Bail for Immigration Detainees
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Bail for Immigration Detainees

RESEARCH REPORT

Risky Business: Immigration Detention decision-making during the COVID-19 pandemic

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Intro

BID is an independent national charity established in 1999 to challenge immigration detention and to increase access to justice for immigration detainees facing removal or deportation. We believe that asylum seekers and migrants in the UK have a right to liberty and access to justice and should not be subjected to 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. Alongside our legal casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice. Since 2014 we have also provided legal advice, information and representation to time-served foreign national prisoners, many with British partners and children who are facing deportation despite long-term residence in the UK, and for whom there is no legal aid. In the year 2018-2019 BID provided advice to 4,161 people detained under immigration powers in the UK.

Executive Summary

Despite the COVID-19 pandemic, the Home Office has continued to maintain the detention of a significant number of people. It has stated that it has done so on the basis of the "risk of harm" that those detainees were purported to present.

However, between 23/03/2020 and 01/05/2020, BiD provided representation in 55 bail hearings in which 52 people were granted bail and 3 refused – a success rate of 94%. This compares with BID's success rate of 59% during 2018-19, and an overall success rate for all bail applications made to the First-tier Tribunal of around 30% outside of the current coronavirus crisis[1].

Accordingly, in the absence of any evidence to suggest that the First-tier Tribunal has altered its approach to bail applications, it is clear that Home Office use of detention during this period does not appear to be justified in the findings of the independent courts.

Research sample

In an effort to examine what lay behind these troubling statistics, we decided to analyse the case files of 42 people who were granted bail between 23rd March 2020 and 01st May 2020. The main focus of our research was assessments of "risk of harm" posed in individual case; vulnerability; and imminence of removal, although other factors were additionally considered.

Risk of harm

- The risk level asserted by the Home Office varied significantly across the cases within this study. Despite the Home Office stating that it was only detaining people who presented a

[1] Figure obtained through FOI request made to the First-tier Tribunal.

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risk of harm, a high risk of harm was only alleged in 9 cases, and medium risk in only 9 cases. In the remaining cases, the level of risk was ambiguously defined or not expressly stated at all.

- In 27 cases, the Home Office relied wholly and exclusively on a bail summary that cited the applicant's previous offending but presented no additional evidence. In 15 cases, the bail summary cited or quoted other evidence (e.g. the sentencing judge, the Probation Service) but the evidence in question was never disclosed.
- In every case, the Home Office provided a bail summary opposing the application on a number of different grounds. This included 7 cases in which bail had previously been granted with release conditional solely upon suitable accommodation being found. It included 4 cases in which release had been recommended by a case progression panel or even agreed to by the Home Office.

Vulnerability

- 32 applicants within the study had particular vulnerabilities. The Home Office had accepted that 23 of the applicants within the study were "adults at risk" in detention. There were 9 individuals who had underlying health problems that under the government's own guidelines make them vulnerable to severe illness if they contract COVID-19.

Removability

- Only 7 bail summaries made reference to the current travel restrictions and the fact that these may have an impact on the imminence of removal. In 32 cases, the Home Office failed to address the existence of travel restrictions altogether. Moreover, even where no travel restrictions existed, the applicant's removal would still have been prevented by some other barrier to removal in 34 cases.

Welfare of a child

- Submissions were made concerning a biological child of the applicant in 15 of the cases. The Home Office engaged with those submissions in only 5 of these cases, despite having a statutory duty to safeguard and promote the welfare of children. The Home Office submissions in those 5 cases were very limited - none of them disputed the existence of a genuine and subsisting parental relationship. In the remaining 10 cases, the bail summary made no reference to the applicant's child.

Other factors

- While the Home Office opposed bail on the grounds of a risk of absconding in practically every single case, it provided evidence of a prior instance of absconding in only 15 cases. In 15 cases, it was positively submitted that the applicant either had no history of absconding or had a positive history of compliance with conditions of release.
- BID was able to determine the length of detention prior to the applicant's bail hearing in 40 cases. In 8 cases, the applicant had been detained for 3-6 months. In 19 cases, the applicant

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had been detained in excess of six months. A total of 6 applicants had been detained in excess of 12 months, with the longest period of detention within this study exceeding 20 months.

