of the primary safeguarding mechanism for vulnerable detainees, Rule 35.
- 5. Rule 35 Reports:** The Detention Centre Rules provide a limited safeguarding mechanism for vulnerable detainees - the Rule 35 reporting procedure. *"The purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention. The information contained in the report needs to be considered in deciding whether continued detention is appropriate in each case."*(55.8A)^[4] A Rule 35 report must be completed by a doctor after seeing someone^[5]:
 - (1) whose health is likely to be injuriously affected by continued detention or any conditions of detention.

- (2) they suspect of having suicidal intentions.
- (3) they are concerned may have been the victim of torture.

5.1 The Rule 35 report is then submitted to the Home Office caseworker who must review and respond within a set time frame. An internal Home Office audit found that only 3% of detainees had a Rule 35 completed and out of these 35% of reports were responded to within the given time frame whilst 33% were not responded to at all. Where a response was received only 9% of detainees were released from detention^[6].

6. **General criticism:** The implementation of Rule 35 has been plagued by widespread, and well-documented^[7], failings resulting in vulnerable detainees being harmed by detention. In the case of [Detention Action vs. SSHD] Justice Ouseley stated that *“Rule 35(3) reports are not the effective safeguard they are supposed to be (...). The ineffectiveness of this safeguard may be caused by the quality of the reports, the quality of the response as to whether they amount to independent evidence of torture. But I am persuaded that Rule 35 (3) reports do not work as intended.”*^[8 §133] The ruling was in the context of the Detention Fast Track system though Rule 35 applies to all detainees. Similar concerns were raised by the Home Affairs Select Committee^[9] and the United Nations Committee Against Torture in May 2013, with one Committee member suggesting the Rule 35 process has become an *“empty paper pushing exercise”*^[10].

7. SPECIFIC SHORTCOMINGS

7.1 **Failure to identify vulnerable detainees:** In order for Rule 35 to function as a safeguard for vulnerable detainees IRC healthcare must effectively identify such individuals. However, ongoing healthcare failings such as a lack of training, brief consultations, poor use of interpreters, poor clinical assessments, inadequate mental health services and a lack of clinical governance^[3] hinder such identification. There is no way of knowing how many vulnerable detainees who should have a Rule 35 report completed, do to receive one. However, a recent study completed at Yarl’s Wood by Women for Refugee Women found that 72% of detainees reported being survivors of rape and 85% stated that they had been either raped or tortured^[11]. These numbers indicate a sizeable proportion of vulnerable detainees may fail to be picked up by this safeguard. It is important to remember that these are some of the most vulnerable detainees in detention, so this failing potentially has very serious consequences.

7.2 **Lack of training:** The 2013 HMIP inspection of Yarl’s Wood found that *“none of the health services staff had been trained in the recognition of alleged acts of trauma or torture, and this was evident in the varied quality of Rule 35 reporting”*^[12 p.42]. In addition, the Colnbrook and Harmondsworth IRC Health Needs Assessment 2013 states *“The Lead GP has been trained in how to carry out a “Rule 35” assessment; this training was provided by the UKBA. It is not clear what training has been provided to other staff and the training received by the lead GP was not cascaded. The clinicians who went on this training reported that they found it confusing with no clear instruction given about how to apply it in practice.”* This report comes two years after the tragic death of Brian Dalrymple at Colnbrook IRC. The Coroner’s inquest ruled that medical neglect had contributed to his death. Mr Dalrymple’s underlying mental health issues were never diagnosed by the IRC healthcare units and no rule 35 report completed. During the inquest it emerged that the GP *“had had no induction training, did not realise he could access wing records, and most extraordinarily had never heard of Rule 35”*^[13].

