

Bail for Immigration Detainee's submission to the APPG on Refugees and APPG on Migration's parliamentary inquiry into the use of immigration detention in the UK

September 2014

Bail for Immigration Detainees is a charity that provides legal advice and representation to asylum seekers and migrants held in immigration detention to secure their release.

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

Introduction

1. This submission sets out BID's concerns about the separation of families by immigration detention, and (from paragraph 16) the detention of children. In addition, we note that key elements of the family returns process such as the time limit on detention should be extended beyond family cases.

Separation of families

What are the impacts of immigration detention on individuals, families and social networks, and wider communities?

2. BID's 2013 report *'Fractured Childhoods: the separation of families by immigration detention'* examined the cases of 111 parents who were separated from 200 children by immigration detention:
 - 85 of these children were in foster or local authority care during their parent's detention.
 - Some children moved between unstable care arrangements, experienced neglect and were placed at risk of serious harm.
 - Parents were detained for an average of 270 days.
 - Children described the extreme distress they experienced – they reported losing weight, having nightmares, suffering from insomnia, crying frequently and becoming deeply unhappy.
 - In 92 out of 111 cases, parents were eventually released, their detention having served no purpose.
 - In 15 cases, parents were deported or removed from the UK without their children.

3. BID carried out a smaller scale monitoring exercise in 2013/14, with a sample of 47 parents with 101 children.¹ Parents were detained for an average of 286 days.² In 33 out of 47 cases, parents were eventually released on bail or temporary admission.

Case study³

Natalie is a single mother with two children. They were aged 8 and 14 when the Home Office detained her, and made a decision to deport her and leave her children in foster care in the UK. Natalie's teenage daughter later disclosed that she was being abused by her foster carer.

Natalie originally came to the UK as a child herself; when she arrived she was pregnant with her first child as a result of being raped. She lived here undocumented for six years before applying for leave to remain. She then waited for 7 years for the Home Office to decide her immigration case. During this period, she did not have the right to work, or recourse to public funds. She was then prosecuted for and pleaded guilty to a drug-related offence. She said that she committed this offence because she needed money to pay for her son's school meals. Probation assessed her risk of reoffending as low.

After completing her prison sentence, Natalie was detained for 576 days. A three month Home Office review of her detention found that: *'taking into account all known and available information there are no compassionate circumstances to mitigate detention.'*

During Natalie's detention her eight year old son, Oliver, who has special needs, moved back and forth between informal private foster arrangements, and had surgery for physical health problems. A charity support worker reported that: *'[Oliver] told me he thought his mum would be coming out of detention very soon. When he visited her...he felt very sad when he had to go.'*

Natalie was eventually released on bail and reunited with her children. Her deportation appeal succeeded and she was granted leave to remain in the UK. Her detention served no purpose.

What are the wider consequences of the current immigration detention system, including any financial and/or social implications?

4. There have been no longitudinal studies on outcomes for children of detained parents. However, the problems experienced by children who are separated from parents in other contexts are evidenced by numerous psychological studies.⁴ It appears likely that in the

¹ For full details of this research, including methodology, see: Bail for Immigration Detainees (April 2014) *BID response to Justice Select Committee Inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012*

² This figure refers to the 46 cases where we were able to obtain length of detention data.

³ This case study is taken from Bail for Immigration Detainees (April 2013) *Fractured Childhoods: the separation of families by immigration detention*

⁴ See for example Bowlby, J. 1973 *Attachment and Loss: Vol. 2, Separation: Anxiety and Anger*; Bartholomew, K. & Horowitz, L.M 1991 'Attachment styles among young adults: a test of a four-category model' *Journal of Personality and Social Psychology* 61(2) pp226-44; Dallos, R. & Shaw, S. 2006 'Attachment and adolescent depression: impacts of early attachment experiences' *Attachment & Human Development* 7:4 pp409-424. 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. Studies have shown that looked-after children and young people are several times more likely to have a statement of special educational needs, to be excluded from school, and to leave school with no qualifications – see McAuley, C. Pecora, P. and Rose, W. (Eds) 2006 *Enhancing the*

long-term, the state will incur costs addressing the issues faced by children whose parents have been detained. Many of the separated family cases BID deals with involve children who are settled in the UK, and will never be removed or deported.⁵

Are the current arrangements for authorising detention appropriate? How effective are the current UK alternatives to detention (e.g. bail, reporting requirements)?