Recommendations

1. The use of immigration detention for the sole purpose of effecting deportation or removal and the presumption in favour of release are fundamental principles in law. They must be the basis for all decisions to detain regardless of actual, suspected or anticipated conduct by the individual in question.
2. Alternatives to detention must be explored before making decisions to detain. There is little evidence that the Home Office undertakes any process in relation to this.
3. A fresh decision must be made on the necessity of maintaining detention when the Home Office receives an application for bail.
4. Applications for bail should not be automatically opposed: particularly not where the Tribunal has already indicated that it is minded to grant bail. They ought to be regarded as a further opportunity to review detention with genuine consideration of the merits of the application and the possibility of conceding the application.
5. The Home Office should disclose the evidence upon which it relies, including full sentencing remarks, OASys reports, Offender Manager Release Plans, travel documents, and evidence that removal is imminent.
6. The Home Office's assessment and interpretation of risk urgently needs to be revised, taking into account the following issues:
    - The decision to detain must not be taken on the basis that an individual presents a risk of harm unless a thorough and recent assessment has concluded: (i) that the individual presents such continuing risk; and, if so, (ii) the level of such risk.
    - An assessment of risk must be based upon evidence that is specific, cited and disclosed by the Home Office. The assessment must not confine itself to citing previous misconduct: it must go on to explain how this establishes current risk. Where possible, the Home Office should base any finding of risk upon an assessment made by HM Prison and Probation Service ("HMPPS"). Where such an assessment has been made, the Home Office must not depart from those findings without express explanation and supporting evidence. Where a person is detained on the basis of risk, the nature and level of that risk must be consistent across all relevant Home Office correspondence for that individual.
7. The terminology used to describe risk of harm must be consistent across all Home Office decision-making. It ought to be consistent with the language used by HMPPS (i.e. low, medium, high).

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Background: Covid-19 and immigration detention

On 23rd March the UK government announced strict lockdown measures, applicable to everyone in the UK, instructing people to stay at home, and only to go out for essential shopping and for one permitted piece of exercise per day. Social distancing measures were also introduced so that people were told to keep 2 metres apart when in shops or exercising. Detention centres, however, remained open. Like all enclosed settings (the example of cruise ships is illustrative), immigration detention centres provide fertile conditions for the rapid spread of COVID-19. In a report on coronavirus and immigration detention,[2] Professor Richard Coker of the London School of Hygiene and Tropical Medicine stated: '*An unfolding COVID-19 epidemic in a detention centre would, in a grim sense, represent a natural experiment*'. Hygiene and ventilation is poor, cleaning products are reported to be scarce, and detainees report that staff do not wear protective equipment. People are frequently required to congregate in large groups and cannot follow the government's strict social distancing instructions. Accordingly, Professor Coker referred to detention centres in his report as being: '*well-recognised "epidemiological pumps"*'. Our clients report that there has been no clear communication about the situation and the dangers that the virus presents from either the Home Office nor detention centre staff employed by private companies.

Many of our clients are held in prisons under immigration powers where the situation is bleaker still. An HMPPS report stated that, as of 24th April 2020, there have been, among prison users: (i) 1,385 probable COVID-19 cases; (ii) 227 confirmed cases; (iii) 29 hospitalisations; and (iv) 14 deaths[3].

Our clients have reported draconian lock-in regimes resulting in those not in quarantine being held in their cells for roughly 23.5 hours per day and required to eat their meals in their cells. Some clients report that they are only permitted a shower every other day. The Prison Service and Public Health England have warned that 15,000 prisoners will have to be released to prevent an epidemic within jails[4]. Although a considerable number of detainees have been released, we are not sure of the exact number of people who remain in detention because those finishing their criminal sentences continue to be detained and there are no published statistics on this. Continuing to hold people in immigration detention is not only reckless, but potentially unlawful. Immigration detention exists to facilitate enforced removal – where an individual cannot be removed, there is no lawful basis for detention. The global nature of the COVID-19 pandemic largely makes removal impossible.

[2] Report on Coronavirus and Immigration Detention, 18th February 2020.
[3] Briefing paper- interim assessment of impact of various population management strategies in prisons in response to COVID-19 pandemic in England (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882622/covid-19-population-management-strategy-prisons.pdf)
Note that the data does not distinguish between serving prisoners and other prison service users such as immigration detainees or those held on remand.
[4] https://www.telegraph.co.uk/politics/2020/04/07/15000-prisoners-need-curb-spread-coronavirus-officials-told/

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As of 25th April 2020, more than 130 countries had introduced some form of travel restriction[5]: while generally strict and wide-ranging, the nature and extent of these restrictions vary significantly from country to country. Critically, there is no reliable indication of when and where restrictions will be lifted and the question of when the UK is prepared to permit removals to take place has no bearing upon the question of when any other country will be prepared to accept them.

There has been very little transparency about how many people remain in detention and the specific reasons for maintaining detention in those cases. In a Guardian article about the release of detainees, a Home Office spokesperson said: '[O]ur priority is to maintain the lawful detention of the most high-harm individuals, including foreign national offenders.'

Purpose of the research

The purpose of this research is to analyse the degree to which the Home Office has assessed that individuals' detention is essential, given the global pandemic, the government's public health instructions to all citizens, and whether indeed the Home Office is detaining only "high-harm individuals". In an article about the release of detainees in the Guardian, a Home Office spokesperson said: '[O]ur priority is to maintain the lawful detention of the most high-harm individuals, including foreign national offenders'.

