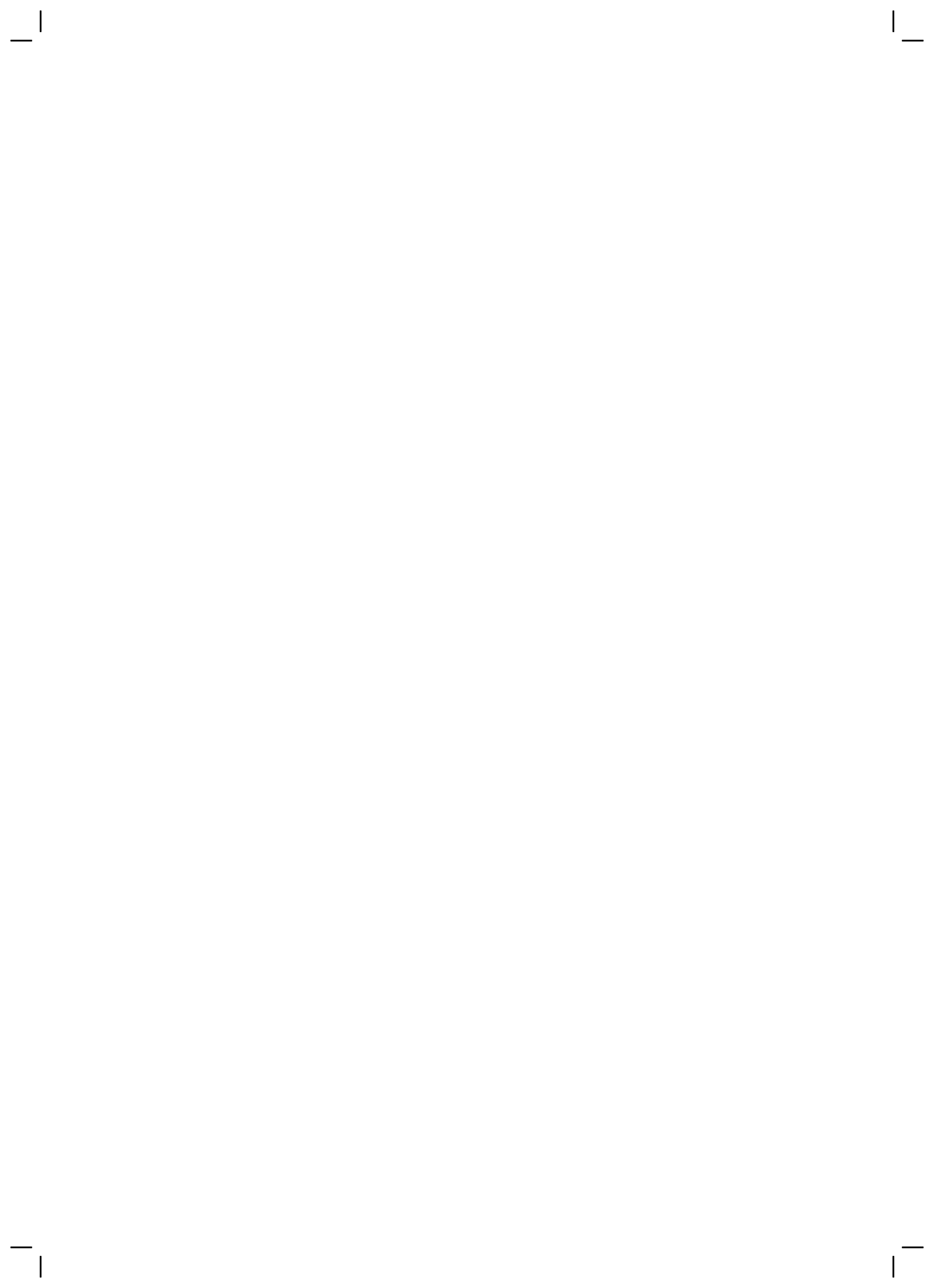




Home Office

Immigration Act 2016: Draft Revised Guidance on adults at risk in immigration detention

March 2018



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Immigration Act 2016:
Draft Revised Guidance on
adults at risk in immigration
detention

Presented to Parliament pursuant to Section 59(4) of the
Immigration Act 2016

March 2018



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Adults at risk in immigration detention

