
Bail for Immigration Detainees

"Excessively cruel": Detention, deportation & separated families'

June 2021



About BID

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. Between 1 August 2017 and 31 July 2018, BID provided advice to 5,941 people. Alongside our legal casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice. Contact details

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Most of all we would like to thank the people who agreed to share their experiences of immigration detention and deportation. We hope this report does justice to the honesty and generosity of the testimonies you gave us.

Contents

Executive summary:	2
Introduction:	4
Deportation law:	4
Section 55 duty:	6
More British than foreign:	7
BiD's Literature review:	8
BiD's deportation interviews:	10
Methodology.....	10
Section 1: Harm caused	11
Section 2: Access to Justice.....	21
Conclusion and recommendations:	36



Executive summary:

“It’s a trauma to everybody, especially my children and my wife”

The introduction of automatic deportation for so called ‘foreign criminals’ convicted and sentenced to 12 months or more under the UK Borders Act 2007 (unless certain exceptions apply including the right to a private and family life), followed by further provisions in 2012¹ and 2014², has led to an increasingly strident regime that makes it mandatory to separate a child from a parent. That is, so long as any harm that is caused to the child, parent or partner is not ‘excessive’. In the case of children, these provisions are relied upon by the Home Office and the courts to override the government’s statutory duty to promote and safeguard the welfare of children. Through our legal casework BID has witnessed first-hand the devastating impact this regime is having on families and communities. We have undertaken this research so that we can shine a light on this cruel and inhuman policy.

Our research is primarily based on interviews with fathers facing deportation from the UK. It is the words of those directly affected that form the substance of the report. The testimonies of the fathers we spoke to are powerful and often heart-breaking, and paint a picture of an entirely broken system that cannot be in the public interest.

Section 1 of the report examines the sprawling impact of the deportation system, from the individuals punished permanently and given no second chance because they don’t have a British passport, to the children and families treated as collateral damage. Families were placed in extreme practical, financial and emotional hardship by extended periods of uncertainty under the constant threat that family life will be brought to a permanent end. Not only were the fathers we interviewed prevented from working, they faced repeated periods of detention that were traumatic for the entire family and placed an even greater practical burden on the mother.

A particular focus of this section is the devastating impact deportation has on children. In the interviews we carried out, fathers facing deportation reported their children developing anxiety; crying constantly; unable to let their dad out of their sight; withdrawing from everything; loss of appetite; difficulty sleeping; having nightmares; and in one particularly serious case self-harm and attempted suicide.

In addition to these testimonies we present evidence of recent academic insights about enforced parental separation in a number of different contexts. Somewhat unsurprisingly the evidence

¹ Changes to the immigration rules 2012

² Immigration Act 2014



overwhelmingly finds that being forcibly and permanently separated from a parent generally has severe consequences for a child's wellbeing and long-term development.

Section 2 of the report concerns access to justice. The removal of legal aid and successive legislative changes have had a particularly detrimental effect on people seeking to appeal deportation. Interviewees explained the myriad interlocking barriers to justice they had been forced to confront. These include the complexity of immigration law and the prohibitive cost of private representation, as well as practical obstacles for those deprived of their liberty. The frequent and excessive use of detention, itself an injustice, leads to additional practical barriers to challenging deportation, particularly where this takes place in a prison. The first-hand evidence from our interviews reflect a dysfunctional system designed to make it practically impossible to even access a fair hearing.

Alongside this we also present evidence from our own Exceptional Case Funding (ECF) project. We have found the ECF scheme to be unnecessarily burdensome and entirely inaccessible to unrepresented individuals.

Our research presents a compelling case for an overhaul of the UK's deportation system and the restoration of legal aid for immigration cases. It cannot be right for the government to deport people who grew up in the UK to a country of which they have no memory. Nor can it be in the national interest for children to be forced to grow up without one of their parents. And it cannot be fair – and may not even be economical – to deny those people effective access to a fair hearing. The need for legislative change is evident. It cannot be stressed enough that unless and until that happens, this cruelty will continue to unfold.



Introduction:

The UK's excessively harsh deportation system has become the subject of increasing scrutiny in recent years. In February 2020, in response to a charter flight to Jamaica, there was an unprecedented outpouring of support for people facing deportation from across the political spectrum. On Twitter, Times, Evening Standard and Sky News journalists and broadcasters and other influential commentators took a strong stance against deporting people who come to the UK as children – while the BBC foregrounded the injustices faced by people subject to deportation when they have no connections to the country of removal. Many other accounts highlighted the families that would be left behind after father figures were deported and questioned whether this was in the public interest. These stories appeared across their news and political commentary, including on the Victoria Derbyshire news show and BBC Newsnight. MP Nadia Whittome's letter to the Prime Minister calling for a halt to the deportation flight until the publication of the Windrush Lessons Learned Review secured cross-party support from over 170 MPs. Much of the outrage reflected a growing realisation that the UK's deportation system has become ludicrously harsh and inflexible. But how did we get here?

Deportation law:

Successive legislative changes have made it very difficult to succeed in deportation appeals. Automatic deportation for foreign nationals who receive a 12-month or longer custodial sentence was brought in under the UK Borders Act 2007 applies to all non-British nationals (including all EEA nationals for offences committed after 31 December 2020), including those who have indefinite leave to remain and have families in the UK, and those who grew up and went to school in the country and would have been eligible for British citizenship (which is difficult and expensive to apply for). As a piece of legislation it is a blunt instrument that has caused considerable harm to individuals facing deportation as well as the families and communities in the UK that they have strong connections to.

Further changes brought about under the Immigration Act 2014 introduced additional hurdles to those seeking to challenge deportation on the basis of the strength of family or private life in the UK. To succeed in a deportation appeal on the basis of your parental relationship, it is necessary to show that the consequences are 'unduly harsh' to the child, which has been interpreted by the Home Office to mean 'excessively cruel'³. That is to say, the Home Office interprets the Law strictly, sanctioning cruelty to children as long as it is not excessive. In the case of *KO (Nigeria) v SSHD* [2018] UKSC 53 the Supreme Court ruled that an interpretation of the 'unduly harsh' test requires an

³ See Home Office guidance 'Criminality: Article 8 ECHR cases' that states (page 13): "When considering the public interest statements, words must be given their ordinary meanings. The Oxford English Dictionary defines 'unduly' as 'excessively' and 'harsh' as 'severe, cruel'" <https://bit.ly/2JhRrkp>



examination of the ‘degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent’.