Between 23rd March 2020 and 01st May 2020 we provided representation in 55 bail hearings, in which 52 were granted and 3 refused – a success rate of 94%. This compares with BID's success rate of 59% during 2018-19, and an overall success rate for all bail applications made to the First-tier Tribunal of around 30% outside the current coronavirus crisis[6]. The Home Office opposed bail in every case and argued that our clients should remain in detention. It is abundantly clear from the outcomes of overwhelming majority of cases, that judges believe that immigration detainees should be released at this current time. The tribunal is in effect rejecting the Home Office's arguments for the continued use of immigration detention during the Covid-19 pandemic.

In a recent letter to the President of the First-tier Tribunal,[7] the Home Office expressed "surprise" at the level of grants of bail in recent weeks, in light of recent findings by the Divisional Court.[8]

The President of the First-tier Tribunal, in response to this highly unusual and widely criticised[9] written enquiry,[10] felt it necessary to remind the Home Office that, as an independent judiciary, the courts decide bail applications in accordance with the law (which he also felt it necessary to summarise). He stated: '*bail has been refused when the Home Office has indicated that the bail*

[5] https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30967-3/fulltext
[6] Figure obtained through FOI request made to the First-tier Tribunal.
[7] https://ilpa.org.uk/wp-content/uploads/2020/05/Letter-to-MC-29.04.20-1.pdf
[8] https://www.bailii.org/ew/cases/EWHC/Admin/2020/732.html
[9] https://www.freemovement.org.uk/home-office-tries-to-lean-on-judges-deciding-immigration-bail-cases/
[10] https://ilpa.org.uk/wp-content/uploads/2020/05/Letter-to-MC-29.04.20-1.pdf

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applicant will be removed', before adding: '*Unfortunately the feedback that I am receiving is not only that the Home Office rarely consent to the grant of bail having seen the "minded to grant" but that bail is still opposed at the hearing without any meaningful additional representations being given by Presenting Officers which address or challenge the reasons*'. He also stated that the Secretary of State's generic submissions alongside the bail hearing were not helpful and that specific reasons for wishing bail to be refused ought to be made clear.[11]

We submit that the Home Office's justifications for the continued use of immigration detention during the Covid-19 pandemic has been legally flawed.

Research sample and selection criteria:

We examined in further detail the case files of 42 people who were granted bail between 23rd March 2020 and 01st May 2020.

Between these dates we provided representation in 55 bail hearings, in which 52 individuals were granted bail. We only had access to sufficient documentation[12] in 42 cases, so we selected these 42 case files for further examination.

The main focus of our research was to examine assessments of risk of harm posed in individual cases, vulnerability, and imminence of removal, although other factors were additionally considered.[13]

Risk of harm

The Home Office has maintained that the primary justification for continuing to operate a detention system during the Covid-19 outbreak is due to a supposed risk of harm[14] posed by those it detains. This has been echoed in Home Office press statements. Furthermore the Home Office has stated that in the case of 49 countries to which removal is not possible, detention will only take place in 'high harm' cases.

This is problematic for a number of reasons. If it is government policy to maintain detention only in the cases of the 'most high-harm individuals,' then this should be clearly set out in policy. Moreover, any 'foreign national offender'(FNO) held in immigration detention will have served the duration of their custodial sentences and would have been released if they were British nationals. There is no reason to suggest that their release necessarily carries a higher risk of public harm than the release of a British national following the completion of their sentence; to impose detention on this express

[11] https://ilpa.org.uk/wp-content/uploads/2020/05/Letter-to-Home-Office-1.5.20.doc
[12] Documentation includes Home Office monthly progress reports, bail summaries, medical documentation, other evidence from our client, and grounds for bail and bundle that we had prepared
[13] Other factors include, for example, the welfare of any children of a detainee.
[14] https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic

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or implied basis is discriminatory and unambiguously contrary to the rule of law. Immigration detention cannot be used for the sole purpose of public protection. Risk of harm or risk of reoffending are not by themselves sufficient to provide legal justification for continued detention – imminence of removal will always be the acid test.

Equally it is important to remember that it is the Probation Service, rather than the Home Office, that is the official body responsible for assessing the risk of harm to the public and risk of re-offending posed by offenders. However it is our experience that the Home Office frequently makes its own assessments of risk of harm on the basis of scant evidence (often exclusively the prior conviction) and in some cases it departs from assessments of the risk of harm or offending made by the Probation Service in OASys (Offender Assessment System) reports. We examined how assessments of risk of harm were being made in these cases, to scrutinise the government's claim that it is only 'the most high-harm' cases where detention is being maintained.

Findings

All the 42 individuals whose case files we examined had committed offences in the past. In 10 cases, the Home Office did not put forward any arguments in the bail summary about the individual's risk of harm[15]. In 32 cases, the Home Office argued in the bail summary that the risk of harm that the individual would pose upon release was a reason for maintaining detention.

We examined the arguments made by the Home Office in the assessments of risk of harm in those 32 cases. Those assessments were frequently flawed.