Purpose and background

1. This guidance specifies the matters to be taken into account in accordance with section 59 of the Immigration Act 2016 when determining whether a person would be particularly vulnerable to harm if they were detained, or if they remained in detention, and, if they were particularly vulnerable in those circumstances, whether they should be detained or should remain in detention. This approach emerges from the Government's response (in a Written Ministerial Statement of 14 January 2016) to the report by Stephen Shaw of his review of the welfare of vulnerable people in detention. The intention is that the guidance will, in conjunction with other reforms referred to in the Government's response, lead to a reduction in the number of vulnerable people detained and a reduction in the duration of detention before removal. It aims to introduce a more holistic approach to the consideration of individual circumstances, ensuring that genuine cases of vulnerability are consistently identified, in order to ensure that vulnerable people are not detained inappropriately. The guidance aims to strike the right balance between protecting the vulnerable and ensuring the maintenance of legitimate immigration control.

2. This guidance allows for a case-by-case evidence-based assessment of the appropriateness of the detention of an individual considered to be at particular risk of harm in the terms of this guidance.

3. The clear presumption is that detention will not be appropriate if a person is considered to be "at risk". However, it will not mean that no one at risk will ever be detained. Instead, detention will only become appropriate at the point at which immigration control considerations outweigh this presumption. Within this context it will remain appropriate to detain individuals at risk if it is necessary in order to remove them. This builds on the existing guidance and sits alongside the general presumption of liberty.

4. This guidance will apply in all cases in which an individual is being considered for immigration detention in order to facilitate their removal.¹ In these cases, an assessment will be made of whether the individual is "at risk" in the terms of this guidance and, if so, the level of risk (based on the available evidence) into which they fall. If the individual is considered to be at risk, an assessment will be made of whether the immigration considerations outweigh the risk factors. Only when they do will the individual be detained.

5. The processes set out in this guidance apply to all cases in which consideration is being given to detaining a potentially vulnerable individual in order to remove them.² They also apply to cases of individuals who are already in detention, though there are some differences in the way in which these cases are managed.

¹ Except in certain modern slavery cases – see paragraph 18 of this document.

² Except in certain modern slavery cases – see paragraph 18 of this document.

Principles

6. The main principles underpinning this guidance are:

- the intention is that fewer people with a confirmed vulnerability will be detained in fewer instances and that, where detention becomes necessary, it will be for the shortest period necessary
- there will be a clearer understanding of how the Government defines 'at risk' and how those considerations are weighed against legitimate immigration control factors to ensure greater transparency about who is detained and why
- individuals should leave the UK when they have no permission to enter or stay in the UK. The Government expects individuals to leave the UK on the expiry of any valid leave they may have, and to comply with any requirement or instruction to leave the UK
- for the purposes of removal, individuals can be detained if there is a realistic prospect of removal within a reasonable timescale and if there is evidence which suggests that the individual would not be likely to be removed without the use of detention
- detention will not be appropriate if an individual is considered to be at risk in the terms of this guidance unless and until there are overriding immigration considerations
- consideration will need to be given to the weight of evidence in support of the contention that the individual is at risk, and the level of risk that is supported by the evidence
- assessment of risk is based on the evidence available, ranging from a self declaration of risk to authoritative professional opinion. The level of evidence available dictates the level of evidence-based risk into which any given individual will fall
- where professional evidence is not immediately available, but where observations from Home Office officials lead to a belief that the individual is at a higher level of risk than a simple self declaration would suggest, an individual can be allocated to a higher risk category in the terms of this guidance on the basis of that observational evidence
- in each case, the evidence of risk to the individual will be considered against any immigration factors to establish whether these factors outweigh the risk
- the greater the weight of evidence in support of the contention that the individual is at risk, the weightier the immigration factors need to be in order to justify detention.

Who is an adult at risk?

7. For the purposes of this guidance, an individual will be regarded as being an adult at risk if:

- they declare that they are suffering from a condition, or have experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention
- those considering or reviewing detention are aware of medical or other professional evidence, or observational evidence, which indicates that an individual is suffering from a condition, or has experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention – whether or not the individual has highlighted this themselves.