5. There are serious problems with the quality of Home Office decision-making on authorising detention. Home Office figures state that in the second quarter of 2014, the cost of detaining people who left immigration detention and were subsequently granted Leave to Enter or Leave to Remain in the UK was £207,467.40.⁶
6. On two occasions, the High Court has found that BID's separated family clients were unlawfully detained.⁷ Despite the unlawful practices highlighted by the Administrative Court in those cases, many of the flaws which were revealed continued to be features of the cases BID deals with. BID is aware of a number of separated family cases where legal proceedings were commenced but where the Home Office has paid tens of thousands of pounds in compensation prior to the case reaching trial. In one case which settled last year, a mother and her child were awarded £68,500 following a referral by BID to a solicitor who made a civil claim.
7. BID's *Fractured Childhoods* research found that scant attention appeared to have been paid to children's welfare when their parents were detained. It is difficult to imagine any other setting in which children in the UK could be separated from their parent without proper enquiry as to the impact of that decision or the proportionality of it. We explored how a child's welfare was considered in the Home office's Monthly Progress Reports, bail summaries and (where available) detention reviews for a qualitative of sample of 12 families. In the majority of cases there was no recorded consideration of child welfare in any of these documents. In some cases, child welfare was reviewed on the basis of inaccurate information or flawed reasoning, and in all 12 cases these Home Office documents failed to mention significant information about child welfare which was included in the parent's BID file. The Home Office did not contact any of the 53 children in the small quantitative sample of 27 families to ascertain their wishes and feelings before or during their parent's detention.
8. Our report found serious problems with failures by the Home Office to properly consider alternatives to detention. The Home Office repeatedly argued that it was likely that parents would abscond if they were released from detention. However, post-detention research with a sample of 15 parents showed that all these parents subsequently complied with the terms of their release and maintained contact with the Home Office. The parents who participated in this research explained that they would not consider absconding because of concern for their children's welfare, their desire to regularise their

Wellbeing of Children and Families through Effective Intervention: International Evidence for Practice and Warren, D. 1999 'Setting new national standards for foster care' *Adoption and Fostering* 23(2) pp48-56

⁵ 91 of the 101 children in BID's 2013/14 monitoring exercise were born in the UK, and 64 of these 91 children were British Citizens. See: Bail for Immigration Detainees (April 2014) *BID response to Justice Select Committee Inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012*

⁶ Home Office (28 August 2014) *Immigration Enforcement data: August 2014*

<https://www.gov.uk/government/publications/immigration-enforcement-data-august-2014>. We note that this is likely to be an underestimate. For example, these figures put the cost of holding an individual in immigration detention for one day at £98.70. However, the Independent Chief Inspector of Borders and Immigration states that average cost of detention in 2011/12 was £164 per person per night. See: Independent Chief Inspector of Borders and Immigration (March 2014) *An Inspection of the Emergency Travel Document Process May-September 2013*, p4 footnote 4. There will also be social costs such as the impact on these individuals' integration into the UK.

⁷ *MXL, R (on the application of) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin) and *NXT, R (on the application of) & Ors v Secretary of State for the Home Department* [2011] EWHC 969 (Admin)

status in the UK, and their need to access support, healthcare and education for their children.

Criminal risk and decisions to detain

9. In most, but not all, of the separated family cases BID deals with parents have served criminal sentences before being held in immigration detention. Foreign national ex-offenders are often depicted by politicians and journalists as a group of people who have committed extremely serious offences and cynically use spurious family ties to prevent their deportation.⁸ However, BID's *Fractured Childhoods* research showed that single parents can be separated from their children after committing relatively minor offences such as possession of false documents. 12 of the 15 parents in this study who were removed or deported without their children had been convicted of non-violent offences, and a further parent was not convicted of any offence. BID's 2013/14 monitoring exercise found that in two out of 47 cases, parents had no criminal convictions, and 38 parents were convicted of non-violent offences including theft and false documents.⁹
10. BID's *Fractured Childhoods* report also revealed serious problems with Home Office assessments of the risk that parents would re-offend. Detailed data were gathered for a sample of 27 parents. In 14 out of 27 cases, it was possible to obtain information about how the National Offender Management Service had assessed parents' risk of reoffending or risk of harm to the public on release. In 10 cases, parents were assessed as posing a low risk, and four parents were assessed as posing a medium risk. However, the Home Office repeatedly argued that these parents needed to be detained as they posed a 'significant' and 'unacceptable' risk.

Immigration Act 2014

11. s2, 3, 5 and 6 of the Immigration Act concern the family returns process. When these sections were introduced, the Home Secretary explained that their purpose was to '*reinforce the commitment to end the detention of children.*'¹⁰ However, the Act allows for families to be separated as an alternative to detaining children. For example, s2 and s3 define family returns cases, and limit the definition of a '*relevant parent or carer*' to somebody who is '*living in a household in the United Kingdom with a child.*'¹¹ Parents may not be living in a household with their child because the Home Office has detained the parent. Such cases should not be excluded from the protections afforded by the family returns process.