Arguments made about the risk of harm in those 32 cases:

- In 9 cases, the Home Office argued that release carried a 'high' risk of harm[16]
- In 9 cases the Home Office argued that release carried a 'medium' risk of harm
- In 9 cases the Home Office described the risk of harm as 'unacceptable' or 'serious'
- In 5 cases there is an assertion that release would carry a risk of harm but no level of harm is given.

It is notable that characterisations of the level of risk posed are often vaguely worded – such as the 9 cases where the level of risk is described as 'unacceptable' or 'serious' or when risk of harm is merely asserted but without a risk level being stated. It is unclear what an 'unacceptable' level of risk in fact means and as far as we are aware this is not set out anywhere in Home Office policy. If the

[15] Although in 3 of these cases the Home Office did make arguments that our client's presence in the UK was not 'conducive to the public good' – an argument that clearly alludes to but does not explicitly raise risk of harm. In another 2 of these cases the Home Office did not make arguments relating to risk of harm in the bail summary but they had made those assertions elsewhere

[16] In 8 cases it was asserted that the individual posed a high risk of harm in general, in 1 case it was argued that the individual did not pose a high risk overall but posed a high risk only to specific groups.

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Home Office is going to justify continued detention on the basis of the risk of harm then the level of risk must be clearly set out.

In cases where the Home Office did not make any express submissions as to risk of harm, the reasons for opposing bail would still cite the applicant's previous convictions. They would also frequently include an expression that the person's presence is not conducive to the public good and/or that deportation was justified. While prior offending is a matter for which a bail judge is required to have regard,[17] the Bail Guidance for Immigration Judges firmly indicates that this is not a freestanding justification for detention; rather, it is a matter to be assessed in determining whether or not bail would raise any safeguarding issues.[18]

In 2 cases the risk of harm is euphemistically described as 'unacceptable' by the Home Office when it would appear more appropriate to characterise the level of risk as low. In one particularly concerning case it was argued in the bail summary that the individual posed an 'unacceptable risk of harm to the public' even though in a previous document (the response to our client's rule 35 report[19]) which was not disclosed by the Home Office to the court, the Home Office confirmed "that A's Offender Manager has assessed him as posing low risk of harm to the public". In another case our client's bail summary stated that he would pose an 'unacceptable risk to the public' but later in the bail summary it stated that "it is accepted that the applicant may pose a low risk of harm". In another case the Home Office bail summary accepts our submission that the applicant poses a low risk of reoffending or absconding only to argue later in the same bail summary that our client's previous behaviour "is linked to a serious risk of harm".

In at least 7 cases, bail was opposed even though it had already been granted at a preceding bail hearing with release conditional upon resolution of an outstanding issue. This usually occurs where a judge is minded to grant bail in principle but cannot give immediate effect to that decision in practice: usually because suitable accommodation is not currently available and it is incumbent upon the Home Office or Probation Service to provide it. In his letter to the Home Office of 1st May 2020, the President of the First-tier Tribunal affirmed the Tribunal's position in such cases: "*With regard to the difficulties in sourcing suitable accommodation when a person is subject to licence conditions this is a matter for UKVI, the criminal authorities and the Probation Service. I do not consider a refusal of a bail application to be in accordance with the law due to an inability of Government departments, or those answerable to them, to meet criminal licence conditions*".

[17] Immigration Act 2014, Ch. 19, Sch. 10, para. 3(2).
[18] Presidential Guidance Note No 1 of 2018 "Guidance on Immigration Bail for Judges of the First-tier Tribunal (Immigration and Asylum Chamber)", paras. 42-45. Implemented on 15th January 2018.
[19] Rule 35 of the Detention Centre Rules (2001)

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A further application is necessary in such cases only if the prior grant expires before accommodation is provided.[20] In those circumstances, the arguments for and against continued detention have already been examined and a finding made (in favour of release) by the Tribunal. Nevertheless, in all 9 cases, the Home Office continued to oppose bail on a number of grounds but without providing any additional submission or evidence to suggest that the level of risk had altered in the meantime. Indeed, the bail summary would often advance the same grounds that the Tribunal had already considered before granting bail in principle.

The original grant was made prior to 23rd March 2020 in 6 of the 7 "bail in principle" cases. Therefore, in all except one of these cases the Tribunal had already decided that the applicant ought to be released before the COVID-19 lockdown or any of its consequences for conditions in detention and removals. However the grant of bail in principle had lapsed and the Home Office again maintained its opposition to grant bail. A further application for bail had to be made to the First-tier Tribunal and a bail hearing held, resulting in a new grant of bail in principle.

Paragraph 12 of the immigration bail guidance for judges states that "The immigration authorities must substantiate (in the bail summary or elsewhere) any allegation that a person poses a risk of harm to the public or a risk of reoffending." Equally, Home Office detention policy is clear that risk of harm to the public should be assessed by the National Offender Management Service (NOMS)[21].

