

# BiD Bail for Immigration Detainees

## Legal advice in immigration detention: a 10-year review

February 2021



## **Introduction**

BID exists to challenge immigration detention and ensure access to justice for detained people. With the assistance of barristers acting pro bono, BID prepares and presents bail applications in the Immigration and Asylum Chamber of the First-tier Tribunal. Since 2014 BID has also provided legal advice and representation to people challenging their deportation on the basis of Article 8 of the European Convention on Human Rights (ECHR). Our casework feeds into our policy and campaigning work providing a robust evidence base from which to challenge all forms of immigration detention. Our aim is to end immigration detention.

Since its inception, BID has raised serious concerns about the availability and quality of immigration legal advice in detention.

Access to justice is a key pillar of the rule of law, and guaranteeing access to justice is particularly important in the case of vulnerable and marginalised groups. This is particularly true for immigration detainees who can be stripped of their liberty for administrative purposes, without a time limit and with few safeguards. The decision to detain is made by a civil servant, acting on behalf of the Secretary of State for the Home Department (SSHD), rather than a judge and the Home Office has very wide discretion in the operation of its detention powers. People can be detained in prisons having served a criminal sentence or in Immigration Removal Centres (IRC's). People in detention are isolated from assistance and support networks. Many do not speak English and may not understand why they are being detained.

The lack of judicial oversight and transparency of immigration detention leaves those detained particularly vulnerable to systemic abuse and mistreatment – undercover footage broadcast in September 2017 and recorded in an Immigration Removal Centre by BBC Panorama revealed a pattern of bullying, mistreatment, humiliation, physical and verbal abuse of detainees by G4S officers<sup>1</sup>.

Home Office decision making is poor with over 50 per cent of immigration and asylum appeals being allowed, a figure that has not dipped below 50 per cent in any quarter since July–September 2017<sup>2</sup>.

The Home Office has also repeatedly been found to have detained people unlawfully. In the two year period between 2017 and 2019 £15.1 million was paid out in compensation to 584 people who had been unlawfully detained.<sup>3</sup> The parliamentary Home Affairs Committee described the Home

---

<sup>1</sup> BBC Panorama *Britain's Immigration Secrets*

<sup>2</sup> Saira Grant: "An overview of immigration advice services in England and Wales". Research commissioned by the Paul Hamlyn Foundation March 2020.

<sup>3</sup> Page 118 Home Office Annual Report and Accounts 2019-20

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/902593/HO\\_Annual\\_Report\\_and\\_Accounts\\_2019-20\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902593/HO_Annual_Report_and_Accounts_2019-20_FINAL.pdf)



Office’s approach to immigration detention as ‘shockingly cavalier’<sup>4</sup>. The consequences of wrongful decisions in the context of immigration law could not be more serious and touches every aspect of life, potentially causing deprivation of liberty, denial of the most basic of entitlements, and permanent exclusion.

UK immigration law is complex. As the parliamentary Joint Committee on Human Rights (JCHR) argued in 2019 in their inquiry into immigration detention<sup>5</sup> “Given the challenges individuals face in detention, and the complexity of the law, legal advice and representation is crucial to help individuals to pursue their rights effectively”<sup>6</sup>. This reflects BID’s position. It is vitally important that people held in immigration detention are able to access legal advice to challenge their detention and to have the opportunity to articulate their right to remain in the UK. Indeed the very justification for immigration detention relies on the fact that it can be challenged.

Since 2010, BID has been carrying out 6-monthly surveys with people held in immigration detention to document their experiences of accessing legal advice while in detention, and to better understand the barriers they face. The upheaval caused by COVID-19 has meant that in 2020 it was not possible to carry out a legal advice survey. Instead, we decided to take a look at the data that we have collected over the last decade. In this review we analyse the trends and continuities in access to justice in immigration detention, within a broader context of shrinking of legal aid and hostile immigration policy.