Subsequent cases held that most children who have a parent facing deportation are likely to suffer significant psychological trauma, and that to succeed in their appeal a parent would have to show a risk of likely harm beyond what would be a normally expected consequence. Despite the “great sympathy” expressed by the Court of Appeal in PG (Jamaica) for the children, distress to innocent children is insufficient to prevent deportation⁴. In KF (Nigeria), Baker LJ accepted that the forcible separation of a father from his 3-year-old child would put the child at risk of harm, but that he was bound by the legislation and the Supreme Court judgment in KO Nigeria to look for “a degree of harshness over and beyond what every child would experience in such circumstances”. He added that “[f]or those lawyers, like my Lord and myself, who have spent many years practising in the family jurisdiction, this is not a comfortable interpretation to apply. But that is what parliament has decided” (para 31)⁵

It should however be noted that Lord Justice Underhill recently said (while endorsing KO (Nigeria)), in HA (Iraq) [2020] EWCA Civ 1176: ‘it is hard to see how one would define the level of harshness that would “necessarily” be suffered by “any” child’. He went on to say: ‘The essential point is that the criterion of undue harshness sets a bar which is “elevated” and carries a “much stronger emphasis” than mere undesirability [...] The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.’ These nuanced, if not contradictory, positions are at the very least difficult for a person facing deportation, who may also lack legal representation, to understand when faced with a Home Office policy that insists on applying an ‘excessively cruel’ threshold.

The threshold for those challenging deportation on the basis of private life in the UK, e.g. as they have lived in the UK since childhood or for very many years is equally demanding⁶.

It is therefore essential for Article 8 applicants and appellants to be able to understand the Law and how the courts and the Home Office have applied it, before being able to make detailed submissions, or before drafting complex grounds of appeal. This requires representation from experienced legal representatives as well as evidence in the form of expert reports to satisfy the high evidentiary threshold. Until 2013, Legal Aid was automatically available for deportation cases (subject to a means and merits test) however the Legal Aid Sentencing and Punishment of Offenders Act 2012 removed non-asylum immigration work from the scope of legal aid and replaced it with a scheme where you have to apply to the Legal Aid Agency for ‘exceptional case funding’ (ECF). ECF creates an additional hurdle that restricts access to justice.

⁴ PG (Jamaica) v Secretary of State for the Home Department [2019] EWCA Civ 1213

⁵ KF (Nigeria) v Secretary of State for the Home Department v [2019] EWCA Civ 2051

⁶ Those sentenced to 4 years or more in custody are not even eligible to be considered under the ‘exceptions’ to deportation being in the public interest and must meet an even higher and ill-defined test of ‘very compelling circumstances’ over and above the exceptions.

Without automatic access to legal aid, people are being denied a fair hearing to challenge their deportation. Some people may be able to afford private representation but essential expert reports usually cost £1,000 - £2,000 which is likely to be prohibitively expensive for many, especially given that people are banned from working. Equally, private representation can become prohibitively expensive if cases progress through the higher courts. If a person does not speak good English, the lack of legal aid means that the costs for legal representation are increased, as they need to pay interpreters as well. The reinstatement of legal aid in Article 8 cases is absolutely critical.

In addition there are myriad practical barriers to accessing high-quality immigration advice for people in immigration detention. BID's bi-annual surveys of access to legal advice for immigration detainees have shown that immigration advice in detention is often poor quality and difficult to access. The situation is worse still for people detained in prisons.

Section 55 duty:

Running contrary to the trend of increasingly harsh deportation law, and indeed incompatible with the unduly harsh test is the Home Office's 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. In an attempt at ensuring the Home Office complies with this duty, its own policies set out 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 – it is required to treat the best interests of any child(ren) affected by that decision as a primary consideration. 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 child⁷.

In practice, we see many cases where parents are forcibly separated from their children by detention or deportation where the Home Office has failed to properly engage with its section 55 duty and attendant policies. Although the policies clearly place a burden of enquiry on the Home Office we rarely encounter cases where the Home Office has made such meaningful enquiries to ascertain the best interests of a child.

Alarming, the Home Office does not even monitor how many parents are separated from their children through detention and deportation policies. BID's repeated FOI requests have been rejected on the basis that the information is not held. This is of great concern as it prevents independent scrutiny of the Home Office's compliance with its own statutory duty.

⁷ 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



However, even where the Secretary of State carries out a best interests assessment of the child and finds that their best interests require the parent to remain in the UK, that is not sufficient to prevent deportation. In order to prevent deportation the consequences for the child must also be shown to be ‘unduly harsh’ which is a far more demanding test than a best interests consideration. Therefore, the legislative framework governing deportation frequently pushes the Secretary of State to act contrary to the child’s best interests and is incompatible with fulfilment of her own Section 55 duty.

It is important to remember that regardless of the immigration status of the parent, 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. Baroness Hale⁸ 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...

Unfortunately however this does not seem to be the case when consideration is given to children’s best interests in Immigration Law. Indeed the complexity and the incompatibility of the best interests provisions with those relating to deportation fail to induce the same moral outrage as one may find in matters relating to British national children. The principle needs to be recognised that there can be no circumstances where any cruelty to any child is permissible. That should be the default position. Short-term and the long-term harm that is caused to children by actions sanctioned by the State cannot in any circumstance be justified. That is the dilemma that parliament has allowed to arise from the deportation provisions it enshrined under the 2014 Immigration Act, provisions that should be abolished. The best interests of the child should be made *the* primary consideration in all immigration and deportation cases.

More British than foreign:

Many people facing automatic deportation 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. Former 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

⁸ In *In Re B* [2009] 1 AC 11 at [20]



“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.”

We welcome these comments, along with the recommendation, 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 not visitors to the UK but 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.

