

Submission from Bail for Immigration Detainees (BiD) to the International Covenant on Civil and Political Rights periodic review of the UK: January 2020

BiD is an independent national charity established in 1999 to challenge immigration detention. We assist those held under immigration powers in removal centres and prisons to secure their release from detention through the provision of free legal advice, information and representation. We are accredited by the Office of the Immigration Services Commissioner (OISC). Between 1 August 2018 and 31 July 2019, BiD provided advice to 4,161 people. Alongside our legal casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice.

This submission is divided into five sections. The first four sections were written by BiD and are as follows: legal and policy framework, access to justice, family separation, and the use of prisons for immigration detention. The fifth section concerns the failure to protect vulnerable adults in immigration detention and has been produced by Medical Justice. Medical Justice is the only organisation in the UK that sends independent volunteer doctors into immigration removal centres (IRCs) to document detainees' scars of torture and challenge instances of medical mistreatment.

BiD campaigns for an end to immigration detention. However we believe that while it exists there are a number of reforms that should be implemented urgently. In particular there should be judicial oversight of the decision to detain and a strict maximum time limit. The government should also restore legal aid for immigration cases as a matter of urgency.

In the ICCPR's last periodic report on the UK the committee raised a concern that *"no fixed time limit on the duration of detention in immigration removal centres has been established and that individuals may be detained for prolonged periods"*. The Committee recommended that a statutory time limit on the duration of immigration detention should be established and that the government should *"ensure that detention is a measure of last resort and is justified as reasonable, necessary and proportionate in the light of relevant circumstances"*.

Section 1: legal and policy framework: The lack of safeguards and the insufficiently robust legal and policy framework governing immigration detention means that people are frequently unlawfully detained, or held for excessive periods.

Asylum seekers and migrants in the UK can be detained by immigration officers exercising powers conferred on the Secretary of State under a number of different Immigration Acts¹. These powers have been enshrined in policy and practice via non-statutory documents such as the Home Office's Chapter 55 Enforcement Instructions and Guidance (EIG)². The Immigration Act 1971 provides the majority of the statutory powers of detention for those subject to immigration control³, although these provisions have been amended and added to by subsequent legislation.

¹ The Immigration Act 1971; the Immigration and Asylum Act 1999; Nationality, Immigration and Asylum Act 2002; UK Borders Act 2007; Citizenship Immigration and Borders Act 2009.

² Available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804785/Chapter-55-detention-v26.0ext.pdf

³ Burnham, E., (2003), "Challenging Immigration Detention: a best practice guide". Immigration Law Practitioners' Association/Bail for Immigration Detainees, London.

Immigration detention can only be used to assess someone's claim to be in the UK, or to effect an imminent removal. Case law, including the "Hardial Singh" principles⁴ makes this abundantly clear. However there are very few safeguards against unjust or arbitrary deprivation of liberty such as those which exist in a criminal context. The decision to detain is made by an individual Immigration officer and is not automatically subject to independent review at any stage. When the Home Office decides to detain someone, it must provide them with an 'IS.91' form which purports to explain the reasons for detention. However such forms are in practice a box-ticking exercise as individuals are not given reasons in writing as to why they are being detained and there is no requirement for the Home Office to provide evidence for the assertions it makes on these forms because there is no external scrutiny.

There is no maximum period of detention. The Home Office is obliged to provide detainees with monthly reviews on their detention. But in practice it is little more than a rubber-stamping exercise, and certainly detention is not demonstrated to be used as a last resort, as set out in Chapter 55 of the Home Office's Enforcement Instructions and Guidance. In BID's experience, in an alarmingly large numbers of cases the Home Office has used administrative detention for prolonged periods of time. For example, in the case of Amin Sino⁵ it was found that the applicant was unlawfully detained from the outset and for the entire period of over 5 years in immigration detention.

Existing safeguards are inadequate. The principles set out in common law do not constitute an adequate safeguard because as judges [see **Fardous v Secretary of SSHD [2014] EWHC 3061 (QB) (05/09/14)**] have noted, it is very difficult to predict (even for the judiciary and lawyers) what period of detention will be considered lawful. Moreover, in the absence of automatic judicial oversight, a challenge to an unlawful Home Office decision to detain must be initiated by the person held in immigration detention, and often after an unlawful decision and detention has already occurred. Detainees need therefore to understand complex immigration and public law principles and common law sufficiently to apply for permission to judicially review the decision to detain them, or they must find a lawyer willing and sufficiently competent to represent them in a judicial review (or more rarely, habeas corpus) challenge before the courts. Access to quality immigration advice within detention is very limited⁶.

The Home Office recently introduced automatic bail hearings for detainees every four months, and introduced a pilot system of two-monthly hearings in January 2019. However, foreign national offenders are excluded from the process. The bail process also has as its starting point the assumption that detention is lawful and it does not allow for an assessment of the lawfulness of continued detention. Evidence suggests the automatic bail process is highly problematic, as

⁴ See *R v. Governor of Durham Prison, Ex parte Singh*, [1984] 1 All ER 983, [1984] 1 WLR 704, [1983] Imm AR 198, United Kingdom: High Court (England and Wales), 13 December 1983. Available at <http://www.bailii.org/ew/cases/EWHC/QB/1983/1.html/>. The Hardial Singh Principles were restated by the Court of Appeal in two important cases: *R (I) v SSHD* [2003] INLR 196 and adopted by the Supreme Court in *Lumba v SSHD* [2011] UKSC 12. In *I Dyson LJ* stated that there were four such principles:

- (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
- (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
- (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
- (iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.