---

<sup>4</sup> <https://committees.parliament.uk/committee/83/home-affairs-committee/news/100608/cavalier-home-office-failing-in-its-responsibility-for-immigration-detention/>

<sup>5</sup> Joint Committee on Human Rights Immigration Detention Sixteenth Report of Session 2017–19, published January 2019

<sup>6</sup> JCHR Detention Report at para 47



## **A shifting landscape:**

### **LASPO**

Legal advice in immigration detention has undergone a number of changes in the last decade. Cuts to legal aid brought about in April 2013 under the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO 2012) removed non-asylum immigration work from the scope of legal aid. . This has had a devastating impact on the immigration legal aid market as well as being disastrous for people subject to immigration control<sup>7</sup>. The government's own review of LASPO showed an 85% reduction in legal help for non-asylum immigration matters post LASPO, and a 62% reduction in full representation<sup>8</sup>. LASPO reduced the rates paid for legal work and led to a reduction in the number of legal aid providers. *It has been argued that without the cuts to legal aid, the Windrush scandal may not have had as severe consequences as it did, as Windrush citizens would have been entitled to access legal assistance to regularise their status.*

### **Immigration Act 2014**

As well as restricting access to justice by taking immigration matters out of scope of legal aid the Immigration Act 2014 reduced the number of appealable immigration decisions from 17 to 4. This led to reduction in the number of appeals lodged against Home Office decisions.<sup>9</sup>

Many of BID's clients are foreign national offenders detained under immigration powers in prisons who are challenging deportation on the basis of their right to family or private life (Article 8 ECHR). Our client group have been particularly affected by successive legislative changes. UK deportation law, already harsh, became tougher still for those seeking to challenge deportation on the basis of the strength of family or private life in the UK (Article 8 ECHR). The Immigration Act 2014 amended the Nationality and Immigration Act 2002 and codified the deportation of foreign national offenders as being in the public interest unless (very limited) exceptions applied. The onus is on the appellant to show that an exception applies and to have any chance of success it is essential to provide expert evidence to satisfy the high evidentiary threshold, but independent social work or psychiatric reports on children can cost £1000-2000 or more. Since LASPO removed such cases from the scope of legal aid, many people are effectively being denied access to a fair hearing to challenge their deportation simply because they cannot afford the costs.

### **Legal advice in Immigration Removal Centres**

In September 2018, the Legal Aid Agency made sweeping changes to the contractual arrangements governing the provision of legal advice in immigration detention, under the Detained Duty Advice (DDA) scheme. Under the DDA scheme detainees can book a half-hour appointment with a legal aid

---

<sup>7</sup> For more details see Dr Jo Wilding's report on the immigration legal aid market, Droughts and Deserts (2019),

<sup>8</sup> LASPO post-implementation review.

<sup>9</sup> Saira Grant: "An overview of immigration advice services in England and Wales". Pg 12. Citing Ministry of Justice data.



immigration lawyer, and each firm that is contracted to give advice in that detention centre is responsible for the provision of advice for a week at a time. Lawyers staffing the DDA legal advice scheme or surgery agree, and are required, to take on all cases that have merit.

The main feature of the changes has been a sharp increase in the number of providers. Prior to September 2018 there were eight or nine firms delivering the DDA in seven IRCs<sup>10</sup>, there are now 77 firms. The vast majority of providers have never run DDA surgeries in the past and lack experience of detention work which is a very complex, fast-changing and specialist area of immigration law. Under the previous system firms were delivering regular surgeries, whereas now firms are unlikely to deliver more than 3 weeks of surgeries over a 2 year period in any given IRC. Such irregularity means that newer firms cannot build up expertise and those with experience risk losing their expertise. This has had a negative effect on the quality of legal advice in immigration detention.