BID’s Literature review:

In 2020 BID published a literature review⁹ providing in-depth overview of recent academic insights and discussions, exploring the effects of forced family separation upon children in two different contexts – incarceration and deportation. The UK deportation regime forcibly separates families on a regular basis and the monumental impact this has upon children has not been fully reckoned with by the UK government. Unsurprisingly the academic evidence overwhelmingly suggested that forced parental separation has a profound and permanent impact, potentially affecting every aspect of a child’s life and development. In other words it is in almost all cases ‘unduly harsh’. We examined academic insights from a range of different perspectives and contexts, and focussed on literature from various disciplines published in the past 10 years.

Parental Imprisonment

The first part of the review considers the impact of family separation in a general context of imprisonment, looking at the impact of parental incarcerations, as well as the specifics of incarceration of either the mother or the father on a child. Imprisonment has far-reaching adverse consequences on the families and wider communities connected to prisoners.

Evidence from a range of studies based in different countries found that outcomes for children of incarcerated parents are far worse on a number of different measures. The impact on health and wellbeing was considerable on a wide range of outcomes. Such children are more likely to have Adverse Childhood Experiences.

⁹ *The Impact of Forced Family Separation on a Child* November 2020 https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1217/Literature_Review_-_Impact_of_Forced_Separation_on_a_Child.pdf

A recent major pan-European study based on evidence from over 1500 children, care-givers, imprisoned parents and stakeholders found that although there are some significant differences between countries, in all countries, children separated from a parent or carer in prison are at a significantly higher risk of mental health problems than children in the general population. Such children were at significantly higher risk of mental health problems; more likely to suffer from nightmares, anxiety, and bedwetting.

Other studies found the effects of parental incarceration have long-term implications for a child's development and endure for considerable periods and well into adulthood. Children with a parent in prison face a higher likelihood of offending, drug abuse, school failure and unemployment.

Deportation

We found mounting empirical research that has begun to document the short and long-term effects on children and families caused by involuntary parental separation through detention and deportation. Physical separation in the case of deportation disrupts the essential secure base of a child, thereby risking internalising symptoms (depression, anxiety) and externalising behaviours (withdrawal, aggression). Deportation leads to abrupt loss of familiar home environment and family structure. It can lead to family dissolution. Deportation is also associated with a loss of income and numerous US studies show how this can lead to housing insecurity, food insecurity, psychological distress, and falling from low income into poverty. The emotional effects are often compounded by successive traumatic experiences such as immigration raids and parental detention. The experience of deportation produces increased emotional and behavioural distress among children and places children at risk of developing a range of disorders, such as sleeping disorders, depression, anxiety and post-traumatic stress disorder.

It is essential that proper account and weight is placed on the long-term harm caused to children and communities by deportation. The 'unduly harsh' test is all too often restricted by the Home office and the courts to the immediate impact of separation. Any meaningful analysis of the proportionality of the use of deportation and the public interest must include an assessment of the long-term impact of deportation upon children, individuals, and the community at large.

BID's Self-Help Guide for Families

Alongside the research BID released [a self-help guide](#) to enable the research to be used by unrepresented appellants in deportation appeals. The removal of legal aid for immigration cases brought about in the 2013 legal aid cuts means that many people facing forced separation through deportation may be unrepresented or forced to pay privately. Independent expert report documenting the likely short-term and long-term harm caused to the child (produced by a child psychologist or independent social worker, for example) are often prohibitively expensive for appellants. Whilst this is no substitute for such an independent expert report, it is essential evidence of the short-term and long-term harm caused to children by forced, and in nearly all cases, permanent separation from a parent.



BiD's deportation interviews:

Methodology

We interviewed 11 former clients whom BiD had previously helped to secure release from immigration detention. We wanted to speak directly with parents facing the prospect of permanent separation from their child/children through deportation. The interviews were conducted in 2019 and 2020. We selected individuals who had children in the UK, although none of the individuals interviewed had in fact been deported. All of the interviewees were fathers. All but one of the interviewees had received a deportation order – one interviewee was facing separation from his family through administrative removal. We carried out semi-structured interviews over the telephone, aiming to cover the following areas:

- Basic immigration history
- Experience of immigration detention
- Family situation
- The impact of detention upon the family
- The impact of threats of deportation
- Access to legal advice including legal aid
- The impact of access to legal aid upon the ability to challenge deportation

All of the people interviewed gave consent to participate in the research project and to have interviews recorded and transcribed. We agreed with participants that names or details that could identify them would not be used.

This research is led by the testimonies of the people interviewed. The voices of those directly affected are so frequently excluded from inflammatory discourses around deportation. Our aim is to amplify those voices while situating them within a broader context.



Section 1: Harm caused

1.1 Harm caused to children and families.

“It’s not just me, really. It’s the effect it’s having on my family”

Legislation focuses on the harm that will be caused by deportation itself but we cannot afford to overlook the harm caused to families through the years spent trying to challenge deportation and maintain family life. As we found in the course of each interview, the impact of having to live this way is wide-ranging and devastating and affects the entire family.

All the interviewees described the family unit struggling to cope with the practical and financial strain of fighting deportation, in some cases pushing families into considerable hardship. While facing deportation the interviewees had been banned from working and their partner was forced to become the sole breadwinner. While many took on more of the childcare responsibilities as a result, all the people we interviewed had spent periods of time in detention, some for multiple periods. This generally placed their partners in an impossible situation, who in some cases were unable to keep their job. Meanwhile several families had to pay hefty legal fees to fight deportation.

The strain these families face is exacerbated by the fact that people facing deportation can be arrested and detained at any time, without warning. Reporting events are traumatic experiences because of the very real possibility it will lead to detention. Equally it is common for the Home Office to detain people in ‘dawn raids’ on the sanctuary of family homes. The decision to detain is taken by a civil servant rather than a judge and there are none of the safeguards that exist in the criminal justice system to prevent wrongful deprivation of liberty. The Home Office claims to use detention as a ‘last resort’. It is in fact used far too frequently, in an attempt to pre-empt or prevent absconding, but without evidence for its necessity. The fact that the Home Office has such wide discretion over the power to detain means that life on immigration bail takes place in the shadow of detention. For our interviewees, repeated periods of detention combined with the ever-present threat when they are at ‘liberty’ that it will occur again at any moment, was a tremendous source of practical and emotional difficulty for them and their families.