7.3 **Narrow definition of torture:** Following a court case of 5 linked torture cases whose detention was ruled unlawful after Rule 35 reports failed to effect their release [EO v SSHD]^[14] the Home Office conceded that the definition of torture applied should go beyond torture at the hands of a state actor (eg UNCAT^[15]). A broader definition centred on the severity of ill-treatment suffered and includes acts of domestic, sexual and community violence by any actor should be applied. However, MJ frequently finds that doctors still appear to apply the UNCAT definition in practice. One client who disclosed a history of multiple-perpetrator rape by a violent gang was told her situation did not warrant a Rule 35 report. In

the medical notes the doctor concludes: “rape – private. No rule 35”. Similarly, no rule 35 reports were completed in cases where detainees reported homophobic attacks or domestic abuse. Another client who reported being the victim of an ‘honour crime’ was told to ‘go and google torture’ – presumably a reference to the fact that as the ill treatment did not come at the hands of state actors it did not qualify as torture. This confusion contributes to Rule 35 reports being delayed, or not completed at all, for vulnerable detainees who continue to be inappropriately detained.

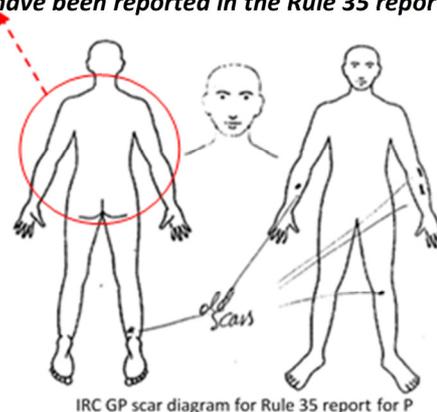
7.4 Under-reported psychological presentation: Rule 35 reports often focus on the physical evidence of torture and fail to consider or record evidence of psychological trauma. One client who reported being anally raped whilst in prison in his country of origin was seen by a doctor who documented severe psychological symptoms in his medical notes and recommended an urgent mental health assessment. The doctor carried out a physical examination but, finding no anal fissure, concluded “no independent evidence of torture, no rule 35 report”. This is despite the Istanbul Protocol^[16] stating that such physical evidence is present in less than 30% of cases of anal rape.

7.5 Poor quality Rule 35 reports: HMIP inspections found that Rule 35 reports were “often insufficient or formulaic, and gave limited assurance that the needs of individuals had been fully considered”^[17 p.5] and lacked diagnostic judgements^[12]. The 2013 HMIP inspection of Colnbrook IRC stated: “The reports did not comment on the consistency between scarring and a method of torture. For example, one detainee claimed he was burnt on his back with cigarettes. While the scarring was documented, the doctor did not provide a comment on whether the scarring was consistent with cigarette burns.”^[18 p.29] MJ research on Rule 35 in IRCs, ‘The Second Torture’^[7] found similarly poor quality. Out of 50 cases reviewed: 46% of reports were completed by nurses despite policy specifying they be completed by a doctor, 49% were incomplete, 49% were missing a body map for documenting scars, many of the reports failed to identify signs of torture, failed to express an opinion, comment on severity or failed to comment on the impact on the detainee’s health. Only one out of 50 detainees was released as a result of a Rule 35 report and the average length of time spent in detention was 226 days. The health impact of the detention of such vulnerable individuals was undeniable and dramatic as the study found that 23% went on hunger strike (50% of whom required hospitalisation), 34% experienced suicidal ideation, 16% attempted suicide, 83% self-reported that detention had a negative impact on their mental and physical health, 11 detainees were transferred to hospital as acute emergencies and there was one near death event^[7]. Not only does poor quality Rule 35 reports lead to vulnerable detainees lingering inappropriately in detention but it can also impact the outcome of their asylum claims as Rule 35 reports are often relied upon as evidence, or lack thereof, of torture. As in the case below:

“P informed healthcare at Yarl’s Wood that she had been mentally and physically tortured whilst imprisoned by police in her country of origin. The GP in Yarl’s Wood completed a Rule 35 failing to record a large portion of P’s scars, to offer a professional opinion or to comment on the clinical consequences of continued detention. The Home Office case worker dismissed the report as the GP had “not suggested that your detention is inappropriate”.

