

Justice Select Committee Inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Second submission of written evidence from Bail for Immigration Detainees 1st December 2014

Bail for Immigration Detainees (BiD) is a charity which provides immigration detainees with free legal advice, information and representation to secure their release. From 1 August 2013 to 31 July 2014, BiD assisted 3071 detainees. As the committee will remember, BiD provided written evidence to this inquiry in April 2014, and oral evidence on 21st October 2014.

Executive Summary

- BiD believes that legal aid should be available for private and family life cases (Article 8 ECHR), where the means and merits tests are met. BiD deals with cases where the Home Office is seeking to remove or deport parents from the UK without their children. From paragraph 6 we summarise the case of Teresa Gudaviciene,¹ who was subjected to prolonged domestic violence, and on one occasion stabbed her partner in self-defence. Following her prison sentence, the Home Office detained and decided to deport her. Her daughter was in foster care in the UK, and the Home Office said they could stay in contact via 'modern means of communication.'² Teresa was refused Exceptional Case Funding; the challenge to this refusal is ongoing. BiD is gravely concerned that legal aid is unavailable to protect children and family life in such cases.
- Very many detainees do not have the means to pay for legal representation. At paragraph 12 we set out quantitative data on the increased number of unrepresented detainees.
- On p5, an example is given of a young man who has been refused Exceptional Case Funding. He arrived in the UK when he was nine, to join his mother who is a recognised refugee, and needs regular care from him for physical health problems. As a minor, he was convicted of two counts of robbing a mobile phone, and a small amount of cash, and faces deportation.
- Lawyers preparing 'mixed' asylum and private and family life claims face significant practical and ethical difficulties. BiD has dealt with 'mixed' case clients who have not been able to find a legal aid representative to deal with their asylum claim. This is gravely concerning given the potential consequences of refoulement for refugees.
- At paragraphs 25-27 we give examples of cases where detainees face barriers to properly preparing their own cases due to lack of legal knowledge.
- Finally, from paragraph 32 we give examples of cases where concerns have been raised about the quality of work done by private solicitors.

¹ *Gudaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin)

² *Gudaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin), paragraph 57

Lack of legal aid for family life cases

1. During the oral evidence session on 21st October, at which BID gave evidence, Nick Du Bois MP asked: 'Time after time after time I have people come in to see me with cases going back as far as 10 years, where they have, first, overstayed their legitimate visa, they have then left the country, illegally re-entered the country and sometimes done this two or three times. They get married and have children, all in the knowledge that they have no right to be here. My question is this. If this is their behaviour, whatever motivated it, is it fair that a taxpayer should pick up their case when eventually they try and do it under article 8 of the Human Rights Act?'
2. We therefore wish to set out here the reasons why BID believes that legal aid should be available for private and family life cases (Article 8 ECHR), where the means and merits tests are met.
3. First, it is important to note that before the cuts introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), by no means all such cases would have attracted legal aid funding. An assessment of whether the case had merit would take into account a range of factors including whether the applicant had overstayed their visa, illegally re-entered the country and so on. A poor immigration history of the type Nick Du Bois MP describes could go against the person seeking legal aid. It therefore cannot be assumed that the constituents described here would have been able to access legal aid before April 2013.
4. Secondly, BID deals with cases where the Home Office is seeking to remove or deport parents from the UK without their children. Parents, including single parents, cannot access legal aid to challenge Home Office decisions. The consequences for child welfare are extremely serious. The Government's position appears to be that it is acceptable that children should not be able to access the protections which legal aid would afford them, simply because they or their parents are foreign. This is not a line of reasoning which BID is able to agree with.
5. On 13th June 2014, in the case of *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin), the High Court found that the Legal Aid Agency had made unlawful decisions to refuse exceptional case funding in six test cases. The Ministry of Justice has appealed this decision.
6. The case of one of the claimants, Teresa Gudanaviciene, vividly illustrates the reasons why legal aid should be available for private and family life claims.
7. Teresa was subjected to domestic violence by her alcoholic partner. On one occasion, she took a kitchen knife and stabbed her partner in self-defence. Although the court recognised that her actions had been 'provoked by her partner's conduct'³ she was convicted of wounding with intent. Her infant daughter was taken into foster care. Children's Services 'had concerns for [the daughter's] safety and development should she be placed with her