⁵ See *R (Amin Sino) v Home Secretary* [2011] EWHC 2249 (Admin) (25th August 2011)

⁶ For more information see BID's Legal Advice Surveys <https://www.biduk.org/pages/106-bid-legal-advice-surveys>

detainees are often not prepared and lack legal advice. Data obtained by BID through FOI requests⁷ revealed that of 561 cases referred for an automatic bail hearing in 2018, only 18 were granted bail (3%). In the first 6 months of 2019 just over 1% of automatic bail referrals were granted bail⁸. Overall, bail is granted in 33% of cases which would seem to indicate that this safeguard is not functioning effectively. There is also no justification for excluding former foreign national offenders from this process when they are often detained for longer periods and face greater barriers when seeking to access justice.

The consequence of all of this is that detention is used far too casually - we rarely see evidence that the Home Office has considered alternatives to detention in individual cases and the necessity of detention is seldom demonstrated.

This is further evidenced by the fact that the Home Office is frequently found to have broken the law in its use of immigration detention. The Home Office was forced to pay out £21 million to 850 people detained unlawfully from 2012-2017⁹ and last year this figure was £8.2 million, paid to 312 people who had been unlawfully detained¹⁰. This figure is increasing but we rarely see evidence that the Home Office learns lessons from the countless occasions on which it has broken the law. Furthermore, these cases may be the tip of the iceberg because there will be many individuals who are not able to access the high quality legal advice required to bring an unlawful detention judicial review.

A recent case in the UK supreme court (**R (HEMMATI & ORS) V SECRETARY OF STATE FOR THE HOME DEPARTMENT [2019] UKSC 56**) recently found that the Home Office policy for detention of asylum seekers pending transfer to another EU state under the "Dublin III" regulations¹¹ was unlawful. The court found that the Home Office's detention policy – Chapter 55 EIG – didn't meet the threshold for lawful detention under Dublin regulations, because the policy provides 'no more than general guidance' and does not provide a clear and objective criteria as to how to assess the risk of absconding. The Supreme Court found that the policy lacks the sufficient certainty and predictability to constitute "law" for the purposes of Dublin III¹².

Although the case referred to a specific cohort of immigration detainees – asylum seekers detained pending transfer to another EU state – it calls into question the entirety of the UK's immigration detention policy. It is highly concerning that the UK's detention policy has been found by the highest court in the country to lack objective criteria for assessment of risk of absconding. Risk of absconding is crucial to every decision to detain and it would appear to be a minimum requirement of any detention system that there are clear and objective criteria for assessment of risk of absconding, and

⁷ FOI request submitted 14th November 2018, response received 7th January 2019, reference number 56473

⁸ The FOI data showed that of 162 referrals for automatic bail hearings in the first 6 months of 2019, only 2 were granted bail.

⁹ *The Guardian* <https://www.theguardian.com/uk-news/2018/jun/28/wrongful-detention-cost-21m-as-immigration-staff-chased-bonuses>

¹⁰ Home Office annual report and accounts 2018-19

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807126/6.5571_HO_Annual_Report_2019_20_WEB.PDF page 105

¹¹ Asylum seekers processed under Dublin III can be detained whilst the UK 'requests the transfer' (hands over responsibility) of someone's asylum claim to the EU country where they had first claimed asylum.

¹² 'Potentially thousands unlawfully detained' *Hodge Jones & Allen* <https://www.hja.net/r-hemmati-ors-v-secretary-of-state-for-the-home-department-2019-uksc-56-potentially-thousands-unlawfully-detained/>

that decisions about risk of absconding are made on the basis of *“the existence of reasons in an individual case, which are based on objective criteria defined by law”*¹³.

The Supreme Court also found the policy to lack the sufficient certainty and predictability to be considered a law, supporting the view that the current legal and policy framework and lack of safeguards mean that the use of detention is often arbitrary.

Indeed detention is frequently used in a way that is inconsistent with its statutory purpose or the limitations set out in common law. In the majority of instances detention is not used to effect removal. In the year ending September 2019, 24,757 people left the detention estate, of whom only 39% were removed at the end of their period of detention¹⁴. In his 2018 review of vulnerable adults in detention commissioned by Theresa May as Home Secretary in 2015, former Prisons and Probation Ombudsman Stephen Shaw said that the Home Office’s figures on the proportion of detainees removed at the end of their period of detention

*“continue to call into question the extent to which the current use of detention is cost effective or necessary”*¹⁵.

At a separate section of the report, Shaw stated:

*“It is apparent that more than half of those subject to immigration detention are eventually released back into the community. I remain of the view that, very frequently, detention is not fulfilling its stated aims.”*¹⁶

These comments were made by Shaw when 45% of people were removed at the end of their period of detention. The figure is even lower now at 39%.

A recent FOI request¹⁷ made by us showed that 3,598 people were detained while reporting to the Home Office¹⁸. Put another way, these individuals were detained whilst in the very act of complying with their immigration bail conditions. It is unclear how the Home Office demonstrates in such cases that detention is necessary as a last resort and immigration bail cannot continue to be used as an alternative when the individual is compliant. (Furthermore the practice of detaining people in the very act of compliance perversely creates an incentive to abscond, because even with assiduous compliance with bail conditions there is a very significant threat of detention without warning.)

A further FOI request revealed that only 600 of these individuals (17%) were removed from the UK¹⁹ at the end of their period of detention. That means that 83% of people detained upon reporting in 2018 were simply released again at the end of their period of detention. Such cases illustrate that the Home Office frequently uses detention when it is not in a position to effect removal and it does

¹³ 2(n) Dublin III

¹⁴ Home Office data: <https://www.gov.uk/government/publications/immigration-statistics-year-ending-september-2019/how-many-people-are-detained-or-turned>

¹⁵ Stephen Shaw, “Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons A follow-up report to the Home Office”, July 2018. Pg 27

¹⁶ Ibid. pg 22

¹⁷ FOI request made 27th June 2019, response received 26th July 2019, reference number 54321

¹⁸ Individuals on immigration bail are required to satisfy a number of conditions of bail, which invariably includes a requirement to report to the Home Office at regular intervals.