However, assessments of risk of harm made by the Home Office are frequently lacking in evidence such as from NOMS. In 27 cases the Home Office relied only on assertions made in the bail summary relating to history of offending and did not cite any additional evidence. In 6 cases the Home Office cited the individual's OASys report from their offender manager. In 5 cases the Home Office also cited the sentencing remarks made by the judge at the time that the individual was convicted (albeit only in part). In 4 cases the Home Office cited other evidence of risk such as from the police or probation evidence that was not the individual's OASys report.

It is notable that out of 42 cases where they opposed bail, it is only in 9 cases that the Home Office asserts that there is a 'high risk of harm'. It is difficult to see how the Home Office can continue to justify its position that the primary reason for continued detention during Covid-19 is to protect the public from 'high-harm' individuals when they are only making these arguments in a minority of cases.

Of the 9 cases where the Home Office did assert that release carried a high risk of harm, in one case they argued that this was a high risk in relation to specific groups, and they cited evidence from

[20] There is one exception, where the Home Office is entitled to maintain detention for no more than 48 hours for the purposes of arranging electronic monitoring.
[21] Chapter 55.3.2.6 Enforcement Instructions and Guidance (the Home Office's main detention policy) states that "*Risk of harm to the public will be assessed by NOMS unless there is no Offender Assessment System (OASYS) or pre-sentence report*".

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probation reports. In one case they provided evidence but not from the probation service[22]. However in 7 of the cases the Home Office did not disclose evidence from the probation service in support of this position. In one case the Home Office provided evidence relating to the individual's conduct in detention and in another case the Home Office relied on evidence from the police relating to the unsuitability of the client's release address. In two cases the Home Office relied on the sentencing remarks made by the judge at the time that the individual was sentenced. Two of the cases where the Home Office asserted a high risk of harm were particularly problematic and are described below.

In one of these cases, as in many others, the assessment of high risk of harm appeared to be based exclusively on offending history. Our client instructed counsel that his OASys report had in fact assessed him as a medium risk. The attendance note provided by counsel after the hearing also confirms that the judge pressed the Home Office Presenting Officer (HOPO) to explain their risk assessment and the HOPO was unable to elaborate. In another case, the Home Office asserted that our client's release carried a 'medium to high risk' without specifying or disclosing the source, even though our client instructed that his risk had been assessed as low to medium. The attendance note provided by counsel after that hearing confirms that the HOPO was unable to provide evidence of high risk.

In at least 4 cases, release had been recommended by a case progression panel and/or actually acquiesced to by the Home Office at some point prior to the bail application. Nevertheless, in all these cases, the Home Office produced a bail summary opposing bail on a number of grounds. This included one instance where – during a hearing – the judge effectively had to decline to hear the application after the Home Office Presenting Officer disclosed that the Secretary of State had granted bail approximately 70 minutes before that hearing had begun. In that instance, the Home Office had originally referred the applicant for release 5 months before the hearing.

Vulnerability

Leaving aside the current Covid-19 crisis, everybody in immigration detention can be considered to be potentially vulnerable. As former Prisons and Probation Ombudsman Stephen Shaw found in his Home Office-commissioned review into vulnerable adults in immigration detention in 2016, "*vulnerability is intrinsic to the very fact of immigration detention*[23]".

In addition, many people have underlying physical or mental health problems that mean they are particularly vulnerable to harm in immigration detention.

[22] This case relied on non-conviction evidence from the police
[23] Shaw, Stephen. *Review into the Welfare in Detention of Vulnerable Persons* Pg 8. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf

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In particular during the COVID-19 pandemic, everyone in immigration detention is vulnerable. Evidence provided by Professor Richard Coker in the Detention Action challenge found that Covid-19 spreads rapidly in 'congregate settings' such as cruise ships and immigration removal centres. In addition IRCs have poor ventilation and sanitation people are unable to self-isolate. Professor Coker argued it is plausible and credible to suppose that 60% of people held in immigration removal centres may become infected. The rapid spread of Covid-19 across the prison estate serves to highlight the urgency of these risks.

Many people in immigration detention also have Covid-19 related co-morbidities. The government has issued guidance for people who are at increased risk of severe illness from Covid-19. Those include people with respiratory, heart, liver or kidney disease, diabetes, people with chronic neurological conditions, or people with a weakened immune system[24]. Individuals suffering from such conditions are advised to "stay at home at all times and avoid any face-to-face contact for a period of at least 12 weeks".

The Home Office's 'Adults at Risk' policy was introduced in 2016 as a safeguard to prevent the wrongful detention of vulnerable adults. According to the policy the Home Office assigns a level of vulnerability (1,2 or 3) and then balance this against 'immigration control factors'. Research produced by BID in 2018[25] identified multiple and systemic failings in the design and operation of the policy and found that it fails to protect vulnerable adults from detention.

Findings

We sought to better understand the range and extent of vulnerability among the group of 42.

32 out of 42 individuals in the study had particular vulnerabilities. 23 were accepted by the Home Office to be "adults at risk" under that policy, and a further 9 had independent medical evidence indicating they are particularly vulnerable to harm in detention[26].