³ *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin), paragraph 54

father.⁴ The Home Office's decision to deport Teresa stated that she would be able to stay in contact with her daughter via 'modern means of communication.'⁵ The Legal Aid Agency's refusal of exceptional case funding envisaged the possibility that 'the father is awarded a residence order [for the child] and remains in the UK.'⁶ Teresa speaks limited English. In his judgment in *Gudanaviciene & Ors*, Justice Collins notes that she has no funds or means to gather the expert evidence needed to assess her risk of reoffending or her child's situation, and finds that the Legal Aid Agency's position that she could adequately represent herself is 'little short of absurd.'⁷ He states: 'There is no evidence as to whether the daughter will be able to be cared for if she were to go to Lithuania with her mother and what provision will be made for her daughter's future here.'⁸

8. It may appear to committee members that, in such cases, some of the concerns could be addressed by a decision to deport children with their parents. However, the matter is not this straightforward. In deportation cases, the children have often been born in the UK and have British Citizenship. Where the deported parent has been in prison, and spent a lengthy period in detention, they may not have lived with the child for several years. It is unlikely that children's best interests will be served by being reunited with their parent during their forced deportation to an unknown country where they may face destitution. Nevertheless, if a child is forcibly separated from their parent for the remainder of their childhood, or left in an inadequate or unsafe care arrangement in the UK, this will have far-reaching negative consequences for them. Legal aid is needed so that a proper assessment can be made of what actions are needed to safeguard and promote the welfare of children in such situations.
9. Where single parents are removed or deported and their children are left in Local Authority care, this leads to direct costs to the state. In cases where one parent is expelled and the other remains in the UK with the children, this may also result in costs to the state. For example, if a father is deported leaving a British partner with several young children in the UK, the mother may well be unable to work and be forced to rely on benefits as a result of the deportation. Furthermore, psychological studies show that children who are separated from parents in other contexts, such as parental imprisonment, are at greater risk of poor outcomes in terms of education, health, and anti-social behaviour.⁹ This is likely to lead to long-term cost to the state.

⁴ *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin), paragraph 56

⁵ *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin), paragraph 57

⁶ *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin), paragraph 61

⁷ *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin), paragraph 60

⁸ *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin), paragraph 60

⁹ For example, a 2008 meta-analysis of existing research found that children of prisoners have about twice the risk of antisocial behaviour and poor mental health outcomes compared to children without imprisoned parents: Murray, J. & Farrington, D.P. 2008 'The Effects of Parental Imprisonment on Children' in M. Tonry (Ed.) *Crime and Justice: A review of research* Vol. 37 pp133-206. See also: Phillips, S.D. Erkanli, A. Keeler, G.P. Costello, E.J. and Angold, A. 2006 'Disentangling the Risks: Parent Criminal Justice Involvement and Children's Exposure to Family Risks' *Criminology and Public Policy* Vol.5 pp677-703. While no longitudinal studies have been carried out with children in the UK who are separated from parents by removal or deportation, BID's 2013 report *Fractured Childhoods: the separation of families by immigration detention* found that children lost weight, had nightmares, suffered from insomnia, cried frequently, and become very socially isolated during their parent's detention.

10. Further examples of separated family cases are provided in BID's 2013 report *Fractured Childhoods*, and our April 2014 submission to the Justice Committee in response to this inquiry. BID has dealt with cases where single parents have been deported without their children. In one case, the Home Office deported a father leaving his two sons, aged 12 and nine, in the care of his ex-girlfriend. The care arrangement later broke down. The Home Office did not make any inquiries about the children to their carer, and did not take any effective steps to investigate the care arrangement before deporting the father.¹⁰
11. The removal of legal aid for private and family life claims has effectively stripped many parents of the ability to challenge their deportation. It is difficult to imagine any other setting in which children in the UK could be separated from their parents and have such scant attention paid to their welfare.