¹⁹ Request made 22nd August 2019, response received 16th October 2019, reference number 55175

so even when the individual is fully compliant and remaining in contact with the Home Office as required by their bail conditions.

We submit that the UK's immigration detention system does not have a sufficiently robust legal and policy framework to prevent wrongful detention. There are none of the safeguards that there should be to prevent wrongful deprivation of liberty such as those which exist in the criminal justice system, including strict custody time limits, independent judicial oversight and automatic legal advice and representation.

Section 2: Access to Justice: Deficiencies in access to quality legal advice and representation mean that people in detention have difficulty accessing their legal rights including the right to challenge their detention or removal from the UK.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") removed non-asylum immigration cases from within the scope of legal aid funding. The LASPO cuts have had a direct impact on immigration detainees and the consequences of these cuts alongside the implementation of the government's hostile environment policy have been devastating.

Many detainees do not have legal representatives. In November 2010, BID began to conduct surveys every six months regarding immigration detainees' access to legal representation from within detention. In November 2012, prior to the implementation of the legal aid cuts, 79% of surveyed detainees reported that they had a legal representative at the time of survey, 75% of which were funded by legal aid. Since the cuts were implemented in 2013 there has only been one year where the number of people with a legal representative was above 60% and in a number of years this figure has been below 50%. The importance of legal representation for our clients cannot be understated.

The legal aid cuts have particularly affected families, as the removal of legal aid for private and family life claims has worked to strip many parents of the ability to challenge their deportation. Many parents are detained pending deportation. There is no other setting in which children in the UK could be separated from their parents with such little attention paid to the child's welfare.

BID works with many families where the Home Office is seeking to remove or deport parents from the UK without their children. BID's Separated Families' project provides representation to parents held in immigration detention to enable them to apply for bail. BID therefore has a special insight into the challenges that many families face in accessing legal representation to challenge their deportation or removal.

In addition to our Separated Families project, BID has an Article 8 Deportation Advice Project (ADAP) which was established in 2014 in response to the LASPO cuts. The ADAP project represents people with family and private life claims in the UK who cannot access legal aid and whom the Home Office seek to deport to challenge their deportation.

It is almost impossible to succeed in a deportation appeal without legal aid representation. Those paying privately are forced to scrape together funds from friends and family to pay for private legal representation. These fee-paying clients often have insufficient means to pay for enough immigration advice to progress or conclude their case, especially if the case progresses through the

higher courts. It is well documented that the Home Office places a high evidentiary burden upon those subject to the Immigration Rules, and in order to succeed in a deportation appeal applicants will need to prove the strength of their family life in the UK through expert reports, from an independent social worker or a psychiatrist. Such reports are essential to success in deportation cases but often cost over £1,500 and would thus usually be unaffordable to those paying privately.

It is also fanciful to suppose that an individual could bring a judicial review to challenge the lawfulness of their detention without access to legal representation. This would require an understanding of primary and secondary legislation, as well as rafts of Home Office policies and guidance. The legislative provisions have been repeatedly amended and expanded²⁰ and the Immigration Rules have more than doubled in length since they were drafted, now running at over 1000 pages.²¹ Claimants would also need an understanding of relevant case law which has proliferated considerably in recent years.

Immigration bail is a much simpler process that has been designed to be accessible to unrepresented appellants. However BID recently received a response to an FOI request²² from HMCTS which showed that outcomes are much worse for unrepresented applicants in bail hearings. The results, in the table below, show that the percentage of bail hearings that are granted is almost double for represented applicants vis-à-vis those without representation, who are almost twice as likely to be refused bail.

Outcomes for bail applications²³

		Withdrawn	Granted	Refused
2017	Unrepresented	38%	18%	40%
	Represented	41%	35%	23%
2018	Unrepresented	33%	23%	38%
	Represented	37%	37%	24%
2019 (to date)	Unrepresented	34%	21%	43%
	Represented	40%	36%	22%

BID believes there has been a considerable decline in the quality of legal advice provided in immigration detention since changes to the contractual arrangements governing provision of legal advice in immigration detention implemented in September 2018.

²⁰ Immigration legal provisions and can be found in statutes from 1971, 1988, 1999, 2002, 2004, 2006, 2007, 2008, 2009, 2014 and 2016. Refer to Colin Yeo, “How complex is UK immigration law and is this a problem?”, *Free Movement*, 24 January 2018, retrieved from <https://www.freemovement.org.uk/how-complex-are-the-uk-immigration-rules-and-is-this-a-problem/>

²¹ Martha Bozic, Caelainn Barrm, Niamh McIntyre and Poppy Noor, “Revealed: immigration rules in UK more than double in length”, *The Guardian*, 27 August 2018, retrieved from <https://www.theguardian.com/uk-news/2018/aug/27/revealed-immigration-rules-have-more-than-doubled-in-length-since-2010>

²² request was submitted 14th November, response received 28th November 2019

²³ The figures do not add up to 100% as there are other possible outcomes in the FOI not included in this table – including ‘bail dismissed without hearing’; ‘completed’ and ‘continued’. These categories have not been included here because they only apply to a very small minority of applicants.

Legal advice in immigration detention is provided under the Detention Duty Advice Scheme (DDAS). Under the DDAS detainees can book a half-hour appointment with a legal aid 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. In September 2018 the Legal Aid Agency made changes to the DDAS contract and dramatically increased the number of providers. Prior to September 2018 there were eight or nine firms delivering the DDA in seven IRCs²⁴; 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.