---

<sup>10</sup> There are now 6 IRCs since the closure of Campsfield IRC in 2019. Morton Hall IRC is due to be returned to its previous function as a prison in 2021



## **10 years of BID's Legal Advice Survey**

Every 6 months we speak directly with our clients to find out about their experiences of access to legal advice and representation. We carry out questionnaires to all of our clients that we are able to contact who have open files with BID; have signed letters of authority consenting to the disclosure of their anonymised information to further BID's research work; are held in Immigration Removal Centres. We are unable to ask the same questions to those held in prisons as they do not have access to mobile phones. We ask our clients about the following matters:

- Whether they have, or previously had, a lawyer
- Whether that is legal aid or private
- Reasons for not having a lawyer
- Their experience of the DDA scheme
- Whether their solicitor has applied for bail
- Blocked websites in the detention centres
- Access to immigration advice in prisons (for those who were previously held there)
- Feedback on the service that BID provides and what additional advice and materials would be useful.

We are very grateful to the many volunteers from BPP law school who have carried out the surveys.

## **Findings**

### **Level of representation**

The level of representation in immigration detention has declined since LASPO. In November 2012, before the legal aid cuts came into force, 79% of respondents had legal representation, of which 75% were legal aid. In May 2013, immediately after the introduction of LASPO cuts to legal aid, the proportion of those surveyed with a legal representative fell to 43%. In total, under a third (29%) had a legal aid solicitor. Since then there have only been 2 surveys where the number of people with a legal representative was above 60% and the figure has frequently been below 50%.

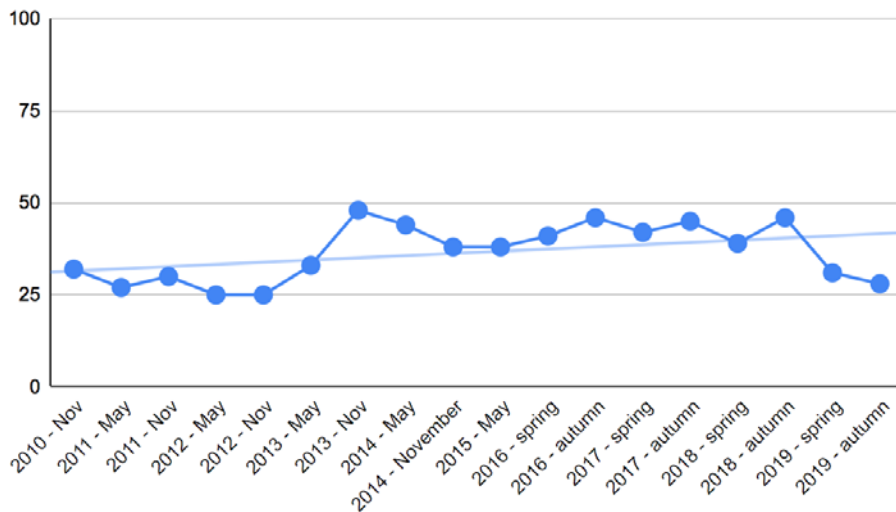
No person should be unrepresented in immigration detention. In the criminal justice system there is an automatic access to a duty solicitor scheme, at the point where somebody is held by the police. There should be an equivalent system for those facing detention under immigration powers.