Of the 23 people who were accepted by the Home Office to be adults at risk under the policy, 8 were accepted by the Home Office as level 3 adults at risk. This means that the Home Office accepts that detention is likely to cause harm and that the individual can only be detained if a date for removal is set and there are no barriers to removal, or if the individual is deemed to present a 'significant public protection concern'.

[24] Full list available here https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults

[25] https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/667/Adults_at_risk_2018.pdf

[26] This includes one case in which the individual had submitted a rule 35 report and the Home Office acknowledged that this was still under review

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There were 9 individuals in the sample that had underlying health problems that would appear to make them particularly vulnerable to severe illness if they were to contract Covid-19:

- 1 individual had HIV
- 3 individuals had respiratory problems
- 1 individual had severe asthma
- 1 individual had high blood pressure (in addition to severe mental health problems)
- 1 individual previously had immune deficiency although we did not have documentary evidence to ascertain whether he was still affected by this condition
- 1 individual had received an NHS letter telling him that he had bad been identified as being in a high risk group with regards to the Covid-19 pandemic and was being advised to self-isolate

In one extremely troubling instance, an individual had been placed in isolation 16 days before the national lockdown due to suspected tuberculosis. This was confirmed in the chronology of the bail summary and in a monthly progress report, but no further explanation given. In consequence, the Home Office failed to address multiple relevant issues, including: whether or not the applicant remained in isolation; whether or not he had since been diagnosed with, or was still suspected of having, TB; and, if not, what was the cause for the suspicion; and whether this could also place him at increased risk from COVID-19.

In another instance, the bail summary confirmed that the applicant was housed in the healthcare department, had chronic swelling on his right foot, was only able to mobilise with the use of crutches, and suffered from diabetes, high blood pressure and high cholesterol. The grounds for bail in that case were supported by a medical report concluding that the applicant "is unfit to be detained".

The prioritisation of immigration control over vulnerability has become a deeply embedded approach within the Home Office. This has not changed since the Covid-19 outbreak. The fact that the Home Office opposed bail in all of these cases illustrates the fact that health risks to individual detainees and the public health risks to all of us do not take precedence over immigration control.

There was one particularly concerning case in which the Home Office stated on a bail summary that "the risks of contracting COVID-19 are acknowledged during the current global crisis, however these risks exist outside of a prison environment as much as inside one". This is unlikely to be true due to issues such as poor sanitation and ventilation and the impossibility of following government advice

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to self-isolate within detention. It also appears to contradict the Department of Health's own advice[27].

Enforced removal

The COVID-19 epidemic has made enforced removal impossible in the vast majority of cases. Many flights are cancelled and there are an increased number of travel restrictions as a range of countries enforce lockdown measures and restrict incoming flights from other countries. The government has released a list of 50 countries whose nationals will not be newly detained except in 'high harm' cases. This list was formulated on the basis that enforced removal is not currently possible to those countries. We understand this list to be dynamic and shifting.

We submit that nationals of these countries should also be released from detention. It is plainly unjustified and unlawful to use administrative immigration detention in cases where removal is not possible, especially given the risks of infection with COVID-19.

The airline industry is currently in crisis and it will be very difficult for the Home Office to secure places on passenger planes to pursue removal. BID has spoken to a number of clients who are desperate to return their countries of origin but are unable to due to a lack of flights. One EEA national client has been booked on 4 separate flights since the outbreak but all have been cancelled because of issues with the airlines. He remains detained and has been since January

However, even for countries that are not on the list, there are numerous reasons why enforcing removal at the current time lacks lawful or moral justification. There is no evidence that the Home Office intends to test people for COVID-19 prior to removal. The continued use of enforced removal would increase the risks of transmission of the virus to places that have not yet been severely affected.

Enforced removal also requires numerous escort staff to accompany the detainee. There is no possibility for this to be carried out in a way that respects the '2 metre rule'. This is borne out by the recent report of the removal of approximately 35 EU nationals, in the midst of travel restrictions across almost the entire continent of Europe.[28] According to the report, the Home Office found it necessary to charter a private plane for the purpose, requiring 40-50 escorts and crew, and neither the wearing of masks nor social distancing was maintained during the flight. It is concerning matter of great concern that while the public is being told to stay at home and avoid social contact in order to protect the NHS and save lives, the government apparently continues to risk the further transmission of COVID-19 by seeking to forcibly remove people from the UK.

[27] The Department of Health's manual on 'Prevention of infection and communicable disease control in prisons and places of detention' states in relation to influenza outbreaks that 'places of detention run the risk of significant and potentially more serious outbreaks'.
[28] https://www.theguardian.com/world/2020/may/07/home-office-charters-plane-to-deport-eu-citizens-despite-coronavirus-rules

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Additionally, removal of a significant number of detainees is precluded in the short or long-term by the lack of a passport or other travel document. The procedure and timescale for arranging an emergency travel document ("ETD") varies significantly from country to country. However, it will invariably require the involvement of the receiving country's officials and resources (either in that country or via consular services in the UK), which are also likely to be adversely affected by the pandemic. As of 20th May 2020, the Home Office's Country Returns Guide (the policy document encompassing these procedures for the majority of receiving countries) has not been updated for a period of three months[29] (since 20th February 2020) when there were only 319 confirmed cases of COVID-19 outside China,[30] and therefore it cannot be said to address any of the consequences of the pandemic.