Unsurprisingly, all interviewees spoke about the increased stress that their family had been placed under, with particularly severe mental and physical health implications in some cases. Some interviewees’ partners or children had been traumatised by periods that they had spent in detention, or by having the Home Office arrive at their home to detain them. Others were struggling to cope with the constant uncertainty and anxiety caused by the situation, knowing that family life can be brought to an abrupt end at any moment. A number of interviewees described the fear and anxiety their family members suffered when there was the slightest possibility that separation was going to occur – such as a knock at the door, or leaving the house to go to the shop. Interviewees described feeling that the Home Office is ‘playing games’ or ‘trying to break them’.



Interviewees described the devastating impact on their children. In 5 cases interviewees reported particularly serious outcomes for their children. Interviewees reported their children developing anxiety; crying constantly; unable to let their dad out of their sight; withdrawing from everything; loss of appetite; difficulty sleeping; having nightmares; and in one particularly serious case self-harm and attempted suicide.

Ali told us that he has been detained 5 or 6 times in the past 4 years, on each occasion for 1-2 months. His family has been forced to rely on food banks and other sources of charity to survive. He spoke about how difficult the entire process has been and the long term severe mental health consequences for both his partner and daughter.

“No they weren’t [able to visit in detention] because basically [we] don’t have enough money to do anything really, even most of the time my family we rely on foodbanks and charity [...] and things like that to be honest. So it’s a difficult situation really, to be honest.”

*“It’s not just me, really. It’s the effect it’s having on my family. I’ve got a little girl, she’s 11 now. I’ve been with my partner for at least 14 years now. So it’s not just me, really, it’s my family that’s suffering from this situation. [...] Both my daughters and my step daughter have developed anxiety. My daughter, she’s a child, when I go out she doesn’t know if she’ll see me [again]. She’s always crying, having nightmares. She’s never had nightmares before this whole thing started; she never had anxiety before this whole thing started. Even my partner as well – she was pregnant, she lost the baby, she was going through this whole situation as well. So it’s not just physical, it’s mental... [...] **You know my girl... she still has nightmares, she cries all the time, and when she has a nightmare and I go to her room she can’t go to bed until she holds my hand tight to make sure I’m still there. It’s just a bad situation that the Home Office has put me in.**”*

“My partner also has developed a kind of anxiety. She’s on medication all the time. Me? I try not to think about it too much. Because they’ve [the family] already broken down, so if I break down as well [...] I don’t know what’s going to happen. So in order to keep them strong, I don’t tell them a lot. [...] So I’m carrying a lot.”

David described the experience as a “trauma to everybody”. Due to previous periods of detention, his children are now anxious every time he leaves the house.

“The deportation is just like [...] it’s a trauma, even my kids they’re still traumatised of what happened – by my detention and what happened in the past. Those kids, [now] if I go out to get something, they think I’m not coming back, because of what has happened. They still have pain – where their dad is, they don’t know my fate, what’s going to happen tomorrow. Are they [Home Office/immigration enforcement] going to come to me tomorrow?”

"It's a trauma to everybody, especially my children and my wife. She's not in a good state. [...] I'm having this trauma, and depression every time; I'm having panic attacks, and finding it difficult to sleep. The situation is going on; it's not like it has ended. Every part of my family, my wife, myself. Not any person that is left out, they are still in that shock every time."

"This is a difficult situation for me and my family. If I'm being removed from this country I don't think I'm going to survive it. Don't think I'm going to survive it because I spend the majority of my years outside. I'm here with my children and they can't spend a night without seeing me."

Carl is very close with his children and they have been particularly badly affected. They are worried whenever there is a knock at the door.

"I'm always spending time with the children, helping them with their school work and then they have their speech and language therapy session so I've been maintaining all those things, I have to make sure that as a father I have to do it. So if I'm not around, the children feel it."

"[My partner] she's very, very, very weak, Even I'm not in a good mood but I still have to encourage her because... because we don't know what's going to happen. Every day we have to think. Every day we have to worry about what is going to happen. The immigration issue has been sucking all the little money that we have been working for. We have been spending all of it. And we are in debt."

For **Charles**, his detention meant that his wife lost her job, and she struggled to cope in his absence. While he was in detention, she attempted to take her own life. He is now concerned that his children could end up in foster care.

"It's bad because what happened is the first time I've been detained my missus she lost her job because she was supposed to work, only I'm not allowed to work. So if every time I'm detained she needs to be a full-time mum, there's no one to help us to look after the kids. [...] In 2017 I was detained and she overdosed on herself, to kill herself. My wife. And she was in hospital and I don't know what happened because I was in detention."

"She's [my partner] got a mental health problem now, every time she worried. Because if she's going to work, what happens to me I'm going to sign the next time. [...] It's not only her, it's my daughter as well. Because she's 17. So everybody worries each time there's a knock on the door because I've been arrested in my house twice you know from the Home Office, so it's like if someone knocks on the door they're worried maybe they come back again."

"I'm seeing my kids are going to go into foster care, because my missus she's not strong enough to look after them. So in the situation she is in now with the mental health she's got, I'm worried for her."

For **Antonio**, the impact on his entire family has been particularly severe, as he has been subjected to a damaging cycle of recurrent detention and release. He spoke of his children struggling to cope, and his daughter has attempted suicide.

"It's very terrible. I mean, when I'm not there it seems hard to believe what the system does but it really leaves a lasting impact. Where they [his family] fight to catch up or even get ahead, they suffer greatly. My partner cannot work because she has to take the kids to school on her own and all these things. And finding food because she has to stop work, can't work enough to pay the bills. The government start charging her to pay back money they said they'd give to her because I'm there [in detention]. She's reimbursing them for what they give to the kids. They stopped the kids benefits."

And the kids... they generally withdraw from everything. They don't sleep anymore, they don't eat, they don't sleep at night for the worry, if I'm coming or going. They don't know what's happening to me. They visit me as often as they can as well. My daughter was thinking of harming herself, killing herself, because I'm in detention and she can't see me because we're close. She tried to kill herself using gases."

When they visit [the detention centre], it's a terrible sight, it's heartbreaking. Because when they came to see me it's as if they're in prison themselves. My son cries, he doesn't want to leave when it's time for them to go. Because he wants me to go with him but you know I can't. It's hard to explain to him and my daughter how it works. And then [...] like this frightening bouncer in a club, you know them looks? And they [the kids] can't get to grips why it's like this. We can't touch, we sit far apart from each other. We can't hug them or anything like that. So it really hurt them deep down just to visit, but they still tried.