P was seen by an independent doctor who found “numerous parallel scars on both halves of the back(...) The scars on the back (...) are highly consistent with the history of being whipped repeatedly with a bamboo stick. (...) I am concerned that these scars on the back do not appear to have been reported in the Rule 35 report in Yarl’s Wood medical notes”.

P’s asylum application was initially refused partly due to lack of evidence of torture but this decision was overturned on appeal as a result of improved medical evidence.”



7.6 **Very few Rule 35 reports lead to release:** In the second quarter of 2014 457 Rule 35 reports were completed for 452 detainees leading to the release of 45 detainees which gives a release rate of less than 10% as a result of Rule 35 reports^[19] (see table below).

IRC Q2 2014	Reports Completed	Total Detained Q2	% received Rule 35
Brook House	29	1097	2.64
Campsfield	5	361	1.39
Cedars	0	14	0.00
Colnbrook	46	724	6.35
Dover	15	602	2.49
Dungavel	12	337	3.56
Harmondsworth	78	530	14.72
Haslar	13	153	8.50
Larne House	1	152	0.66
Morton Hall	28	620	4.52
Pennine House	4	544	0.74
Tinsley House	14	478	2.93
Yarl's Wood	203	956	21.23
Others	9	428	2.10
Total	457	6996	6.53

HMIP reports that “there was little evidence of the effectiveness of Detention Centre Rule 35 procedures” and that “responses from caseworkers were often dismissive and **none** of those we reviewed led to release.”^[20 p.67] The Independent Monitoring Board at Harmondsworth reported “in 2012 there were 125 (109 in 2011) ‘unfit for detention’ reports made to UKBA relating to Harmondsworth detainees, of which only 12 (5 in 2011) resulted in the detainee being released from detention. **We are amazed that a doctor’s judgement is overruled by case owners in 9 cases out of 10. These words and numbers do not in themselves tell the story of the real suffering endured.**”^[21 p.13]

A freedom of Information request in August 2013 (FOI 2786) showed very low numbers of detainees released from detention as a result of Rule 35 reports. The table below relates to rule 35 (1) reports – detainees who are being injuriously affected by detention. It is astonishing that, in such a vast majority of cases where IRC doctors have found individuals to be harmed by continued detention, this has not led to release. Of course detention can continue when someone is being injuriously effected by detention in very exceptional circumstances but this seems to be becoming increasingly common.

	Q1 2012	Q2 2012	Q3 2012	Q4 2012	Total 2012	Q1 2013
Rule35(1) reports in 2012	34	31	9	24	98	16
Detainees relating to the R35 reports	31	29	7	22	89	16
Detainees released	1	2	-	1	4	0

Table 1. Number of Rule 35 reports filed vs number of detainees released as a result

7.7 **Very few Rule 35(1) & Rule 35(2):** It appears that very few IRC clinicians do Rule 35 (1) or Rule 35 (2) reports, when detainees are at risk of suicide or likely to be injuriously affected by detention. MJ frequently see cases where IRC clinicians have recorded in the medical records that they consider the detainee to be ‘unfit for detention’ or that their ‘medical needs cannot be met in detention’, but no Rule 35 report is done. Often alternative reporting procedures, eg IS91 RA Part C form, which do not get reported to the Home Office case worker, are utilised internally in IRCs instead. MJ is concerned that the low number of rule 35 reports does not reflect the number of seriously ill detainees seen by our doctors in detention. If no Rule 35 report is completed and actioned these detainees may remain in detention where their health will continue to deteriorate. The below table shows the number of Rule 35(3) reports

and the total of Rule 35 reports completed for Yarl’s Wood in 2013 and, despite the rounding, it is clear that as few as 1% of Rule 35 reports are Rule 35(1) or (2)^[22].