**Figure 1. Representation Rates Among BID’s Legal Advice Survey Respondents**

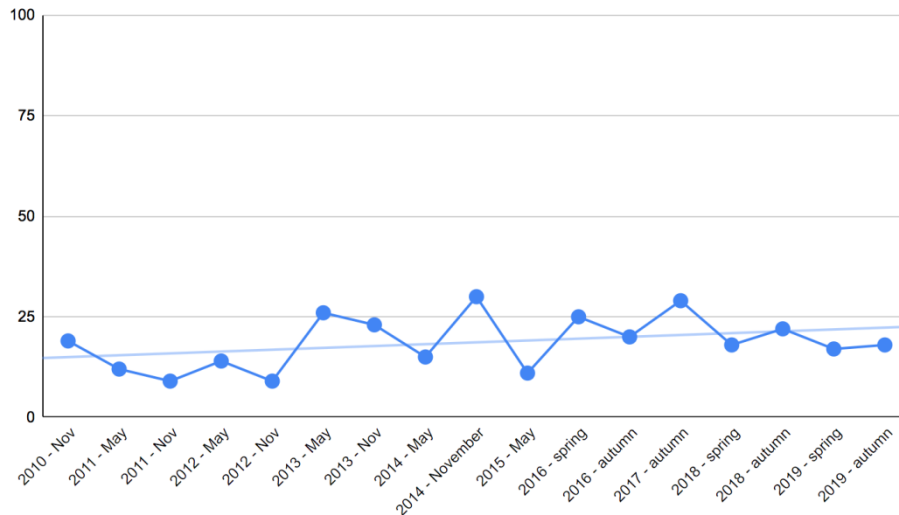


**Figure 2: Percentage of those who have a legal representative who are using a private fee-paying solicitor**



Throughout the past decade there has always been a considerable proportion of people interviewed who have never had a solicitor – this figure is generally between 10 – 30% of all people interviewed.

**Figure 3: Percentage of sample that had never had a legal representative while in detention**



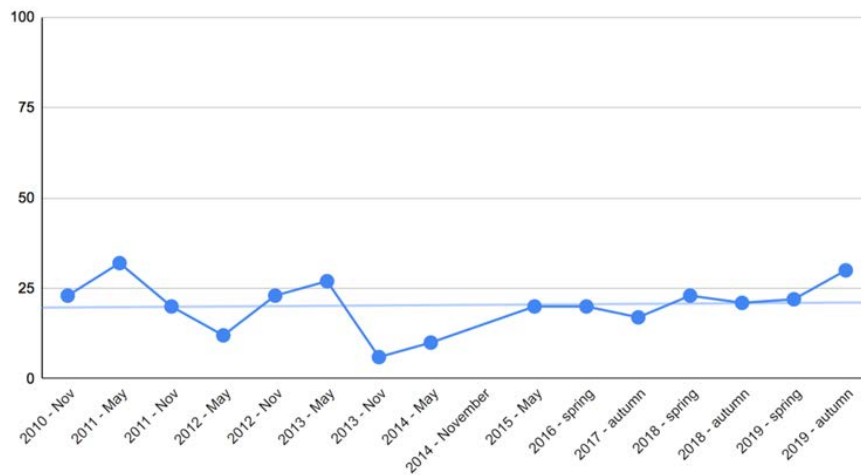
Many people lose their solicitor as a result of being moved from one detention centre to another. The decision is taken by the Home Office without the involvement of the detainee being moved. This can be harmful particularly where they may have established relationships or be more accessible to family, friends or legal representatives. This has increased since 2013 and has been consistently at 20% or above since May 2015.

In addition, every time a detainee is transferred across the border between England and Scotland, they will be required to change solicitors as they enter a different legal jurisdiction. Data obtained by Freedom of Information request<sup>11</sup> showed that from January 2015 – June 2019 there were 3359 transfers of detainees under immigration powers from a place of detention in England to a place of detention in Scotland, and 4467 such transfers from Scotland to England. In each instance the individual almost certainly would have lost access to any legal representative that they had.

<sup>11</sup> FOI request reference number 56254 request submitted 01/11/19 response received 21/11/19



**Figure 4: Percentage of detainees interviewed who had lost their legal representative on one or more occasion as the result of a transfer between IRCs**



