



## **POLICY BRIEFING**

### **Briefing: Families separated by immigration detention and deportation**

**February 2019**

**Winner of the JUSTICE Human Rights Award 2010**



## About BID

BID is an independent national charity established in 1999 to challenge immigration detention and improve access to release from immigration detention for those held under Immigration Act powers in immigration removal centres and prisons. BID provides immigration detainees with free legal advice, information, and representation, and engages in research, policy and advocacy work, and strategic litigation. BID is accredited by the Office of the Immigration Services Commissioner (OISC), and won the JUSTICE Human Rights Award 2010. In the last 12 months, BID provided support to 5,941 people.

With the assistance of barristers acting *pro bono*, BID prepares and presents bail applications in the Immigration and Asylum Chamber of the First-tier Tribunal for the most vulnerable detainees, including long term detainees, people with serious mental or physical ill-health, detainees who have intractable travel document problems, or who are main carers separated by detention from their children, and who are unable to obtain legal representation. Since 2014 BID has also provided legal advice and representation to people challenging deportation on the basis of article 8 ECHR.

BID runs a bi-annual survey of legal representation across the UK detention estate, and aims to raise awareness of immigration detention through its research and publications, including "*Adults at Risk: the ongoing struggle for vulnerable adults in detention*" (2018), and "*Rough justice – children and families affected by the 2013 legal aid cuts*" (2015). BID also works through advocacy with civil servants via a number of Home Office-convened stakeholder groups, and with parliamentarians.

BID has always been committed to helping families affected by immigration detention, and campaigned extensively to end the detention of children from 2001 until the coalition government's commitment to end it in 2010. Since then, BID has shifted its focus to the Home Office's routine separation of parents from their children through immigration detention. This briefing addresses the Home Office's systematic failure to fulfil its statutory duty to safeguard and promote the welfare of children in the UK under section 55 of the Borders, Citizenship and Immigration act 2009.

## **Harm caused by family separation**

In the last year, there has been considerable media scrutiny of the Home Office's detention of parents. President Trump's shocking treatment of migrant families in the USA alerted journalists to the fact that the UK also separates families through immigration detention.

Bail for Immigration Detainees (BID) assisted 148 parents who left detention between 1<sup>st</sup> August 2017 and July 31<sup>st</sup> 2018<sup>1</sup> with bail and/or release applications. Of these 148 cases, there were 333 children<sup>2</sup> affected. Only 26 individuals were removed at the end of their period of detention, with the majority being granted bail, their detention having served no purpose. The average number of

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<sup>1</sup> This figure includes 10 cases where a man was detained and thereby separated from a pregnant partner

<sup>2</sup> From July 2017 to July 2018



days spent in detention was 149<sup>3</sup> days, with the longest period of detention being 763 and the shortest being 14 days.

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.<sup>4</sup> 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.<sup>5</sup> 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 parent’s 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 seriously in the long term. This was, Amnesty noted, nearly universal among parents with school-aged children.”*<sup>6</sup>

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

<sup>3</sup> In 7 of these cases, we were unable to determine the exact date the client left detention as either contact was lost with the client, a solicitor took on their bail case or they no longer wanted BID’s help – therefore it is likely the average number of days spent in detention is actually higher than the estimate given)

<sup>4</sup> 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*.

<sup>5</sup> [https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2\\_assets/files/164/Fractured\\_Childhoods-The\\_Separation\\_of\\_Families\\_by\\_Immigration\\_Detention\\_-\\_Full\\_Report.pdf](https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/164/Fractured_Childhoods-The_Separation_of_Families_by_Immigration_Detention_-_Full_Report.pdf)

<sup>6</sup> Amnesty International, *A Matter of Routine: the use of immigration detention in the UK* (2017)



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 is not required to provide evidence for the reasons it detains people, and BID is concerned that the necessity of detention is rarely demonstrated. Although detention can only be used for the purposes of removal, most people are released back into the community at the end of their period of detention – in the 3 months to February 2018, only 45% of those leaving the detention estate were removed from the UK<sup>7</sup>.

## **Home Office policy and the Section 55 duty**

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 child<sup>8</sup> 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”*.<sup>9</sup>

## **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.

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<sup>7</sup> Figures come from Former Prisons and Probation Ombudsman Stephen Shaw’s 2018 report *“Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons”*, in which he states “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”

<sup>8</sup> *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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666491/family_separations.pdf)

<sup>9</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/488916/Detention_of_families_v7.0.pdf)



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 opposition to bail documents 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 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 by from the Home Office via 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 Oranyendu<sup>10</sup> 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 separation<sup>11</sup> and that they were now “scared every time [he goes] out”<sup>12</sup>. 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.<sup>13</sup>

### **Deportation of “Foreign National Offenders”**

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

<sup>10</sup> <https://news.sky.com/story/children-and-parents-are-separated-by-immigration-in-the-uk-11418129>