In the 9 years that we have been carrying out the legal advice survey we have consistently found:

- Many detainees are unrepresented
- Detainees frequently have to wait over a week for their appointment with the solicitor
- The quality of advice given at DDAS appointments is highly variable
- Detainees' cases are often not taken on for representation after an appointment with the solicitor

In more recent surveys, since contractual changes brought about by the Legal Aid Agency, we have found a decline in the quality of legal advice provided at appointments, including detainees frequently describing that the appointment was considerably shorter than the designated 30 minutes, that no substantial advice was given, or that the solicitor was only looking to take on cases if they could be paid privately.

It is BiD's view that changes to the DDAS have led to a significant reduction in the quality of legal advice in immigration detention, which in turn has affected our clients' ability to access their right to liberty and to challenge immigration decisions. Concerns about the DDAS have been expressed by key stakeholders including the Chair of the Independent Monitoring Board²⁵, the Parliamentary Joint Committee on Human Rights²⁶, Her Majesty's Inspector of Prisons²⁷, and Dr Jo Wilding²⁸.

In addition there is a serious lacuna in relation to the provision of legal advice for those held in prisons under immigration powers. There are around 400 people held under immigration powers in prisons across the UK. Not only are they unable to access mobile phones or the internet, but there is also no advice scheme for people who require specialist immigration advice. We are concerned that many such individuals may be removed without having had the chance to argue their case to remain in the UK.

²⁴ There are now 6 IRCs since the closure of Campsfield IRC in 2019

²⁵ Joint Committee on Human Rights, Examination of Witnesses: Dame Anne Owers, Jane Leech and Hindpal Singh Bhui <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/immigration-detention/oral/92251.html>

²⁶ 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>

²⁷ Report on an unannounced inspection of Colnbrook Immigration Removal Centre by HM Chief Inspector of Prisons <https://www.justiceinspectorates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2019/04/Colnbrook-web-2018.pdf>

²⁸ *Droughts and Deserts: A report on the immigration legal aid market*, Dr Jo Wilding. <http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>

Hindpal Singh Bhui, inspection team leader at Her Majesty's Inspectorate of Prisons, expressed concerns about the inadequacy of legal advice and representation in an evidence session before the Joint Committee on Human Rights²⁹:

"There is access to legal advice in immigration removal centres, which is in excess of what immigration detainees are able to obtain in prisons... it is only a very short, sharp period of advice. It is half an hour. It could take a week or two weeks to get on to the advice surgery.

The real issue is that, even though you can get a short period of advice, representation, which is very important for detainees, will probably not follow, because of the cuts in legal aid. The organisations that used to provide free legal advice and representation by and large no longer exist, because of the lack of funding, so it is more difficult."

Section 3: Family Separation. Families are routinely separated by reason of detention and deportation with little attention paid to the best interests of the children involved.

There is a wealth of evidence in the public domain that illustrates the rather obvious fact that children can be harmed by separation from their parents.³⁰ As far as we are aware, BiD is the only organisation to have carried out research into family separation in the context of immigration detention. Our *"Fractured Childhoods"* study from 2013 examined the cases of 111 parents who were separated from 200 children by immigration detention.³¹ They were detained for an average of 270 days. 85 of the children were in local authority care or private fostering arrangements during their parents' detention. 15 were removed or deported from the UK without their children.

Children who participated in this research described the extreme distress they experienced during their parent's detention. They reported losing weight, having nightmares, suffering from insomnia, crying frequently, and becoming deeply unhappy, socially isolated and withdrawn. Their parents' absence often meant that children's basic practical and emotional needs were not met. Where single parents were detained, children were placed in formal or informal care arrangements. Some children moved between unstable care arrangements, experienced neglect and were placed at risk of serious harm. Parents and carers outside detention often struggled to cope financially and emotionally. Children were seldom able to visit their parents in detention because of the distances involved and the prohibitive cost of travel, and parents struggled to pay for phone calls to children.

Amnesty international's 2017 report on immigration detention in the UK also addressed the harm caused by separation of families by immigration detention. *"Parents who were interviewed reported that detention had resulted in their children's behaviour and performance at school deteriorating*

²⁹ Joint Committee on Human Rights, Examination of Witnesses: Dame Anne Owers, Jane Leech and Hindpal Singh Bhui <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/immigration-detention/oral/92251.html>

³⁰ 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, Beresford S, "What about me?" The impact on children when mothers are involved in the criminal justice system', *Prison Reform Trust*.

³¹ https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/164/Fractured_Childhoods-The_Separation_of_Families_by_Immigration_Detention_-_Full_Report.pdf

*seriously in the long term. This was, Amnesty noted, nearly universal among parents with school-aged children.*³²

It is difficult to imagine any other setting in which children in the UK could be left indefinitely without their primary carer, without proper enquiry as to the impact of that decision and/or the proportionality of it. Detailed processes are followed when children are taken into care because of parental abuse or neglect. And yet people with insecure immigration status who are caring and capable parents can be held in immigration detention without time limit. The decision to detain them is not made by a court but by an immigration officer.

The Home Office has a statutory duty to safeguard and promote the welfare of children in the UK under section 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA 2009), Article 24 of the Charter of Fundamental Rights (CFR) and the UN Convention on the Rights of the Child (UNCRC), Articles 3, 9 and 12. To ensure that the Home Office complies with this duty, its own policies set out very clear guidance with regard to safeguarding and promoting the best interests of children, and the process that must be followed to comprehensively assess these best interests. Where a Home Office decision will have an impact on a child – for instance, the decision to separate a family for the purpose of detention or deportation – they must treat the best interests of any child(ren) affected by that decision as a *primary consideration*.