Access to legal advice is also highly problematic. In IRCs, visits have been cancelled and the Detention Duty Advice Service, through which immigration detainees can access legal advice, is currently operating a telephone service only. This presents obstacles to accessing advice. It will be very difficult for practitioners to assess the merits of a case without a face-to-face appointment as they may not be able to examine detainees' documents[31]. Similarly, legal visits in prisons have been cancelled. This increases the risk that people will be wrongfully removed, without having been able to access legal advice to pursue their claim to remain in the UK. These limitations call into question the lawfulness of enforced removal.

Imminence of removal

In our sample of 42 we examined the ways that the Home Office engaged with arguments relating to imminence of removal in the current context.

There were 39 cases where we had access to the client's latest bail, which sets out the Home Office's reasons for opposing bail. The issue of the imminence of removal is crucial in bail hearings because it has a direct bearing on whether detention can be considered proportionate and indeed lawful. Below is a summary of the arguments made by the Home Office in relation to the imminence of removal.

Findings

[29] That is the longest period that these often decisive procedures have gone without review in the four years that the policy has been publicly available (and updated, on average, approximately every 31 days during that time). See: https://www.gov.uk/government/publications/country-returns-guide#history
[30] https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200210-sitrep-21-ncov.pdf?sfvrsn=947679ef_2
[31] The Legal Aid Agency has stated that detainees' documents are to be sent by IRC staff to surgery practitioners in advance of the appointment but we are unaware of how this is functioning in practice.

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Only 7 bail summaries made reference to the current travel restrictions and the fact that these may have an impact on the imminence of removal[32]. In one case the Home Office referred to the fact that the Emergency Travel Document process was currently suspended in our client's country of origin, and that this would as a result delay the removal process. In another case the Home Office referred to the current travel restrictions and stated that "it is not the position of the Secretary of State that there is currently no viable route of return available".

It was much more common for the Home Office to ignore the fact that restrictions imposed as a result of COVID-19 make enforced removal extremely difficult if not impossible. In 32 cases, the Home Office, made no mention of the impact the current pandemic on imminence of removal. The bail summaries reflected a "business as usual" approach – the manner in which they evaluated the imminence of removal was no different to how it was before the pandemic.

In no fewer than 34 cases, even if there had been no COVID-19 travel restrictions, removal would have been precluded by: (i) the lack of a travel document; (ii) submissions awaiting determination by the Home Office; and/or (iii) appeal rights or proceedings. In at least 15 cases where an ETD was required, the Home Office either accepted that this was not yet available[33] or declined to confirm whether or not this was the case.[34] The barriers to removal were specifically monitored for the purposes of the study because they are the most common. However, the list is not exhaustive: for example, in at least one case, removal had been stayed by order of the High Court.

In 19 cases the Home Office simply made a normal assessment of the imminence of removal, considering usual barriers to removal such as the availability of a travel document or any outstanding appeals or legal barriers to removal that the individual may have. In some of those cases the Home Office gave an estimate of the number of weeks or months that removal was likely to take place but in many others the Home Office simply asserted that removal would be 'imminent' or 'within a reasonable timescale'.

In 8 cases the bail summary did not engage with the question of whether removal could be enforced imminently.

In 5 cases the Home Office accepted that removal was not imminent – because of the lack of a timescale for processing travel documentation issues for the individual's country of origin, or because of outstanding representations that the individual had made.

Overall it appears that in 32 cases there was a tacit assumption that the pandemic had not affected the Home Office's ability to enforce removal. The Home Office, when making decisions to detain or

[32] Although one of these cases referred to the current delays in the asylum system as a result of Covid-19 and found that this would delay removal. Travel restrictions as a result of Covid-19 were not raised in that case.
[33] For these purposes, available means that an ETD has been issued and is currently valid.
[34] Of the said 17 cases, the Home Office accepted that no ETD was available in 9 cases and declined to confirm whether or not an ETD was available in a further 8 cases.

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maintain detention, it is obliged to meaningfully engage with the question of whether removal is imminent. They must be transparent about the impact of the pandemic. It is unacceptable to act as if there is no global pandemic and make submissions to the court arguing that detention should be maintained without engaging with these questions.

Best Interests of the child

Many of BID's cases involve other factors affecting the proportionality of immigration detention. One of the more commonplace and consequential examples is detainees who have a child or children for whom they have a caring responsibility. In all cases involving children, the Secretary of State has a statutory duty to ensure that any of her functions relating to immigration, asylum and nationality (including, therefore, the decision to detain or maintain detention) are discharged: "*having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom*".[35]

It is generally in the best interests of a child not to be separated from either of his/her parents. This is truer still in the present circumstances. The lockdown has the effect of isolating children from all but the members of the immediate household. Moreover, the pressure on the remaining parent in taking care of the child is likely to be greater: they are likely to have sole responsibility for the child; they may have to work from home; they may be under additional psychological pressure due to a loss of earnings; or they may themselves be suffering from COVID-19.