Availability of legal representation to detainees

12. Very many detainees do not have the means to pay for legal representation. Since the April 2013 legal aid cuts, BID has seen a sharp increase in the numbers of detainees who are unrepresented. BID carries out a six monthly detainee survey. In November 2012, 79% of surveyed detainees told us they had either a legal aid or privately funded legal representative at that time. Only 49% of our November 2013 sample, and 55% of our May 2014 sample reported that they had a legal representative at the time of the survey.¹¹
13. The cost of immigration detention is considerable. Some detainees are not willing to leave the UK because they believe they have a valid case to remain here. Following the legal aid cuts, many detainees cannot access a legal aid representative who could either advise them that their case has no merit, or represent them. Where there are barriers to the Home Office forcibly removing them, many detainees remain in detention, unable to resolve their immigration matter.
14. In non-detained cases, appellants who are desperate to find funds to pay for private legal representation are at risk of exploitation. A lawyer who BID regularly refers cases to has informed BID that she has represented destitute women who are working in prostitution in order to pay legal fees. One father who the same lawyer represented for a deportation appeal worked numerous night shifts in order to pay the legal fees, and struggled to provide adequately for his children financially.

Exceptional Case Funding

15. During the passage of LASPO, Justice Minister Jonathan Djanogly told parliament that Exceptional Case Funding would provide 'an essential safeguard for the protection of an individual's fundamental right to access to justice.'¹² In reality the scheme is inaccessible and unfit for purpose.

¹⁰ See Bail for Immigration Detainees (2013) *Fractured Childhoods: the separation of families by immigration detention*, p90

¹¹ Bail for Immigration Detainees (2014) *Summary findings of survey of levels of legal representation for immigration detainees across the UK detention estate (Surveys 1 - 8)*

¹² Hansard HC Committee, 8 Sept 2011: Column 419

16. There are serious problems with the quality of Legal Aid Agency decision-making on Exceptional Case Funding applications. In *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin), the High Court found that the Legal Aid Agency had made unlawful decisions to refuse exceptional case funding in six test cases. There is an urgent need to improve the quality of decision-making, and increase the level of experience and knowledge required of decision-makers. This would both improve access to justice, and increase the speed and efficiency of the application process.¹³

Case study – refusal of Exceptional Case Funding

Michael came to the UK when he was nine to join his mother, who is a recognised refugee. She is also a survivor of extreme domestic violence, and needs regular care from Michael as she suffers from frequent seizures as a result of injuries to her head.

When Michael was 17, he was convicted of robbing a small amount of money from another boy. He had previously been convicted of robbing a mobile phone. He was sentenced to 18 months in prison, and when he completed his sentence he was detained under Immigration Act powers while the Home Office sought to deport him.

His lawyer had carried out some of the work on his case pro bono. However, the day before Michael's deportation appeal hearing, the Home Office served a bundle on him with 210 pages of further evidence. It was not financially viable for his lawyer to continue to work for free in this situation. She arranged for Michael's hearing to be adjourned, and applied for Exceptional Case Funding, which was refused. She has challenged this refusal by way of judicial review, and the case is ongoing.

The lawyer has 10 lever arch files of documents on this case in her office. The Ministry of Justice are maintaining that this young man, who has one GCSE and no work experience, would be able to successfully:

- analyse items of expert evidence such as police reports and establish their validity;
- obtain relevant reports from the prison and probation service and cross check police evidence against them;
- effectively cross examine two police officers who had been involved in his case, and his own mother, who has been recognised by the court as a vulnerable witness.

While this challenge to refusal of Exceptional Case Funding goes on, Michael remains in detention. He has been held in prison under Immigration Act powers for over 20 months, and is currently in a prison where he and his fellow prisoners are locked in their cells 23 hours per day. His detention has come at considerable personal cost to himself and his mother, and financial cost to the state.

17. BID is gravely concerned by the quality of Exceptional Case Funding decision-making. However, it is perhaps even more troubling to note that there are considerable barriers to detainees applying for funding at all.

¹³ See for example House of Commons Justice Committee (21/10/14) *Oral evidence: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, HC 311, Q177: Carita Thomas (Immigration Law Practitioner's Association): 'My limited experience of making exceptional funding applications is that I found I had to explain a large amount of immigration law in order to try and put my point across... I would respectfully submit that my experience of the exceptional funding decision making team has not been very positive in how they understand immigration law and immigration clients. I would think that they need to have more specialised training in dealing with those or have an immigration team within that department who knows all about this.'