The case should be referred to the ‘Office of the Children’s Champion’ (OCC), an internal Home Office body that offers advice to decision-makers on the implications of decisions on the welfare of children. Local Authority Children’s Services (LACS) should be contacted to ascertain whether the Local Authority has had some involvement with the family.

Home Office policies acknowledge that the separation of a parent from their child has an impact on the ‘emotional development’ and ‘identity development’ of the child³³ and that *“If there is a subsisting relationship between the parent and the child, the best interests of the child will almost always be in the liberty of the parent”*.³⁴

Section 55 – systematic failures

The section 55 policies clearly place the burden of enquiry on the Home Office, but in BID’s experience they are rarely complied with. Time and again we see parents with caring responsibilities being detained, the Home Office having made no enquiries as to the children’s welfare.

BID’s research report, *Fractured Childhoods* examined detention decision-making and found inconsistent practice as to whether and when the OCC was consulted during the decision-making process. In some cases there was no contact with the OCC at all. In others, referrals were made only months into the detention, i.e. after key decisions had been taken. In others, a referral was noted to have been made but never followed up. Reviews of detention and documents opposing bail

³² Amnesty International, *A Matter of Routine: the use of immigration detention in the UK* (2017)

³³ *Family separations Version 4.0* Published for Home Office staff on 11 December 2017

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666491/family_separations.pdf

³⁴ Detention of families, v7.0, p.12 “Detaining foreign national offenders (FNOs) with parental responsibility”

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/488916/Detention_of_families_v7.0.pdf

frequently failed to engage with the best interests and welfare of the children involved, including the impact of continued detention, and in some cases the bail summaries prepared were inaccurate and/or otherwise significantly flawed.

More recent evidence:

Recently BID conducted an analysis of 28 cases where we made an application to the Home Office for our client to be released on bail. In each of these applications we requested full disclosure of any correspondence with the OCC or LACS, citing evidence of the Home Office's failure to show that it had complied with its section 55 duty or its own policies by considering the best interests of the child in any decision to detain or maintain detention up to that point. In 12 of these cases the Home Office had already accepted that the client had a genuine and subsisting relationship with a child in the UK; in the remaining cases we made arguments to this effect in the application. In both situations, the Home Office's Section 55 duty would require a reference to be made to the OCC, and a reference to LACS in those cases where the local authority had been involved with the family in some way.

Findings:

Just 3 of these applications led to release. Of even greater concern was the fact that despite explicitly asking for disclosure of any correspondence, not a single response to these bail applications contained evidence that the OCC had been contacted and in only one case was there evidence that a local authority been contacted. The responses simply failed to mention the best interests of the children. This reflects BID's general experience with Home Office documents relating to decisions to detain or maintain detention, which at best involve nothing more than a cursory nod towards the Section 55 duty.

As we rarely see evidence of the Home Office's compliance with its Section 55 duty, BID recently conducted an analysis of two Home Office case files which had been obtained from the Home Office via a 'subject access request'. We undertook this exercise to establish whether the fact that our clients did not receive evidence of section 55 considerations on documents they received from the Home Office meant that such considerations were simply not taking place, or whether they were taking place but recorded only on internal documents that were placed on the individual's Home Office file but not disclosed to the individual.

We found that the Home Office had repeatedly failed to consider the best interests of the children in cases where it decided to separate the family. In one case, our client's family life was overlooked in his decision to detain and every subsequent review of detention, despite the fact that he had challenged his deportation on the basis of his family life in the UK, and the Home Office had themselves accepted during deportation proceedings that the proof of his family life was 'incontrovertible'. Similarly in the other case the Home Office argued in both the decision to detain him and every subsequent detention review that he did not have a genuine and subsisting relationship with his children, despite previously having accepted this relationship in deportation proceedings.

From detailed analysis of two case files and evidence from BID's applications for bail to the Home Office, the evidence overwhelmingly suggests that the Section 55 duty and its attendant policies do

not form a substantive part of decision-making in relation to detention of parents in the majority of cases. In other words, BID argues that the Home Office routinely breaches its own policies when it detains parents. Below are examples of recent judicial findings to that effect.

Recent legal cases:

Recent well-publicised cases highlight failures on the part of the Home Office to protect and promote the welfare of children when detaining a parent. Kenneth Oranyendu³⁵ was detained upon reporting to the Home Office, despite the fact his wife was abroad at the time and no one was there to care for their four children. His children were subsequently taken into care until her return. In an article for Sky News, he said his children had been “shattered” by the separation³⁶ and that they were now “scared every time [he goes] out”³⁷. In another case, the daughter (AJU) of an Indian national (AJS) was just days away from being put up for adoption because her father was being held in immigration detention, leading to the family being awarded £50,000 in damages. In a third case, a woman with two children – one of whom was severely disabled – was detained for 160 days. During this time, the children’s grandfather who was caring for them became seriously ill and was hospitalised and the older daughter had to drop out of school and miss her GCSE’s to care for her younger brother, whilst also dealing with proceedings which were started to evict the family due to rent arrears.³⁸

Deportation of “Foreign Criminals”

The UK Borders Act 2007 provides for the automatic deportation of any foreign national who is sentenced to a period of 12 months or more imprisonment. Since the Legal Aid, Sentencing and Punishment of Offenders Act (‘LASPO’) 2012 removed all non-asylum immigration matters from the scope of legal aid, people challenging their deportation on the basis of their Article 8 right to family and private life no longer have access to legal aid.