## Blocked websites

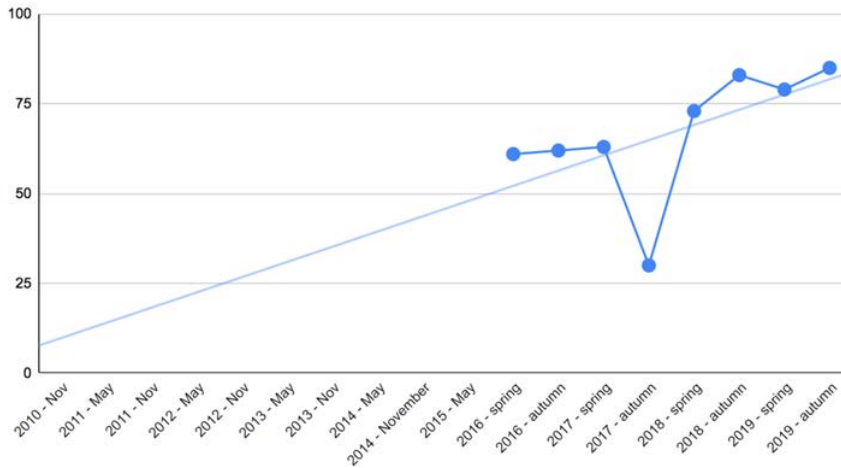
In each survey we ask people whether they have tried to use the internet to research their case, and for those that answer yes, we ask a follow-up question to find out whether they have been blocked from accessing websites that might be helpful with their immigration case. We began including this question in the survey from Spring 2016 and it has consistently been found to be a problem. In each survey since Spring 2018<sup>12</sup>, over 75% of respondents who tried to use the internet to research their case have complained that this is an issue. Which websites are blocked generally varies across different detention centres. The types of websites that are blocked include:

- BID's website
- personal emails
- Some news sites
- Sites offering advice on immigration matters or legal advice
- Solicitors' websites
- Some gov.uk websites

It remains the case that all websites that fall into the category of 'social media' are prohibited in immigration removal centres. This was criticised by former Prisons and Probation Ombudsman in his government commissioned review into immigration detention in 2018 on the grounds that access to such sites would reduce detainees' feelings of isolation.

<sup>12</sup> In the Autumn 2017 the figure was considerably lower. We are unable to comment as to why this might have been the case and it does not necessarily mean that fewer websites were blocked during that period.

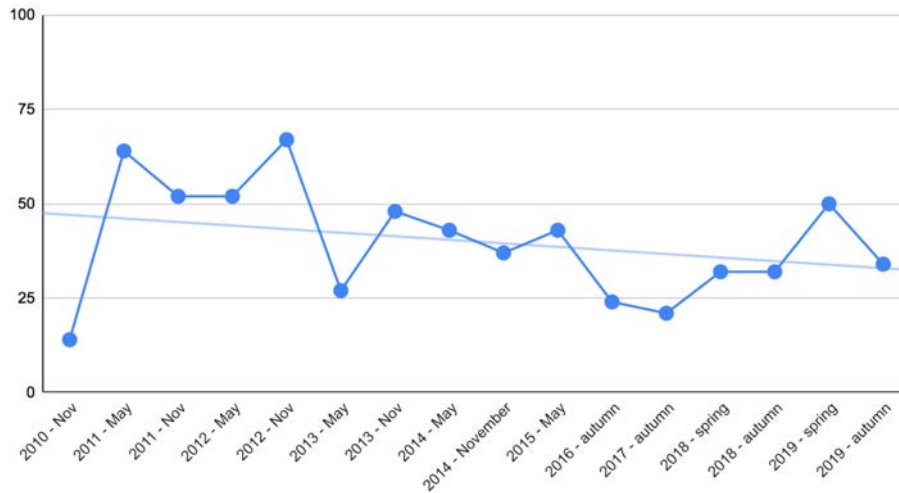
**Figure 5: Percentage of respondents who reported that they had been blocked from accessing websites that might help them with their immigration case**



### Appointments with the Detention Duty Solicitor

Under the Detention Duty Advice (DDA) scheme detainees can book a 30 minute appointment with a legal aid solicitor, who will assess the merits of the case. Solicitors staffing the rota are contractually required to provide representation in any case that has merit. However, Respondents in the Legal Advice Survey state that duty solicitors often do not take on cases at the end of the appointment. The percentage of people who had a DDA appointment who were subsequently taken on by the lawyer has not risen above 50% since Autumn 2012, the last survey before LASPO came into force. These figures are appallingly low especially given that duty solicitors should be seeking to provide advice or representation in the individual’s detention or bail matter in all of these cases, regardless of the merits of the substantive immigration case. Even someone who may have little chance of being granted bail should receive legal advice regarding the merits of their detention case, the steps they need to take to be able to get out of detention, and for their detention matter to be dealt with until such point that they leave detention, or are able to challenge the lawfulness of their detention.