What's happening now is they're detaining me so often. Each time I'm away there's nothing my partner can do to make money and her hours are already cut short if I'm not around to look after the children. So unless I'm here she won't be able to work, to do anything."

For now my family is broken, mental issues, physical issues. My partner is really ill, I know she's going through a rough mental stress, depression. My children as I say, my daughter has tried to harm herself, to kill herself, and I'm suffering from depression as well as we can't afford medications. We see the doctor just now and there's nothing they can do at this moment to help. Each time I try and see the doctor I'm detained."

Adam and his entire family were excited for him to be released from prison on his release day. He spoke about the pain of not being released and subsequently being refused bail, with the whole family thinking that it was over and he was going to be deported.

“It affected my family a lot because on my release day we were all hoping that I’m going to get released on that day. Everyone was excited. So they come and they say I’m not going to be released, and then if I want to get released I have to go through court, tribunal court, judge decide. So we have to wait about eight, ten days before I go to tribunal. So she and her mother and my son they travelled to court to be there for the day of the hearing. And then I got refused because of silly reasons. Kids were crying, my missus was crying, obviously then I had to go to detention, knowing obviously to them it was a big threat ‘oh, we’re going to deport him.’ They think they’re just going to deport you like that. So it had a huge impact on them. The uncertainty and things like that.

It still affects them, but it affects me more, as a dad, as a man. Obviously I’ve got indefinite leave to remain, like I said I’ve always worked, since I’m trouble with the Home Office I’m not allowed to work. I’m not allowed to work, how am I supposed to support myself, my family?”

Omar described the experience of having the Home Office come to his house to detain him, and the long-term confusion and trauma this has caused to his wife and children. He emphasised the fact that the Home Office detains him frequently and the harm and instability caused by repeated use of detention.

“Obviously if I’m being detained I am not allowed to work so everything just falls on my partner, as in looking after the kids – because she starts work 7 in the morning and finishes at 6 in the evening. So it’s been difficult.”

“When they came to my house to detain me it caused a lot of confusion for my son. Till now he still talks about it. My partner ended up in hospital due to the stress during the pregnancy. I don’t know why they did that because they knew about the pregnancy – it was shocking. So I couldn’t take my son to school and my wife had to leave work to come back home.”

“We’re in a big financial mess. Because right now my partner is on maternity leave so our finances are extremely low – or rather below the living standard”

“What’s happening now is they’re detaining me so often. Each time I’m away there’s nothing my partner can do to make money and her hours are already cut short if I’m not around to look after the children. So unless I’m here she won’t be able to work, to do anything.”

Not only does deportation law sanction cruel treatment of children and partners provided that it is not excessively cruel, there are other important family relationships that are overlooked entirely,

such as the bonds between adults and their parents. For **Jonathan**, the saddest part was the suffering of his parents, as his mum passed away while he was in the prison.

"[If I'm deported] it's going to affect my family a lot, especially my wife and youngest child. The eldest two, they're going to feel it but eventually they'll get on with their lives. But my youngest one, he's doing his GCSEs now so it's the most crucial time of his life and the next 2-3 years."

"My wife's been on a depression medication on and off for the last 9 years, especially with three teenage boys. It was hard and my children were definitely affected, specially my middle one. [...] He stopped his studies because he couldn't concentrate. [...] It did affect them definitely a lot. And not only that, those effects are probably going to stay for the rest of their lives. [...] My parents suffered as well. My mum especially – she passed away when I was in the prison. That was probably the saddest time for me."

Raphael felt that the Home Office was playing games with him – knowing that he has a family and making it impossible for him to do any of the things he needs to maintain his family.

"They [the Home Office/UK gov] have been playing game with my life. [...] It's literally driving the family crazy. My kids don't know if I'm going to be here or I'm gone."

"Literally it's driving me crazy. I'm mentally disturbed. I have to take medication for sleep. I'm hearing voices telling me to kill myself and the only thing that's helping me is just to keep taking my medication. [...] They know that I'm ill; they know that I've got mental problems, they don't want to have nothing to do with it... why is it that they're still trying to put me on a plane knowing that I'm mentally sick?"

Mo described having to hide the reason for his 9-month absence due to detention from his young son.

"During that time [when I was in detention], [my son] was 5 years old. I wasn't around for a long time, so when I came back he was asking: 'Daddy, where have you been?' So I had to tell him I went for work, so he didn't learn anything because I stayed a long time, almost 9 months. We didn't let him know [that I was in detention] [...] We [still] have to hide it."

"Everything was miserable. Everything was upside down [...] But up today we're still trying to manage ourself [...] I thank god with prayer. I'm out of it but it's not easy. It was a bad experience which I cannot forget for the rest of my life."

Paul described how he felt the system was affecting families generally. *"Humans are meant to be happy and I'm not happy due to what is going on [...] It's just bringing sadness into families, the kids and the parents."*

Home Office deportation decision letters:

The overwhelming evidence of the very serious and long-lasting harm that is caused to children by enforced family separation is at odds with the remarkably casual approach taken by the Home Office. In BID's experience the Home Office frequently makes use of stock phrases to justify decisions to deport parents and argue that forced family separation will not have any real impact on the child. The statements below are taken from Home Office deportation decision-letters:

There is *"no threat to the child's physical wellbeing"* if you are deported.

"There is no evidence of your child's emotional dependency on you".

"The children's emotional needs and care would be provided for them by their mother"

You can *"maintain the parental relationship with the children from abroad via modern methods of communication such as telephone, email or letter"*.

Often such statements, included within Home Office decision-letters, are based on minimal evidence. Despite extensive experience in this area of work, BID is not aware of a single case where the Home Office has actively sought the views of the child to inform its decision. The language deployed is disturbingly callous and the arguments display a lack of curiosity or care about the harm that may be caused to the child. There would rightly be outrage if a different government department were making the same kind of platitudinous stock arguments to justify the forcible separation of a child from a parent, if the parent was a British national.

It is impossible to see how this approach is compatible with the Home Office's statutory duty to safeguard and promote the best interests of children in the UK.