During the passage of LASPO, the government claimed that the immigration cases that would be placed outside of scope did not require legal aid funding because the process for making applications is accessible and straightforward.³⁹ This is not the case. British immigration law is extremely complex and has become more so in recent years. The legislative provisions have been repeatedly amended and expanded.⁴⁰ In addition to the proliferation of legislation, the Immigration Rules have more than doubled in length since they were drafted, running at over 1000 pages.⁴¹ There have been 5,700 changes to the Immigration Rules since 2010, and 230,000 words added.⁴² As well as the Immigration Rules, there are also rafts of other guidance documents on the Home Office website that are subject

³⁵ <https://news.sky.com/story/children-and-parents-are-separated-by-immigration-in-the-uk-11418129>

³⁶ <https://news.sky.com/story/children-and-parents-are-separated-by-immigration-in-the-uk-11418129>

³⁷ <https://www.independent.co.uk/news/uk/home-news/immigration-child-separation-parents-uk-home-office-kenneth-oranyendu-family-a8431731.html>

³⁸ Bail for Immigration Detainees. (2013). *Fractured Childhoods: the separation of families by immigration detention*. p.8.

³⁹ Coram Children’s Legal Centre, Rights without remedies: legal aid and access to justice for children, February 2018 retrieved from https://www.childrenslegalcentre.com/wp-content/uploads/2018/05/Rights-without-remedies_Final.pdf

⁴⁰ Immigration legal provisions and can be found in statutes from 1971, 1988, 1999, 2002, 2004, 2006, 2007, 2008, 2009, 2014 and 2016. Refer to Colin Yeo, “How complex is UK immigration law and is this a problem?”, *Free Movement*, 24 January 2018, retrieved from <https://www.freemovement.org.uk/how-complex-are-the-uk-immigration-rules-and-is-this-a-problem/>

⁴¹ Martha Bozic, Caelainn Barrm, Niamh McIntyre and Poppy Noor, “Revealed: immigration rules in UK more than double in length”, *The Guardian*, 27 August 2018, retrieved from <https://www.theguardian.com/uk-news/2018/aug/27/revealed-immigration-rules-have-more-than-doubled-in-length-since-2010>

⁴² Ibid.

to constant change (and are not publicly archived online). It is near impossible to navigate this area of the legal system without a lawyer. Furthermore, few can afford to pay for the expert reports needed to evidence an Article 8 case to the satisfaction of the courts without legal aid. Independent social work or psychiatric reports on children can cost £1000-2000 or more.

Section 117C of the 2014 Immigration Act exacerbates this further by making it extremely difficult to challenge deportation on the basis of article 8. 117C(1) of the act states that “the deportation of foreign criminals is in the *public interest*”, unless one of two exceptions applies:

- The individual has been lawfully resident in the UK for most of their life, is socially and culturally integrated in the UK, and would face *very significant obstacles* to integration into the country to which they face deportation
- The individual has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting relationship with a qualifying child, and the effect of their deportation would be *unduly harsh*⁴³

In 2015, BiD published a research paper “Rough Justice: children and families affected by the 2013 legal aid cuts” (Annex B). In this research we investigated the cases of 102 parents who were separated from 219 children under the age of 18 by immigration detention, deportation or removal from the UK. We found that 22 of the 102 parents were removed or deported without their children.

Over 80% of children in the study for whom we were able to obtain data were British citizens and 93% were born in the UK.⁴⁴ A third of the parents in the study either did not have a representative or were dropped by their representative. Approximately a third were represented by private lawyers. A number of these parents who were privately represented reported that they could not pay for all the work needed, or that there were deficiencies in their solicitor’s work.

We ask whether it is truly in the public interest for parents to be deported from the UK without their children, and for children in the UK to grow up in single parent households as a result. It is not only severely damaging to the child but is also likely to lead to unnecessary costs for the taxpayer.

More British than foreign

Another group facing automatic deportation despite having strong article 8 claims actually came to the UK as a child or perhaps were born here, were educated in British schools, are a part of British communities, and have no connection to the place the Home Office proposes to deport them to. Many would have been eligible for British citizenship but never knew they had to apply or lacked the resources to do so. Others grew up in under the care of the Local Authority, who failed to register them as British citizens. Prisons and Probation Ombudsman Stephen Shaw’s 2018 report into vulnerable adults in immigration detention found that a significant proportion of former foreign national offenders fell into this category. He said

⁴³ 2014 Immigration act Section 117C <http://www.legislation.gov.uk/ukpga/2014/22/section/19/enacted>

⁴⁴ Data were obtained on place of birth for 179 of the 219 children in the sample. Of these 179, 168 were born in the UK.

"I find the policy of removing individuals brought up here from infancy to be deeply troubling. For low-risk offenders, it seems entirely disproportionate to tear them away from their lives, families and friends in the UK, and send them to countries where they may not speak the language or have any ties. For those who have committed serious crimes, there is also a further question of whether it is right to send high-risk offenders to another country when their offending follows an upbringing in the UK⁴⁵."

We welcome these comments, along with the recommendation attached, that *"The Home Office should no longer routinely seek to remove those who were born in the UK or have been brought up here from an early age"*. Such is the hysteria around the concept of 'foreign criminals', and the ruthless deportation policies that have followed, that it obscures the fact that these individuals are in fact members of British society and British themselves in everything but immigration status. It is refreshing to see the logic and fairness of these policies questioned in a review that the Home Office itself commissioned.