There is currently no time limit on immigration detention – in your view what are the impacts (if any) of this?

12. BID's *Fractured Childhoods* research found that parents were detained for an average of 270 days, and in some cases much longer. The majority were eventually released, their detention having served no purpose. If there had been a time limit on these people's detention, a great deal of unnecessary suffering would have been avoided.

⁸ See for example: Theresa May, 4th October 2011, Speech to Conservative Party Conference <http://bit.ly/qWR3dZ>; Daily Mail 2nd January 2013 '4,000 foreign criminals including murderers and rapists we can't throw out. . . and, yes, you can blame human rights again' <http://bit.ly/1185GtR>

⁹ Bail for Immigration Detainees (April 2014) *BID response to Justice Select Committee Inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012*

¹⁰ Home Office (February 2014) 'Immigration Bill Factsheet: Ending the detention of children for immigration purposes'

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284479/factsheet_ending_child_detention.pdf

¹¹ See Immigration Act 2014 s2 New 78A(1)(b); s3 New 54A (3)

What are your views on the current conditions within UK immigration detention centres, including detainees' access to advice and services? Please highlight any areas where you think that improvements could be made.

13. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed the vast majority of immigration cases from scope for legal aid. As a result, large numbers of detainees are no longer able to meaningfully challenge decisions by the Home Office to deport or remove them from the UK, even where these decisions are unlawful. 11 of the 47 parents in BID's 2013/14 monitoring exercise were removed or deported without their children after these legal aid cuts came into force. In one case, a parent who was illiterate represented himself in a deportation appeal the Upper Tribunal. His case was refused but he has not yet been deported. Following these cuts, the 'Exceptional Case Funding' scheme was established to provide a safety net. However, in practice it has not provided a meaningful or accessible safeguard for detainees.¹²
14. Legal aid continues to be available for bail applications. However, the Home Office's decision to detain somebody will normally follow from a decision about their substantive immigration matter. Therefore, the absence of legal aid for most immigration matters prevents detainees from resolving the issue underlying their detention and challenging their incarceration.
15. Judicial review is a crucial safeguard against unlawful detention. However, detainees' access to judicial review has been restricted by the new fee arrangements which were introduced in April 2014.¹³ The Government's Criminal Justice and Courts Bill also seeks to further reduce access to judicial review. The Government also proposes to introduce a residence test, which would prevent detainees from accessing legal aid to bring civil claims seeking compensation for unlawful detention after release, or challenge abuse suffered in detention.¹⁴

Detention of children

16. In May 2010, the Government committed to ending the immigration detention of children. BID welcomed this change; there is considerable evidence that detention can seriously harm children.¹⁵ There have been significant improvements in Government policy on child

¹² 235 exceptional case funding applications were made in immigration cases in 2013/14; only four were granted funding - Ministry of Justice 24/4/2014 'Ad hoc Statistical Release: Legal Aid Exceptional Case Funding Application and Determination Statistics 1 April 2013 to 31 March 2014.' On 13th June 2014, the High Court found that the Legal Aid Agency had made unlawful decisions to refuse exceptional case funding in six test cases - see *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin). Exceptional Case Funding applications are made at the risk of non-payment. Very few solicitors are willing to apply, as it is not financially viable for firms to keep carrying out this work, given the considerable risk of non-payment. BID assists over 3,000 detainees per year. As of April 2014, we had only successfully referred two cases to solicitors to make exceptional funding applications. In BID's experience, detainees lack the legal knowledge to make their own applications.

¹³ The Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 came into force on 22 April 2014. Lawyers working under legal aid are now required to carry out all legal work on the early stages of judicial review at risk. This reduces the financial viability of such work.

¹⁴ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014. The residence test would limit access to many types of legal aid to those who are: a) lawfully resident on the day of the application and b) have previously lawfully resided in the UK for one year. The residence test has been found to be unlawful, but the Ministry of Justice are appealing this decision – see *R (On the Application Of The Public Law Project) v The Secretary of State for Justice the Office of the Children's Commissioner* [2014] EWHC 2365 (Admin).

¹⁵ See for example Lorek, A. Entholt, K. et al. (2009) "The mental and physical health difficulties of children held within a British immigration detention center: A Pilot Study" *Child Abuse and Neglect* Vol. 33 Issue 9, pp573-585; Children's Commissioner for England (2010) *Follow up report to: The arrest and detention of children who are subject to immigration control*

detention since 2010; far fewer children are detained for much shorter periods. However, the Government is yet to meet its commitment to end child detention.

Are the current arrangements for authorising detention appropriate?