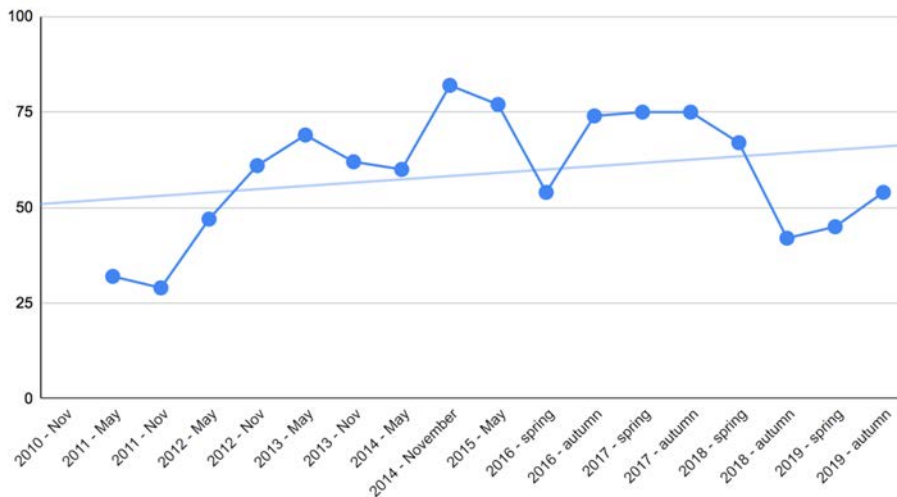
**Figure 6: Percentage of those who had a DDA appointment who were subsequently taken on as a client by the contracted advice provider**



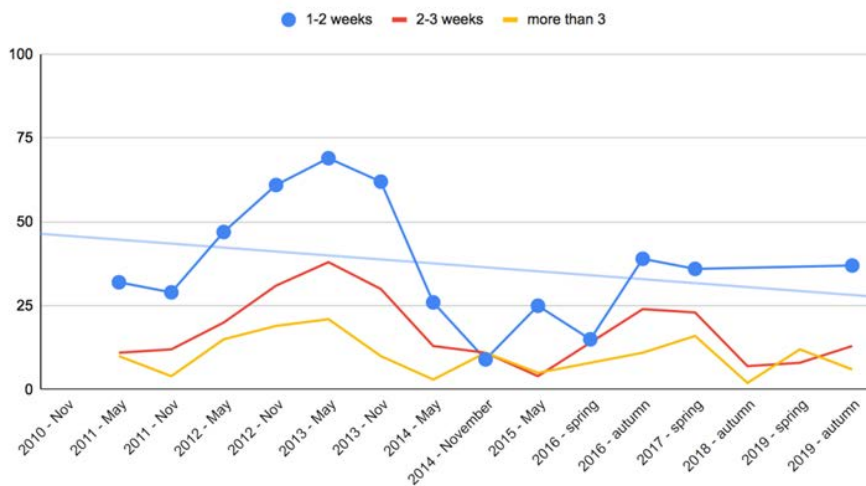
## Waiting times

Under the DDA scheme people are frequently waiting lengthy periods to see a solicitor. Since November 2011, there have only been two occasions on which fewer than 50% of respondents were waiting more than a week to see a solicitor, in some cases waiting up to 3 weeks (although this has improved recently). It is not acceptable that people should be required to wait such long periods deprived of their liberty and without legal assistance. Moreover, detainees usually receive just a few days' notice of their enforced removal from the UK and may require legal advice urgently. There is no way of knowing how many people have been removed from the UK because they were unable to access legal advice during this notice period.