Yarl’s Wood 2013	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Rule 35 (3)	40	30	35	35	60	70	40	50	50	40	55	45	555
All Rule 35	40	30	35	35	60	70	40	50	50	40	55	45	560

Note: Figures rounded to the nearest five and may not sum to the totals shown

7.8 **Decision making process:** A completed Rule 35 report should trigger a review of the detainees continued detention by the Home Office Case Worker. Few lead to release. However, the reasoning behind continued detention is often contrary to policy, providing reasons for refusing release such as: ‘the doctor has not recommended your release’; ‘your scars are not diagnostic’; ‘you are not being returned to country x’; ‘report does not amount to independent evidence’. None of the above reasons are valid reasons for continued detention according to Home Office policy. One HMIP inspection found that *“Responses were prompt, but dismissive. For example, a female detainee claimed she was tortured in Iran. The caseworker stated that one of the reasons for refusing to release her was: ‘You arrived without a valid travel document’, ignoring the substantive issue.”*^[18] Another noted *“Case workers generally replied promptly but the focus was on maintaining detention. In one case, a case worker had accepted that a detainee had been tortured but had maintained detention as their condition could be managed satisfactorily; this was inconsistent with Home Office policy.”*^[12]

7.8.1 *Clinical assessment overruled:* Even when Rule 35 reports are completed to a high standard Home Office caseworkers frequently overrule^[9, 17] the clinical assessments of doctors who have found that detention could injuriously affect the detainee’s health. The HMIP review of healthcare at Yarl’s Wood in 2006 found that Home Office caseworkers were unresponsive to *“an alleged history of torture or adverse medical consequences of continued detention. When clinical concerns were raised, the information was not systematically addressed or actioned. Nor was independent medical opinion sought or adhered to”*^[23 p.6] and as *“there was no system to seek the opinion of an independent medical specialist (...) in some cases [Home Office] caseworkers, with no declared medical qualification, appeared to be making their own clinical judgments”*^[23 p.11]. The same problems persist in IRCs to this day.

7.9 **No Rule 35 in prisons:** Rule 35 does not apply to those held in prisons under immigration powers which may put detainees at risk of significant harm. In Medical Justice’s opinion this is of great concern, as there is no reason to think that detainees vulnerable to suffer harm as a result of detention would not suffer the same level of harm whether detained in an IRC or a Prison. Prison staff are possibly even less likely to have received training in identifying signs of trauma and torture. In addition, as the prison estate has an obligation to incarcerate convicted prisoners and those on remand, who make up the vast majority in prison, it may not occur to healthcare, or other staff, that they should be advocating for the release of immigration detainees who are injuriously affected by detention or fulfil other Rule 35 criteria.

7.10 **Outstanding audit:** The Home Office had promised a full audit of rule 35, including the quality of reports and the reasons given by caseworkers for overruling the recommendations of doctors. The audit was scrapped in favour of a quality marking standard exercise which was due to be completed in January 2014. MJ is disappointed at the new format for the auditing exercise as it does not address vital questions around the decision making process and why doctor’s recommendation are so often overruled by caseworkers.

8. **Indefinite Detention:** MJ believes, in line with academic research^[24], that all immigration detention is harmful to the health of detainees, however, indefinite detention is particularly harmful^[24]. Lack of insight into progress of their case and likely length of detention means that even detainees that are held for a relatively short period of time suffer the devastating psychological effects^[25] and the wider human cost^[26] of indefinite

detention. MJ recommends that all IRCs are closed due to the widespread harm they cause but, as long as immigration detention continues to be used, there should be a time limit on the period of detention

9. **Alternative to detention:** Vulnerable detainees whose continued detention would be injurious to their health should not be detained. Rule 35, in its current application, is an inadequate safeguard. Improving the Rule 35 process would ensure that vulnerable detainees would not be inappropriately detained but released to access support in the community.

Medical Justice would like to be invited to give evidence at oral evidence sessions

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