17. 228 children entered detention during 2013. 144 of these children were subsequently released, raising serious questions about why they were detained in the first place.¹⁶ Systemic problems can lead to enforcement action being taken against families inappropriately. Two reports published by the UN High Commission on Refugees in 2013 raised serious concerns about Home Office decision-making in family asylum cases.¹⁷ Furthermore, barriers to accessing legal advice mean that families may not have had the opportunity to properly present their immigration or asylum case before being detained.¹⁸

How effective are the current UK alternatives to detention (e.g. bail, reporting requirements)?

18. The Home Office designed the family returns process following their review into ending the detention of children for immigration purposes. A time limit of 72 hours has been set on child detention. This can be extended to one week in exceptional circumstances.¹⁹ Since the introduction of the family returns process there has been a dramatic reduction in the numbers of children detained and the length of time they are detained for. There has been an increase in, for example, the numbers of families who 'self check in' on flights to leave the UK.²⁰ The Home Office commissioned evaluation of the family returns process found that exactly the same proportion of families (5%) absconded in the new family returns process, as in the previous process, where large numbers of families were detained, in some cases for very long periods.²¹ It therefore appears that the reduction in detention of children has not increased the risk of families absconding. BID cannot see any reason why key elements of the family returns process cannot be extended beyond family cases. For example, the time limit on detention, and the provision for consideration of voluntary return before enforcement action.

19. In addition, BID has a number of recommendations regarding the current family returns process. First, the process allows families who may have been in the UK for years a minimum of just two weeks to consider voluntary return before enforcement action is commenced. In BID's view this is inadequate, particularly given that children may have strong ties to the UK including having attended school here for years. In addition, it may take longer than two weeks for families to get an appointment with a legal advisor.

20. Secondly, the Home Office commissioned evaluation of the Family Returns Process notes that in some cases parents became distressed during Family Return Conferences and that there were incidents of '*actual or threatened self-harm*' in the course of the return process.²² The evaluation also found that in some cases children found encounters with Immigration Officers '*distressing*' and that '*older children felt that they had not been listened to.*'²³ At p36 the evaluation found that one of the key reasons given for detaining

¹⁶ Home Office *Immigration Statistics April to June 2014*

<https://www.gov.uk/government/statistics/immigration-statistics-april-to-june-2014-data-tables>

¹⁷ UNHCR (June 2013) *Untold stories: families in the asylum process*; UNHCR (December 2013) *Considering the Best Interests of a Child Within a Family Seeking Asylum*

¹⁸ The vast majority of immigration cases, including those of children, have been removed from the scope of legal aid funding by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. There are also numerous barriers to asylum seeking families accessing competent legal advice, which have been exacerbated by the repeated cuts which have been made to legal aid funding in recent years – see for example Trude, A. and Gibbs, J. (2010) *Review of quality issues in legal advice: measuring and costing quality in asylum work*; Refugee Action (2008) *Long term impact of the 2004 Asylum Legal Aid Reforms on access to legal aid*

¹⁹ UK Border Agency (December 2010) *Review into ending the detention of children for immigration purposes*

²⁰ Home Office (2013) *Evaluation of the new family returns process*

²¹ Home Office (2013) *Evaluation of the new family returns process*, p24

²² Home Office (2013) *Evaluation of the new family returns process*

²³ Home Office (December 2013) *Evaluation of the new family returns process*, p31

families was *'for Barnardos [a third sector organisation] to provide preparatory support for children before the return.'* In BID's view, support should be provided to non-detained families in the returns process – it is perverse that families should be detained simply in order to access support.

Recommendations

- Families should not be separated by immigration detention.
- While the practice continues, a time limit should be introduced on the separation of families by immigration detention.
- The UK Government should fulfil their commitment to end child detention.
- The Home Office should publish statistics on the numbers of children who are separated from their parents by immigration detention, removal and deportation.
- Before decisions are made to detain, remove or deport parents, an assessment of the child's best interests should be carried out by a child welfare specialist who is independent of the Home Office.
- In separated family cases, decisions to detain parents should be reviewed on a weekly basis.
- Guidance should be produced on s2 and s3 of the Immigration Act, to ensure that children's welfare is safeguarded.
- Immigration matters should be brought back into scope for legal aid funding.
- While immigration matters remain out of scope, the 'Exceptional Case Funding' scheme should be revised so that it provides a meaningful safety net.
- The April 2014 changes to fee arrangements for judicial reviews introduced by the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 should be repealed. While the arrangements are in place, the UK Government should carry out a review of the provision to make discretionary payments to assess whether this is operating effectively.
- Statistics should be published on the numbers of children detained at port.
- Families in the family returns process should be given a longer period to consider returning voluntarily to their country of origin.
- Adequate welfare support should be provided to non-detained families in the return process, so that families are not detained in order to access support.