1.2 No second chance: unending punishment and unfair treatment

The detention and deportation system inflicts sequential and seemingly never-ending punishment upon individuals and their families. We have already spoken about the lasting trauma and long-term mental health impact caused by periods of detention and living under the threat of deportation. Related to this is the feeling that many interviewees had that they were being continually punished for a single mistake and were denied a chance of rehabilitation.

Deportation is experienced as a continual and relentless punishment for a number of reasons. When they are not detained people facing deportation in the UK have their lives heavily restricted by the immigration bail regime. Most are prevented from working or carrying out normal activities that enable them to participate in society or engage in rehabilitation. They may also be subject to indefinite electronic monitoring and fitted with an ankle-bracelet, and will be required to report to the Home Office on a regular basis. The government recently introduced GPS tagging for people on

bail, a highly intrusive form of monitoring that tracks the wearer's every move. The government is preparing to make GPS monitoring compulsory for all non-detained people facing deportation except where one of two exceptions apply, meaning thousands of additional people will likely be subject to this far more invasive form of monitoring¹⁰.

Deportation is also a continual punishment insofar as it constitutes a permanent end to that individual's life in the UK. People issued with a deportation order are banned from entering the UK for 10 years and there is no guarantee that they will be permitted to re-enter thereafter. This could mean a complete end to family life, and certainly an end to a child sharing a family life with a parent; or with a parent sharing a family life and the upbringing of their child. The punishment of deportation is generally final, and allows for no second chance for parent or child in the UK.

Interviewees generally stated unprompted that they had made mistakes but felt that they were being disproportionately punished. They were keenly aware of the fact that their status as not only an ex-offender but also a foreign national, rendered them susceptible to almost any punishment and that their access to basic human rights was diminished. Some interviewees highlighted the hypocrisy of a British state that champions human rights whilst simultaneously denying human rights to people facing deportation.

Jonathan, Charles and Adam articulated their claims in terms of entitlement to rehabilitation and the fact that their life should not be permanently ruined as a result of a single mistake.

"I understand people do commit crimes and people do make mistakes and but then again like I've said, the prison reports are very important so people who go to prison and if they come out and if they're changed people and they are back in the community, why not, they should be given a chance. Especially those people who are involved for the first time" (Jonathan)

"I've been here 27 years, I make one mistake, I went to prison – I was given 15 months in prison – and I face deportation. It makes all my life upside down; not for me only, for my family. Sometimes I feel people should get another chance, you know. Because if someone did three times or two times, that is bad you know. Because I've been released in 2013, until now I didn't do anything. I always keep my bail conditions." (Charles)

"I've been here 18 years, never left the country the minute I came here. I've always worked. I commit a crime, I paid for it, three times more than a normal people would have paid for it, I mean I paid what I owed. And you know, it's not like I've raped someone, it's not like I've killed someone, it's not like I've robbed someone, it was just some drugs cannabis – it's not the crime of the century. I mean come on, give us a second chance. People do change, do you know what I mean, they don't see any of this." (Adam)

¹⁰ For more information, see BiD's briefing on GPS monitoring: <https://www.biduk.org/articles/805-bid-s-briefing-on-electronic-monitoring>

Raphael and **David** spoke powerfully about the experience of being left in limbo as a result indefinite restrictions on their liberty.

"I'm in a bad place; I can't do nothing... I need to work. I need to learn ways to take care of my family, that's being rehabilitated... they know that I've got a family, they know that I've got to maintain my family...but they're telling me I can't work, I can't study, I can't do nothing voluntary so they're excluding me from England. I'm excluded. I'm not literally living, I'm just existing." **Raphael**

"It's not like it's finished, it's the same thing; I've been facing the same problem. Sitting for the past how many years, coming out of prison, without doing anything, it's just like you're somebody walking but you're a dead man. So I'm doing nothing, just like I'm helpless, hopeless for not being helpful, to even go out to fend for my family, to look after the kids, at least to pay back to the community for all the years that I spent out not being with them. I'm just hoping for a second chance to prove to everyone that I'm not a bad person, it's just a mistake that I've made, a wrong choice, that I go a wrong way." **David**

David and **Omar** articulated their claims of unfair treatment in terms of unjustly and infuriatingly harsh deportation legislation.

"I don't know what they mean by compelling circumstances. Do they want somebody to die in my family before they know it's compelling? I'm telling them that the country [they want to deport me to], I have not been there, I have not been there for ages, I don't know the situation, I don't know their system. They're going to dump me in a country where I don't know how to operate. All the Article 8 you throw at them they refuse it." **David**

"In one of the letters they sent to me they said that they understand that the relationship is genuine. But they continued with some all sort of long story of balancing the weight of the public against me and so on." **Omar**

Carl and **Ali** spoke about their own treatment in the context of the hypocrisy of a British government that claims to respect human rights and criticises human rights abuses in other countries.

"We complain about the Middle East and all this and that, but we do the same thing here. The difference is we do this charade of human rights. Human rights are for people who are born here; people who are not born here don't have any human rights. They lock you up, they don't care." **Ali**

"If you have an immigration case they say you're a danger to the public, so any foreigner, any foreigner it doesn't matter what you do. [...] when they see China is doing this thing, they say that China are not following their human rights procedure, whatever. The way that I have been treated here in England is very, very bad." **Carl**

The detention and deportation regime forces people through years of limbo, followed by a permanent exile that offers no chance of rehabilitation. Our interviewees as well as our clients are prepared to accept that they have made mistakes but experience this never-ending punishment as unjust and overwhelmingly disproportionate.

Injustices within the criminal justice system drag foreign nationals into the deportation system. Overwhelmingly people facing deportation are BAME and therefore likely to face discriminatory outcomes in the criminal justice system. David Lammy's 2018 independent report into outcomes for Black, Asian and Minority Ethnic individuals in the criminal justice system found that "Those who are charged, tried and punished are still disproportionately likely to come from minority communities"¹¹. Racial disparities in the criminal justice system have recently been recognised in sentencing guidelines for judges¹². Equally there has been an increasing tendency to criminalise immigration-related matters¹³. The interlocking disadvantages that foreign nationals face as a result of interactions between the criminal justice and immigration system are exacerbated by increasing collaboration between the police and Immigration Enforcement in recent years, including the embedding of immigration officers in police custody suites¹⁴.