8. On the basis of the available evidence, the Home Office will reach a view on whether a particular individual should be regarded as being “at risk” in the terms of this guidance. If, on this basis, the individual is considered to be an adult at risk, the presumption will be that the individual will not be detained.

Assessment of whether an individual identified as being at risk should be detained

9. Once an individual has been identified as being at risk, consideration should be given to the level of evidence available in support and the weight that should be afforded to the evidence in order to assess the likely risk of harm to the individual if detained for the period identified as necessary to effect their removal:

- 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
- 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
- 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.

10. Determinations from courts or tribunals about the credibility of a person's account or claims, or about professional evidence, or credibility concerns arising from other sources, may be taken into account in deciding the weight that should be afforded to evidence and could result in a reconsideration of the evidence level into which the individual falls.

Indicators of risk

11. The following is a list of conditions or experiences which will indicate that a person may be particularly vulnerable to harm in detention.

- suffering from a mental health condition or impairment (this may include more serious learning difficulties, psychiatric illness or clinical depression, depending on the nature and seriousness of the condition)
- having been a victim of torture³ (individuals with a completed Medico Legal Report from reputable providers will be regarded as meeting level 3 evidence, provided the report meets the required standards)
- having been a victim of sexual or gender based violence, including female genital mutilation
- having been a victim of human trafficking or modern slavery (see paragraph 20 below)
- suffering from post traumatic stress disorder (which may or may not be related to one of the above experiences)
- being pregnant (pregnant women will automatically be regarded as meeting level 3 evidence)⁴
- suffering from a serious physical disability
- suffering from other serious physical health conditions or illnesses
- being aged 70 or over
- being a transsexual or intersex person.

12. The above list is not intended to be exhaustive. Any other relevant condition or experience that may render an individual particularly vulnerable to harm in immigration detention, and which does not fall within the above list, should be considered in the same way as the indicators in that list. In addition, the nature and severity of a condition, as well as the available evidence of a condition or traumatic event, can change over time.

Assessment of immigration factors

13. The presumption will be that, once an individual is regarded as being at risk in the terms of this guidance, they should not be detained. However, any risk factors identified and evidence in support, will then need to be balanced against any immigration control factors in deciding whether they should be detained.

³ "Torture" is defined in rule 35(6) of the Detention Centre Rules 2001.

⁴ By virtue of the Immigration Act 2016, pregnant women may not be detained for longer than 72 hours, extendable up to a week in total with Ministerial approval.

14. The immigration factors that will be taken into account are:

- Length of time in detention – there must be a realistic prospect of removal within a reasonable period. What is a “reasonable period” will vary according to the type of case but, in all cases, every effort should be made to ensure that the length of time for which an individual is detained is as short as possible. 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. Because of their normally inherently short turnaround time, individuals who arrive at the border with no right to enter the UK are likely to be detainable notwithstanding the other elements of this guidance
- Public protection issues – consideration will be given to whether the individual raises public protection concerns by virtue of, for example, criminal history, security risk, decision to deport for the public good
- Compliance issues - an assessment will be made of the individual’s risk of abscond, based on the previous compliance record.

15. An individual should be detained only if the immigration factors outweigh the risk factors such as to displace the presumption that individuals at risk should not be detained. This will be a highly case specific consideration.

16. Consideration must be given to whether there are alternative measures, such as residence or reporting restrictions, which could be taken to ensure an individual’s compliance whilst removal is being planned or arranged and to reduce to the minimum any period of detention that may be necessary to support that removal.

17. All reasonable voluntary return options should be pursued before consideration is given to detaining at risk individuals. Where it is believed that the individual would not return without the use of detention to support enforced removal (e.g. has previously been offered the chance to pursue a voluntary return and not taken it up or complied with the process or, for instance, has been living and working illegally in the UK for some time or has made attempts to frustrate their return), this should be regarded as a matter of non-compliance.

Trafficking cases

18. Any decision made on the immigration detention of an individual who has received a positive reasonable grounds decision under the National Referral Mechanism (NRM), and who has not yet received their conclusive grounds decision or otherwise left the NRM, will be made on the basis of the modern slavery policy set out in separate guidance.

Medico Legal Reports

19. In cases where an individual is detained during the consideration of their asylum claim and is successfully referred for a Medico Legal Report, the Asylum Policy Instruction on Medico Legal Reports will apply.



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