Failure to store data on family separation

The Home Office does not even monitor how many parents are separated from their children through detention and deportation policies. Over July and August 2019, BID wrote 3 separate FOIs asking for information on the number of parents separated from their children through detention and deportation. In each response, the Home Office was unable to answer any of the questions in our FOI requests due to the fact that "the information is not held in a reportable field on [their] case management system" and therefore they are "unable to capture the information" without resorting to searching a high volume of individual records which would exceed the £600 cost limit⁴⁶. We believe this failure to store data infringes on our ability to scrutinise the government's compliance with its own section 55 duty and undermines the government's ability to formulate evidence-based policy.

Section 4: *The use of prisons for immigration detention: People who are held in prisons under immigration powers face additional disadvantages which infringe on the right to liberty and access to justice*

There are currently approximately 70 prisons in the UK where "foreign national prisoners" (FNPs) are being held under immigration powers. For prisoners in remote areas of the country, finding legal advisors who are able to travel to the prison at risk to their costs to take initial instructions can be especially difficult. Around 400 people are held in prisons under immigration powers at any one time, and this is governed by a Service Level Agreement between the Home Office and the National Offender Management Service.

Although publicly-funded advice may be available in principle to all those held within the prison estate that are eligible, in practice there are significant difficulties in securing a legal aid immigration solicitor from within prison. There is no equivalent to the IRC DDAS within prisons. It is up to the

⁴⁵ Stephen Shaw, "Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons A follow-up report to the Home Office", July 2018.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728376/Shaw_report_2018_Final_web_accessible.pdf

⁴⁶ [FOI data](#) obtained by BID in 2018

prisoner, who has restricted, or no, access to the internet, to contact a legal aid solicitor and persuade them to visit the prison in order to take instructions and open a file to represent them.

People held in prisons under immigration powers face more restrictions to their liberty than those held in IRCs. Telephone access is severely restricted in almost all prisons. Detainees have a limited number of telephone numbers that they can hold on their 'pin' at any time, and it can take a week or longer to add a new telephone number to a 'pin'. This can mean that without the assistance of a friend or family member in the community, even if a potential legal aid provider can be identified, contacting that solicitor by telephone or by post can take a prohibitively long time.

BID has for many years raised concerns about the growing use of prisons to hold immigration detainees. This is because the routine use of prison for immigration detainees at the conclusion of their sentence is contrary to recommendations by international human rights bodies such as the CPT⁴⁷ and the UNHCR⁴⁸ and also places the person subject to immigration control at a particular disadvantage. On the basis of information from BID's legal casework it is our experience that detainees in prison suffer significant detriment compared to those individuals held in immigration removal centres.

Evidence from BID's legal advice surveys indicates that immigration detainees held in prisons face significant barriers accessing legal advice. Although we are not able to carry out the legal advice survey with people in prisons (because people in prisons do not have mobile phones and cannot receive telephone calls) 53 interviewees in the survey said that they had come to the removal centre from prison. Of those, only 8 people had received advice on their immigration case from an immigration solicitor – just 15%⁴⁹. This low percentage is consistent with the results of the previous four surveys⁵⁰.

Some BID clients held in prisons report that they are locked in their cells for 23 hours per day. This is highly inappropriate for people who are being held for administrative purposes and are not serving a sentence. This stands in stark contrast to the regime in immigration detention centres, which are governed by the Detention Centre Rules 2001. Rule 3 entitled 'purpose of detention centres' states:

"The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time, whilst respecting in particular their dignity and the right to individual expression."

⁴⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) "Considers the detention of irregular migrants in a prison environment to be fundamentally flawed" *Extract from the 19th General Report of the CPT, published in 2009 Safeguards for irregular migrants deprived of their liberty, Extract from the 19th General Report of the CPT, published in 2009*
<https://rm.coe.int/16806cce8e> pg 2

⁴⁸ The United Nations High Commissioner for Refugees (UNHCR) has stated that "The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided" *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*
<https://www.refworld.org/pdfid/503489533b8.pdf> pg 29

⁴⁹ When asked if they had received legal advice on their immigration case whilst in prison, 11 out of 53 people said yes. However, of those 11 people, 1 said the advice was from a criminal solicitor, 1 said it was from an immigration officer, and 1 said it was from a prison officer. Only 8 people said that the advice came from an immigration solicitor.

⁵⁰ The % of those who received immigration advice while they were in prison, for the last four years, has been 9.3% 17.5%, 12%, 10%

This principle does not apply to detainees held in prisons because the Detention Centre Rules 2001 do not apply in prisons, which are instead governed by the prison rules. There is no such provision for a 'relaxed regime with as much freedom of movement as possible'.

Another key reason why immigration detainees should not be held in prisons is that there is no rule 35 process or equivalent mechanism. Rule 35 of the Detention Centre Rules 2001 is an important mechanism so that vulnerable adults detained in IRCs are brought to the attention of the Secretary of State of the Home Department (SSHD) who is then required to review their suitability for detention under the Adults at Risk (AAR) policy. In responding to a Rule 35 report the Home Office caseworker is required to make an assessment of the suitability of the continued use of detention. Such assessment is disclosed to the detainee. A Rule 35 report can therefore have a significant role in securing release for individuals on bail on the basis of vulnerability and even if the response to the rule 35 report does not immediately trigger release the report remains important in submissions for bail. They also form part of an assessment as to the continued lawfulness of the use of detention.

However, there is no mechanism for people held in prisons under immigration powers to notify the Home Office of their vulnerability, in order for the appropriateness of their detention to be reviewed. We are concerned that there are a considerable number of highly vulnerable individuals held in prisons under immigration powers, who have no prospect of having their vulnerability recognised by the Home Office and having the appropriateness of their detention reviewed as a result.