Research by Sarah Turnbull and Ines Hasselberg at the University of Oxford Centre for Criminology found¹⁵ that foreign nationals are:

- a) more likely to be imprisoned on remand while awaiting trial and sentencing (Banks, 2011; Aliverti, 2013)
- b) more likely to be given longer custodial sentences (Richards et al., 1995; Bhui, 2007; Fekete and Webber, 2010)
- c) more likely to be refused re-categorisation to more open prison conditions,

¹¹ The Lammy Review An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System pg 3
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf

¹² Sentencing guidelines to highlight disparity between BAME and white offenders
<https://www.lawgazette.co.uk/news/sentencing-guidelines-to-highlight-disparity-between-bame-and-white-offenders/5107175.article>

¹³ "during the first 97 years of the last century, around 70 new immigration offences were created in the UK, but between 1997 and 2010, more than 80 new offences were created" Hindpal Singh Bhui: 'the place of 'race' in understanding immigration control and the detention of foreign nationals' Criminology & Criminal Justice (2016)

¹⁴ Parmar, A. (2020). Arresting (non)Citizenship: the policing migration nexus of nationality, race and criminalization. Available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/03/arresting>

¹⁵ Sarah Turnbull and Ines Hasselberg (2016) *From prison to detention: The carceral trajectories of foreign-national prisoners in the United Kingdom*

- d) Likely to be detained after sentence under immigration powers, and refused bail from immigration detention on account of their previous conviction(s)

Section 2: Access to Justice

People facing deportation were hit particularly hard by the removal of legal aid for immigration cases. In this section we examine the multiple and often interacting set of barriers to justice this group faces. While legal representation is vital for appellants, private representation is prohibitively expensive and the Exceptional Case Funding scheme is not a satisfactory replacement for mainstream legal aid. The barriers that exist are exacerbated when appellants are required to go through the process while deprived of their liberty, with people held in prisons facing particular barriers.

2.1 Necessity of legal representation

The assistance of an experienced practitioner is essential for people seeking to appeal against deportation. Yet prior to the introduction of the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act 2012, the government argued that

“The Government’s view remains that, in general, individuals in immigration cases should be capable of dealing with their immigration application, and it is not essential for a lawyer to assist.”¹⁶

To put it simply, this reasoning is completely wrong. Legal representation is crucial in deportation cases and British immigration law is extremely complex and has become more so in recent years. The Law Commission has recently recommended the simplification of the Immigration Rules and the introduction to its report states:

“It is widely acknowledged that the Rules have become overly complex and unworkable. They have quadrupled in length in the last ten years. They have been comprehensively criticised for being poorly drafted, including by senior judges. Their structure is confusing and numbering inconsistent. Provisions overlap with identical or near identical wording. The drafting style, often including multiple cross-references, can be impenetrable. The frequency of change fuels complexity.”¹⁷

¹⁶ Reform of Legal Aid in England and Wales: the Government Response, Page 27 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228890/8072.pdf

¹⁷ The Law Commission, Simplification of the Immigration Rules: Report, Page 1 https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf



As the parliamentary Joint Committee on Human Rights (JCHR) argued in 2019 in their inquiry into immigration detention¹⁸:

*“Given the challenges individuals face in detention, and the complexity of the law, legal advice and representation is crucial to help individuals to pursue their rights effectively”.*¹⁹

Deportation appeals are no exception and any appellants seeking to represent themselves would be required to navigate relevant legislation, Home Office policy guidance and recent caselaw. As we have previously noted in this report, meeting the legislative tests to avoid deportation requires the appellant to understand what expert evidence they will need to obtain, how to access it, and how the tests have been interpreted by the courts in a series of cases. For those required to prepare their case while deprived of their liberty in a prison or an IRC, the obstacles are even greater.

Through providing legal advice and representation to people facing deportation we have found that unrepresented appellants are unlikely to have an understanding of the legal tests that they are required to meet; the types of evidence required; or the importance of bringing an application and relevant evidence within timescales set by the Home Office.

A number of interviewees spoke about why having a legal representative is essential to appealing against deportation.

Ali had been told that he was not eligible for legal aid and so had to represent himself in court. He told us that at the hearing the Home Office representative spoke for just a matter of seconds, and Ali spoke about his case for ‘20-25 minutes’. He was expecting the judge to ask questions but this did not happen. He was later shocked when he found that his appeal had been dismissed, and that it listed the fact that he had not provided any evidence. He hadn’t properly understood the process and felt that the judge simply ‘sided with the Home Office’. Now that he has a solicitor who has taken his case, **Ali** said:

“I would advise anybody not to do it themselves. If you do it yourself, it’s a miracle if you actually win”.

None of the other interviewees had tried to represent themselves in a deportation appeal. **Charles** had tried to represent himself in a bail application – a process which is designed to be simple and accessible to unrepresented appellants – but had faced considerable difficulty.

“We didn’t know what to do, we didn’t know anything, we just, finally I don’t know what to do, in the second [bail hearing] I went myself in my hearing, because I didn’t have any money I couldn’t afford it. And at that point the judge was feeling sorry for me and said you need to contact BiD.”

Other interviewees stated that their experience of the deportation appeal system was enough to prove that legal representation is essential. Five interviewees explicitly stated that self-

¹⁸ Joint Committee on Human Rights Immigration detention Sixteenth Report of Session 2017–19, published January 2019

¹⁹ JCHR Detention Report at para 47

representation in a deportation appeal would be difficult or impossible, and all interviewees had gone to significant lengths to try to secure legal representation.

“For an ordinary person it’s impossible to represent himself – you can’t say that, you can’t do that – and stuff like that. There’s so many; they just make it so. It can be simplified if they want, but no, they make it so difficult. It’s difficult I think for an ordinary person to represent themselves.” (Jonathan)

“Of course it’s going to be very, very significant for a barrister to be there, a lawyer to be there because they know what terms to use and how to you know put things together. The problem is with the majority of us because we’re not fluent in English, and that’s a huge barrier to be able to represent yourself in any circumstances let alone through the court” (Adam)

Legal representation is especially important because Home Office decisions across the immigration system are frequently incorrect – half of all appeals against immigration decisions were successful in the year leading up to June 2019²⁰. The Home Office is also repeatedly found to have broken the law in its operation of the immigration detention system – in the last year alone it was required to pay out £8.2 million to compensate the 312 people it was found to have detained unlawfully.