18. The process for applying for Exceptional Case Funding is complex and detailed. If legal representatives make applications for clients, they do so at the risk that they will receive no payment if the application is refused. Given that a very low number of immigration cases have received funding, this financial risk is considerable. It is therefore not financially sustainable for firms to make applications in very many cases.
19. BID advises well over 3,000 individuals each year. On numerous occasions since the introduction of the April 2013 legal aid cuts we have assisted clients who have presented with particular vulnerabilities and/or what appear to be exceptionally complex cases. However, we have only been able to successfully refer two of these many clients to specialist legal aid providers able to assist them to make ECF applications. Both of these applications were refused.
20. In BID's experience, detainees are not equipped to make adequate Exceptional Case Funding applications without assistance. BID is dealing with detainees who do not know what the Exceptional Case Funding scheme is, much less how they could go about applying. To access funding, a detainee would need to demonstrate their case has merit. This means that they would need to understand
 - a) the legal tests which their case would have to pass in order to have merit, which will be determined by complex immigration law and
 - b) how to demonstrate that their case meets these tests.
21. Very few detainees will have the legal knowledge and skill needed to make adequate Exceptional Case Funding applications themselves.
22. In addition, it is often not practical for detainees to seek Exceptional Case Funding because they would have to wait for considerable periods for the outcome of their funding application. Detainees are commonly working against strict timetables, such as deadlines for lodging deportation appeals. They are unable to wait for Exceptional Case Funding, and there is no automatic process for substantive immigration matters to be stayed while the outcome of a funding application is awaited. Detainees therefore often have little choice but to proceed without seeking exceptional funding or obtaining legal representation.

'Mixed cases' concerning asylum *and* private/family life

23. BID has dealt with a number of cases where people with 'mixed' asylum and private and family life claims have not been able to find a legal aid representative to deal with the asylum aspect of their case. This is gravely concerning given the potential consequences of refoulement if asylum seekers are unable to properly present their claim.
24. In theory, legal aid remains available for asylum cases which meet the means and merits test, but not private or family life claims. However, lawyers preparing mixed cases face significant practical and ethical difficulties. It is not financially viable for firms to carry out pro bono work on the private and family life aspects of more than a handful of cases, particularly given that they would need to pay any costs for interpreters and expert reports

for the private and family life case. But lawyers are unable to prepare a case fully without taking into account all the relevant facts. Ignoring an entire human rights element of a case sits uncomfortably with the lawyer's duty to act in their client's best interests. In BID's experience, lawyers are reluctant to take on 'mixed' cases, and this creates a barrier to detainees accessing legal aid for the asylum aspect of their case.

Detainee's ability to represent themselves

25. In BID's experience, most detainees simply don't have the legal knowledge needed to properly represent themselves in deportation appeals or other immigration matters.

Case study: detainee representing himself

In June 2014 BID ran a bail workshop for immigration detainees being held in a prison. One of our legal managers spoke to an EU national whose deportation appeal was to be heard two days later. He faced the prospect of being separated from his partner and children if his appeal was unsuccessful. The detainee had prepared his own case and showed BID's legal manager the papers. It was clear that he had no knowledge of the additional rights which he had access to as an EU national. He did not understand the bundle of evidence which the Home Office had produced against him, and it was clear he would not be able to direct the judge to important documents in the bundle as he was unable to identify them himself. He also did not know what evidence he would need to provide to prove the basic facts of his case, such as how long he had lived in the UK, and that he had a parental relationship with his children. For example, he was not aware that he would need to provide prison records showing that his children had visited him, and had not done so. He had committed a relatively minor offence. In his documents our legal manager saw evidence that he'd been assessed as having a low risk of reoffending by the probation service. However, the detainee didn't understand what these documents meant or how to use them in support of his case.

26. BID has dealt with other cases where parents who are representing themselves have obtained witness statements from family members which are two lines long. The statements include comments to the effect that the appellant is of good character and the witness has known them for years. They do not include details which are required if the statement is to carry any weight, such as who the person giving the witness statement is, the nature of their relationship with the appellant, and the effect which removal or deportation would have on the family or any children. BID has also dealt with separated family cases where witness evidence has been dismissed because witnesses have provided statements but not attended the deportation appeal hearing. However, self-representing appellants do not know in advance that witnesses are expected to attend the hearing.
27. Furthermore, without legal aid appellants are often unable to afford expert evidence which may be essential to the tribunal properly assessing the effect that parental deportation would have on a child. DNA tests typically cost approximately £500, while independent social work or psychiatric reports on children cost circa £1000-2000.