BID published a report in July 2018 which documented serious shortcomings in the design and operation of the AAR policy for people held under immigration powers and the Rule 35 process⁵¹ for people held in Immigration Removal Centres. One section of the report was dedicated to the problems caused by the fact that the Rule 35 process does not operate in prisons. In the sample of cases we researched, highly vulnerable individuals were not recognised as such under the AAR policy; and consideration was not given to releasing individuals because they were vulnerable. Vulnerable individuals spent long periods in detention: of 7 highly vulnerable individuals detained in prisons all but one were detained for more than six months and the average length of detention was 442 days. Only one was recognised as an Adult at Risk by the SSHD.

Section 5: *vulnerable adults in immigration detention*. The UK government continues to detain individuals for prolonged periods and fails to implement effective safeguards and policies to protect vulnerable persons (section written by Medical Justice)

Medical Justice is the only organisation in the UK that sends independent volunteer doctors into immigration removal centres (IRCs) to document detainees' scars of torture and challenge instances of medical mistreatment. Medical Justice would like to direct the attention of the Committee to the manner in which immigration detention is operated in the United Kingdom and argues that the below practices raise serious concerns about the United Kingdom's compliance with the ICCPR. In particular, we wish to draw your attention to: the lack of a fixed time limit on the duration of detention in immigration removal centres; the continued detention of individuals for prolonged periods; and failure to implement effective safeguards and policies to protect vulnerable persons.

⁵¹ http://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/667/Adults_at_risk_2018.pdf

The government's failure to protect vulnerable persons from the harm of immigration detention was highlighted as a key issue raised in the review of the United Kingdom's compliance with the ICCPR stating that the government *"should also ensure that the system protects vulnerable persons, and provides for effective safeguards against arbitrariness"*. (21.b) Despite the discontinuation of the Detained Fast Track policy, the safeguards in place protecting vulnerable persons from immigration detention, and safeguarding vulnerable persons in detention, remain deeply inadequate.

Since the last review in 2015 a thorough review was carried out by Stephen Shaw. 'The Review into the Welfare of Vulnerable Detainees' ('Shaw Review') published in January 2016 found that *"[t]here is too much detention; detention is not a particularly effective means of ensuring that those with no right to remain do in fact leave the UK; and many practices and processes associated with detention are in urgent need of reform."* The findings of the initial Shaw review were very clear – there is a systematic overreliance on immigration detention; too many vulnerable people are detained for too long and existing safeguards fail to adequately protect vulnerable people. The review found shortcomings in both the identification of vulnerability and in the policies designed to maintain wellbeing. In addition, the literature review by Professor Bosworth demonstrates incontrovertibly that detention in and of itself undermines welfare and contributes to vulnerability. The Government response to the review must be understood in this light.

We welcomed the findings of the 2015/2016 Shaw review and had hoped it would lead to desperately-needed reform to safeguard vulnerable people from harm in detention. We particularly welcomed the recognition that detention is harmful to people's mental health and the analysis of the factors which contributed to the cases found to have breached Article 3 of the European Convention on Human Rights. We were optimistic when the Home Office accepted the report's broad recommendations and the Minister promised significant reforms aimed at achieving a *"reduction in the number of those detained, and the duration of detention before removal, in turn improving the welfare of those detained."* However, the government's response to the Shaw Review has been inadequate and has failed to address the central concerns raised.

The core component of the Government's reforms to improve the protection of vulnerable people was the introduction of the Adults at Risk policy. However, this policy is less protective of vulnerable persons than the previous policy, which was so heavily criticised by the Shaw Review. The failure of the Adults at Risk (AAR) policy is connected to the move away from protective categories and the introduction of three levels of evidence in the policy. This has led to a lowering of the threshold for maintaining detention of those at risk of harm in detention. In addition to demonstrating that they belong to a category of persons identified as at increased risk of harm in detention the Adults at Risk policy requires that vulnerable detainees demonstrate that they are likely to suffer harm in detention to qualify for protection equivalent to 'very exceptional circumstances' (the threshold in the previous policy).

The Adults at Risk policy fails to offer increased protections for vulnerable persons from entering detention. The Gatekeeper Team was introduced to harmonise the decision to detain and review all cases prior to detention. However, the Gatekeeper Team merely operationalizes the Adults at Risk policy and so does not protect vulnerable people from the inadequacies in this policy or ameliorate the impact of those inadequacies.

The Adults at Risk policy has not improved identification of vulnerable individuals inside immigration detention. Additional indicators of risk were added, but there is no reporting mechanism for those new indicators. Rule 35 of the Detention Centre Rules 2001 only applies to those with a history of torture (rule 35(3)), those at risk of suicide (rule 35(2)) and where the doctors has identified detention being injurious to the detainee's health (rule 35(1)). No rule 35 report is required for e.g. survivors of domestic violence unless it is deemed torture or for transsexual detainees, those with PTSD etc.

Even where a person's vulnerabilities are known to the Home Office there is a lack of follow up of those detained despite being identified as at increased risk of harm in detention – this means when harm is substantiated this is often initially missed. There is a lack of monitoring within the Home Office and a lack of accountability and transparency in its processes

Medical Justice repeatedly set out our concerns about the AAR policy in detail to the Home Office following the publication of the first draft of the policy. These concerns were ignored. Having exhausted all avenues of influence we felt we had no choice but to issue a legal challenge and filed a Judicial Review challenging the policy as it applies to victims of torture. The High Court found in our favour⁵² and found that the application of a narrower definition of torture in the AAR policy lacked a rational and objective evidence base and, further, that it was unlawful as it served to exclude victims of non-state violence from protection, contrary to the purpose of section 59 Immigration Act 2016.

We now hope that the upcoming ICCPR review may include the identification and protection of vulnerable persons from the harm of immigration detention as part of the list of issues it directs the review to look at.

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⁵² Medical Justice v SSHD [2017] EWHC 2461 (Admin),