Findings

Submissions were made concerning a biological child of the applicant in 15 of the cases in this study. The Home Office sought to address those particular submissions in only 5 of these cases. The Home Office submissions in those 5 cases were very limited: none of them disputed the existence of a genuine and subsisting parental relationship and, in only one instance, did the Secretary of State's make generic submissions regarding the welfare of children. In the remaining 10 cases, the bail summary made no reference to the applicant's child.

In two cases, the Home Office stated that the applicant's family life had been considered in the context of a prior human rights claim or appeal. In another case, the Home Office argued that the applicant's relationship with his child did not go beyond "normal emotional ties" before going on to cite the assessment that was made when deciding to deport. The clear implication is that the separation of a parent from a child for the purposes of detention requires no further assessment if it has at some stage been assessed for the purposes of the parent's immigration status.

BID also had access to a monthly progress report ("MPR") in 10 of the 15 cases. In 8 of those 10 cases the MPR made no reference to the detainee's child. Indeed, many of them informed the recipient: '*You do not have enough close ties (e.g. family...) to make it likely that you will stay in one*

[35] Borders, Citizenship and Immigration Act 2009, Ch. 11, Pt. 4, Children, s. 55.

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place'. In only one case did the MPR seek to address the welfare of the child (the MPR in the other case did not accept that the detainee had a child at all).

Other factors

Risk of absconding: Whiet the Home Office opposed bail on the grounds of a risk of absconding in practically every single case, it provided evidence of a prior instance of absconding in only 15 cases. In the majority of other cases, the Home Office relied upon the applicant's immigration status and/or previous offending as being evidence of a risk of absconding. In 15 cases, it was submitted that the applicant either had no history of absconding or had a positive history of compliance with conditions of release. In at least three cases, bail was expressly granted due to a history of compliance and/or the absence of evidence demonstrating a risk of absconding.

Length of detention: Paragraph 12 of the Bail Guidance for Immigration Judges states: 'It is generally accepted that detention for three months would be considered a substantial period and six months a long period. Imperative considerations of public safety may be necessary to justify detention in excess of six months'. BID was able to determine the length of detention prior to the applicant's bail hearing in 40 cases. Of those 40 cases: 8 applicants had been detained for a "substantial period" and 19 applicants had been detained for a "long period" (i.e. exceeding six months). A total of 6 applicants had been detained in excess of 12 months, with the longest period of detention within this study exceeding 20 months.

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Recommendations

Immigration detainees should be released immediately. The risks of contracting COVID-19 in sites of incarceration such as IRCs and prisons are well documented. Detention is for the purpose of removal but enforced removal is impossible in the majority of cases and in any case there is no way to do so without risking transmission of the virus. However while immigration detention continues to be used the recommendations below should be introduced as a matter of urgency.

1. The use of immigration detention for the sole purpose of effecting deportation or removal and the presumption in favour of release are fundamental principles in accordance with the law. They must be the basis for all decisions to detain: regardless of actual, suspected or anticipated conduct by the individual in question.

2. Alternatives to detention must be explored before making decisions to detain. There is little evidence that the Home Office undertakes any process in relation to this.

3. A fresh decision must be made on the necessity of maintaining detention when the Home Office receives an application for bail.

4. Applications for bail must not be automatically opposed: particularly not where the Tribunal has already indicated that it is minded to grant bail. They ought to be regarded as a further opportunity to review detention with genuine consideration of the merits of the application and the possibility of conceding the application.

5. The Home Office should disclose the evidence upon which it relies, including full sentencing remarks, OASys reports, Offender Manager Release Plans, travel documents, and evidence that removal is imminent.

6. The Home Office's assessment and interpretation of risk urgently needs to be revised, taking into account the following issues:

    - The decision to detain must not be taken on the basis that an individual presents a risk of harm unless a thorough and recently made assessment has concluded: (i) that the individual presents such continuing risk; and, if so, (ii) the level of such risk.

    - An assessment of risk must be based upon evidence that is specific, cited and disclosed by the Home Office. The assessment must not confine itself to citing previous misconduct: it must go on to explain how this establishes current risk. Where possible, the Home Office should base any finding of risk upon an assessment made by H. M. Prison and Probation Service ("HMPPS"). Where such an assessment has been made, the Home Office must not depart from those findings without express explanation and

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supporting evidence. Where a person is detained on the basis of risk, the nature and level of that risk must be consistent across all relevant Home Office correspondence for that individual.

7. The terminology used to describe risk of harm must be consistent across all Home Office decision-making. It ought to be consistent with the language used by H. M. Prison and Probation Service (i.e. low, medium, high).