New legislation: increased difficulties for self-representing appellants

28. While the LASPO cuts are being implemented, new legislation and guidance has made the process of appealing one's removal or deportation increasingly complex and difficult to navigate without legal representation.
29. For example, s17(3) of the Immigration Act 2014 allows that 'foreign criminals' and people the Home Secretary deems not conducive to the public good 'can be deported first and appeal after, unless that would cause serious irreversible harm.'¹⁴ BID is gravely concerned that, in practice, most people will be unable to gather and present evidence to support their case from abroad. Section 19 of the Immigration Act seeks to restrict the circumstances in which people can appeal their removal or deportation on the basis of the right to private and family life.
30. New guidance has been published on the implementation of the Immigration Act. Part of this is contained in Chapter 13 of the Immigration Directorate Instructions. This requires, for example, that deportees address the question of whether they formed their relationships with their spouse or partner when their immigration status was 'precarious'. Immigration law is complex, and appellants will often not be able to properly assess whether their status was 'precarious' at a particular point in the past. Appellant's lack of understanding of points such as this will prevent them from properly preparing their own deportation appeal.

Onward appeals

31. Even where detainees are fortunate enough to be able to scrape together funds for legal representation in a First Tier Tribunal appeal, they are unlikely to be able to pay for representation in onward appeals. In BID's experience, where detainees successfully challenge their deportation, it is common for the Home Office to appeal this decision. It is even more difficult for detainees to represent themselves in the Upper Tribunal or Court of Appeal. Appeals in the Upper Tribunal must be based on an error of law. Very many detainees will not fully understand this concept, much less be able to marshal evidence to demonstrate whether or not an error of law has occurred. Earlier this year, BID dealt with a case in which a father was represented in the Court of Appeal for a deportation appeal. He was able to access legal aid funding through a pre-LASPO funding certificate. He reported to BID that he 'understood about 20% of what the judge said' in the court hearing.

Private solicitors

32. BID has dealt with cases where detainees have paid private solicitors to bring deportation appeals for them, where the amount paid has been very significant to the client but relatively low in relation to the work needed; BID has had serious concerns about the quality of work done on a number of these cases, which in some cases has been negligible.

¹⁴ Home Office October 2013 *Immigration Bill Factsheet: appeals (clauses 11-13)* <http://bit.ly/1gOp7y8>

Case study: inadequate work by private solicitors

Mary arrived in the UK 11 years ago with her family. Her partner was physically abusive, and as a result their marriage broke up two years later. Mary's two young sons stayed with her, and they lived in the UK undocumented. Four years after this, Mary's ex-partner sought asylum with his children as dependents, and the children went to live with him.

Mary saw her children regularly, and later paid a solicitor to submit an application for leave to remain on human rights grounds. She believed this was outstanding when she was arrested as an overstayer in late 2013. However, her application had been refused because the solicitor had not paid the filing fee. They never informed her of this. Due to the LASPO cuts, Mary could not access legal aid at the point of her arrest. The same private solicitors informed her that they would lodge a deportation appeal, and an application to the family court, but didn't do this.

Mary was released on bail after being detained for three months, although her immigration matter remained unresolved. During her detention, her 14 year old son struggled to cope, could not sleep, and would send her text messages at two and three in the morning. BID is very concerned that legal aid is unavailable in cases such as this which raise serious child welfare concerns.

Case study: inadequate work by private solicitors

Last year, BID dealt with a case concerning a father who arrived in the UK nearly 20 years earlier. He had three children who were aged 7, 6 and 2 at the time BID carried out a research interview with him. He had been arrested for a false document offence, following which the Home Office was seeking to deport him.

For his deportation appeal, this father needed to provide evidence of residence in the UK over a 19 year period. This included evidence from his previous employer. His solicitor wasn't prepared to travel to this employer's offices to gather the evidence, and the father was prevented from doing this as he was in detention. The evidence was therefore not included in his deportation appeal papers. He was awaiting the outcome of his case at the time we interviewed him.

Recommendations:

- Immigration matters should be brought back into scope for legal aid funding.
- Legal representatives should be paid to make Exceptional Case Funding applications.
- The application process for Exceptional Case Funding should be simplified, so that no means test is required until a decision on merit has been made.
- A process should be introduced for immigration matters to be stayed pending a decision on Exceptional Case Funding.
- The Legal Aid Agency should increase the level of skill and experience required of staff making decisions on Exceptional Case Funding applications.

Contact: Sarah Campbell, Research & Policy Manager: sarahc@biduk.org, 0207 456 9762