**Figure 7: Percentage of those detainees who made a DDA appointment who waited more than one week to see an advisor**



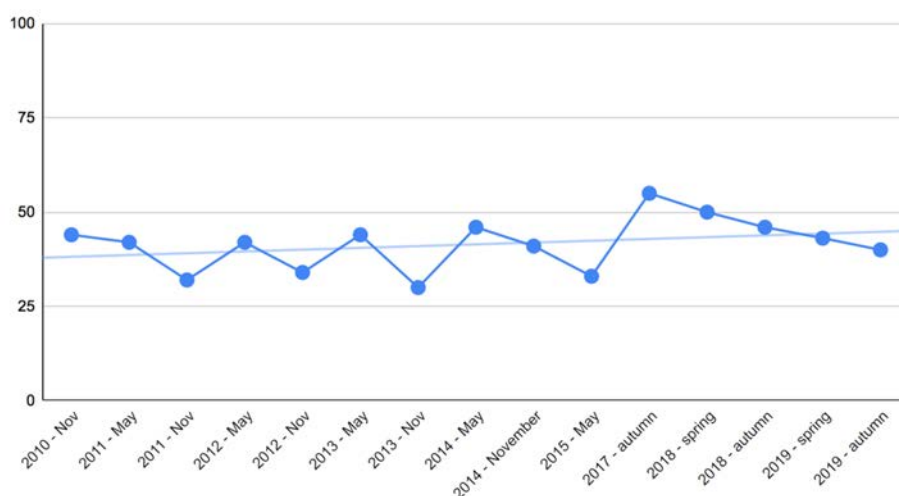
**Figure 8: Percentage of those detainees who made a DDA appointment who waited more than one week to see an advisor who had to wait 1-2, 2-3 or more than 3 weeks.**



For those who do have solicitors, we ask whether their solicitor has made at least one bail application for them. There has only been one year where over 50% of people who had a solicitor had had a bail application made by that solicitor. In the last two years this proportion has been decreasing.

The reasons given for an application for bail not being made are usually unsatisfactory and indicate a lack of understanding of the bail process on the part of the solicitor. Such reasons include solicitors saying that you cannot apply for bail without an address, or without a surety, or the solicitor is reported as asking for a fee before a bail application can be made. In many cases people do not understand why their solicitor has not made a bail application for them.

**Figure 9: Percentage of detainees interviewed with a legal advisor at the time of interview that had one or more bail applications made for them by their legal advisor**



### Quality of advice:

Since changes introduced in September 2018, the DDA rota has been mostly staffed by inexperienced providers and we have observed decline in the quality of advice delivered. Respondents in the Legal Advice Survey have raised the following issues:

- Solicitors holding appointments for less than half an hour and often for just a few minutes
- Solicitors asking for a fee instead of seeking to take on cases on a legal aid basis, and without seeking to make applications for Exceptional Case Funding.
- Solicitors delivering advice that was not useful
- Solicitors not taking on cases without a satisfactory reason, including due to lack of capacity
- Solicitors being very difficult to contact after the appointment
- Detainees not bothering to go to the DDA because the reputation of the duty solicitors is so bad within the centres

A number of firms on the rota have just one practitioner – it is difficult to see how such a firm could run an IRC surgery and take on all the cases that have merit (this could be as many as 50). Others are unable to undertake judicial review work.