<sup>11</sup> <https://news.sky.com/story/children-and-parents-are-separated-by-immigration-in-the-uk-11418129>

<sup>12</sup> <https://www.independent.co.uk/news/uk/home-news/immigration-child-separation-parents-uk-home-office-kenneth-oranyendu-family-a8431731.html>

<sup>13</sup> Bail for Immigration Detainees. (2013). *Fractured Childhoods: the separation of families by immigration detention*. p.8.





is accessible and straightforward.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> There have been 5,700 changes to the Immigration Rules since 2010, and 230,000 words added.<sup>17</sup> As well as the Immigration Rules, there are also rafts of other guidance documents on the Home Office website that are subject to constant change (and are not publicly archived online). It is almost 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*<sup>18</sup>

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.<sup>19</sup> 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

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<sup>14</sup> 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](https://www.childrenslegalcentre.com/wp-content/uploads/2018/05/Rights-without-remedies_Final.pdf)

<sup>15</sup> 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/>

<sup>16</sup> 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>

<sup>17</sup> Ibid.

<sup>18</sup> 2014 Immigration act Section 117C <http://www.legislation.gov.uk/ukpga/2014/22/section/19/enacted>

<sup>19</sup> 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.

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. This 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

*“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 UK<sup>20</sup>.”*

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.

The case studies below are from BID's Article 8 Deportation Appeals Project (ADAP), which supports people who do not have access to legal aid and are challenging their deportation on the basis of an article 8 claim.

#### *Case study 1: DP*

*DDP has had ILR since 1991. He has a British partner and four British children, two of whom are minors. He has a number of minor offences that didn't lead to imprisonment. He has received a*

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/728376/Shaw\\_report\\_2018\\_Final\\_web\\_accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728376/Shaw_report_2018_Final_web_accessible.pdf)





number of non-custodial convictions for petty offences, and his only custodial sentence was six months for having a blade / sharp pointed article in a public place. He was served with a deportation order and detained at the end of his sentence, the Home Office arguing that his presence in the UK is not conducive to the public good.

#### Case study 2: EK

EK is an EEA national who came to the UK at the age of 7 months old. He was homeless by the age of 15 and then brought up in care. He committed a number of minor offences before the age of 18, and then received a 6 month custodial sentence for theft and battery. EK has a child in the UK and has no family in his 'home' country. Despite this the Home Office issued him with a certified deportation order (meaning that his removal could take place before his appeal could be heard).

#### Case study 3: WJ

WJ served in the British Army, spending 15 years in the royal marines and completing multiple tours in Iraq and Afghanistan. WJ had no negative immigration history and had always been in the UK lawfully either as a royal marine, or with leave to remain. WJ has a British wife and two British children, one from a previous marriage. He has a very close relationship with both sons, particularly the one from his current marriage. WJ was served a deportation order after being sentenced to 2 years imprisonment for 'dishonestly making a false representation to make a gain for oneself'.

### Failure to store data on family separation

It is also highly alarming that 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 limit<sup>212223</sup>.

It is of great concern that this information cannot be captured and monitored, as it prevents independent scrutiny of the Home Office's compliance with its own statutory duty. If the Home Office were systematically aware of the presence of children in detention and deportation cases, it would be better placed to discharge its section 55 duty.

<sup>21</sup> <file:///S:/Research%20&%20Policy/Rudy/FOI%20requests/responses/FOI%20separated%20families%20too%20costly%20to%20get%20info%2049404%20-%20Sullivan.pdf>

<sup>22</sup> <file:///S:/Research%20&%20Policy/Rudy/FOI%20requests/responses/FOI%2049796%20-%20Schulkind%20separated%20families%20again.pdf>

<sup>23</sup> <file:///S:/Research%20&%20Policy/Rudy/FOI%20requests/responses/FOI%2049562%20separated%20families%20'we%20don't%20store%20the%20data'%20-%20Sullivan.pdf>



The status of the relationship between parent and child is enshrined and protected in law, and to interfere with this through separation of the family is one of the most draconian steps any state can take. Jurisprudence from the senior courts and Europe consistently recognises the special status of the relationship between parent and child. In *re G (children) (residence: same Sex Partner)* [2006] 1 WLR 2305 per Baroness Hale at [32-36] and [44] and *HH v Deputy prosecutor of the Italian Republic* [2012] 3 WLR 90 per Baroness Hale at [30-34] and [44]. In *In Re B* [2009] 1 AC 11 at [20] Baroness Hale also emphasised the magnitude of any decision that results in the separation of children from their parents:

*...taking a child away from her family is a momentous step, not only for her, but for her whole family, and for the local authority which does so. In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from her family and mould her to its own design. Families in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality. Hence the family is given special protection in all the modern human rights instruments...*

#### Recommendations:

1. End the separation of parents from their children by immigration detention.
2. Restore legal aid for Article 8 (family and private life) cases
3. Repeal automatic deportation provisions in UK Borders Act 2007.

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