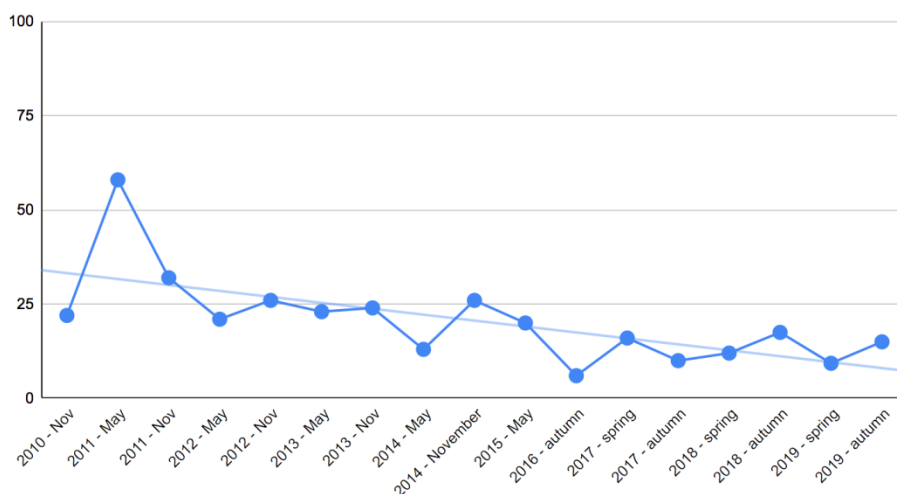
Unfortunately we do not have the resources or access to systematically monitor the quality of advice delivered under the DDA and the majority of poor advice would not come to our attention. However, we are aware that the DDA solicitors have a poor reputation among immigration detainees and the NGOs that support them.

## Advice in prisons:

At the end of September 2020 there were 498 people held in prisons under immigration powers<sup>13</sup>. Our clients held in prisons face multiple mutually compounding barriers to accessing justice. Unlike in detention centres in the UK, there are no advice surgeries, and detainees in prisons are required to find an immigration solicitor while imprisoned, and convince them to come to the prison to take on the case. People in prisons do not have access to mobile phones or the internet and most communication happens via a very slow postal system.

We ask respondents in the Legal Advice Survey whether they were previously held in a prison, and, if so, whether they received immigration advice while they were held. The proportion of people who received immigration advice while they were held in a prison has consistently been significantly low – since the Autumn 2011 survey this figure has never been above 25% and in recent years it has been much lower. Given that these people will often be facing deportation, and therefore permanent exclusion and separation from children, families and communities in the UK, this is an appalling situation that needs to be addressed as a matter of urgency.

## Percentage of those who received legal advice while in prison (includes only advice received from immigration lawyer, CAB, DAS, BID)



<sup>13</sup> This figure fluctuates but it is always close to 400 people. In the months leading up to the Covid-19 pandemic the figure was usually above 400. At any one point there will be roughly 70 prisons where immigration detainees are held, but this can vary.

## **Conclusion and recommendations:**

Immigration detention is inhumane, unnecessary and expensive. We campaign for an end to the practice of depriving people of their liberty for immigration purposes. However, while detention continues to exist it is vital that people are able to access legal advice to challenge their detention and pursue any claim to remain in the UK. Our legal advice survey shows that over the last decade immigration detainees have faced and continue to face multiple and compounding barriers to accessing justice. The following recommendations should be introduced as a matter of urgency.

1. Legal aid withdrawn under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) must be restored. Any immigration decision must be challengeable and thus accompanied by legal advice and representation. Appeal rights removed by the 2014 Immigration Act should be restored.
2. We support the recommendation by the Joint Committee on Human Rights (2019) that “Initial legal advice appointments under the Detention Duty Advice scheme should be made automatically, unless the individual opts out<sup>14</sup>.”
3. The provision of legal aid advice in prisons should be expanded as a matter of urgency and should be equal to the provision of advice in IRCs (including urgent provision of non-means tested advice at the outset of a person’s immigration detention). People should not be held in prisons under immigration powers.
4. There should be a smaller number of providers that are contracted to provide support under the DDA scheme. In addition the scheme should be reviewed:
  - a. The LAA should carry out a review of the quality of advice on the surgery rota following the increase in the numbers of firms contracted to deliver advice.
  - b. The LAA should carry out a peer review of advice delivered on the surgery by firms that have not previously dealt with immigration detention cases.
  - c. The LAA should allow detainees to seek advice from any non-surgery legal aid lawyer of a person’s choosing. This will help to ensure that reputable firms attract advice work without forcing detainees to rely on a duty scheme in detention that has presently lost detainees’ trust.

---

<sup>14</sup> Joint Committee on Human Rights *Immigration Detention* Sixteenth Report of Session 2017-19 pg 20  
<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf>