The evidence suggests that lack of legal representation has a detrimental impact on the prospects of success in a deportation appeal. The government does not publish data on the number of deportation appeals or the success rate of those appeals, so we cannot determine whether legal representation has an impact on success rates. However when BiD requested this information under the Freedom of Information Act we were instead provided data for EEA deportation appeals – see Table 1 below. The evidence shows overwhelmingly that those with legal representation are far more likely to succeed. In each year of the years where data was provided, the chances of success for unrepresented clients was less than half that for represented clients.²¹ It is reasonable to assume that a similar trend is occurring in relation to non-EEA deportation appeals.

Table 1: Success rates in EEA deportation appeals for represented and unrepresented appellants				
Year	Case	Total	Allowed	Dismissed
2015/16	Not represented	303	63 (20.8%)	240 (79.2%)

²⁰ More than half of immigration appeals now successful <https://www.independent.co.uk/news/uk/home-news/immigration-appeals-home-office-success-rate-windrush-migrant-crisis-a8957166.html>

²¹ This data has been amalgamated from 2 FOI requests. The first FOI request, ref. number 190315028, response received 10 April 2019, covers the first 3 periods. The 4th period (2018/19) was covered by FOI request ref. number **200309026** received 6th April 2020.

	Represented	630	268 (42.5%)	362 (57.5%)
	Total	933	331 (35.5%)	602 (64.5%)
2016/17	Not represented	253	55 (21.7%)	198 (78.3%)
	Represented	403	197 (48.9%)	206 (51.1%)
	Total	656	252 (38.4%)	404 (61.6%)
2017/18	Not represented	264	56 (21.2%)	208 (78.8%)
	Represented	339	186 (54.9%)	153 (45.1%)
	Total	603	242 (40.1%)	361 (59.9%)
2018/19	Not represented	268	48 (17.9%)	220 (82.1%)
	Represented	323	179 (55.4%)	144 (44.6%)
	Total	591	227 (38.4%)	364 (61.6%)



SECTION 2.2: Cost of private representation

Legal representation is expensive. Although some individuals will be able to scrape together funds to pay for some private representation, people challenging deportation need to provide evidence in the form of expert reports to satisfy the high evidentiary threshold. Independent social work or psychiatric reports that are often crucial in cases involving children can cost £1000-2000 or more. Equally, private representation can become prohibitively expensive if cases progress through the higher courts. If a person does not speak good English, the lack of legal aid means that the costs for legal representation are significantly increased as they need to pay interpreters as well.

As we found in section 1, every family involved in the research had faced considerable practical or financial difficulty as a result of challenging deportation. A central element of this was the difficulty of funding legal representation, a problem which every interviewee commented on. A number of interviewees commented on the fact that this was impossible at a time when they were prevented from working and lacked a source of income. Some interviewees commented on the fact that they had been exploited by private solicitors, in some cases wasting thousands of pounds without receiving meaningful assistance.

Jonathan argued that cuts to legal aid had been designed to make it impossible for people to afford challenges to their deportation. He himself had been able to borrow money, but he had worked on the information desk while in prison, which included providing information on legal advice charities to assist people facing deportation. Through this work he had seen many cases of people who had been denied the opportunity to challenge their deportation. He said that he had seen people sign and agree to leave the country, simply because they didn't have the money.

"I had to borrow money. My children gave me some money as well but it costs a lot these private [lawyers]. The barristers they cost a hell of a money and every time they go to the court it's thousand pounds."

"I've seen many people and just because they didn't have money, they just signed and they left the country. And you know, they could have easily won their cases, they had very small sentences and stuff like that, but because they didn't have money to hire a solicitor."

"This deportation system is not right. The way they're doing it is wrong. The reason they pull out the legal aid is because they knew people won't be able to afford. And they're successful and they're the reason most of the people they just sign and they left the country because they couldn't, and they left their children here. Families broken, children suffering."

Paul also felt that the cost of legal representation meant people who may have strong cases were priced out of a fair hearing. Kehinde himself had been forced to borrow money from a credit union to challenge deportation.

"It's helpful [private legal representation] but the hard part is I have to pay. So my partner and I need to go lend money from the credit union to be able to afford it. It's what I'm trying to work on right now to go to the credit union to request to borrow money."

"We've got no income and there are bills of thousands and thousands of pounds. It's too difficult to afford it. In most cases most of the people have got the right under the conduct of law, but they couldn't be able to finance it; actually it's this debt that is upsetting families."

Paul

A number of clients reported having been exploited by private lawyers.

Ali now has a legal aid lawyer that he obtained via referral from BID. He told us that he previously had a private solicitor who promised him that he would get him out of detention, if he paid him. He felt that he had been exploited by the fact that he was in a vulnerable position, desperate to get out of prison and unable to access advice.

"They guaranteed me I was going to get out the next day based on the pay. What I didn't know was he was saying that so I could pay him money, all the money I had until I paid him. And he didn't tell me nothing. All my applications got declined. And he promised me that I was going to get it, that all I had to do was just pay."

I was all alone. I was desperate and that's why I paid that guy £5,000. I was desperate because I was in jail [...] If not for people like Bail for Immigration Detainees, guys like me, I wouldn't be here."

Charles was charged thousands of pounds by a private lawyer – he reported paying £5,500 over a number of months for very little work, including a medical examination where a doctor saw him for 5 minutes and didn't assess him properly, and a bail hearing where he was charged £800 in part to pay for a barrister that didn't attend. Fortunately Charles is now represented by a legal aid solicitor, after a referral was made by an organisation that supports people in immigration detention. His current solicitor wants to make a complaint about the way that **Charles** and his family were treated by the previous solicitors.

"He [previous solicitor] didn't do anything at all. That's what my [current legal aid] solicitor said if she does our case she wants to make a complaint about that, the way they've treated us. I said I'm happy to make a complaint about what happened. I went for bail hearing. They said we're going to charge you for bail hearing. And he charged me £800. And my wife she's working you know and we didn't have that money, so she had to loan me for it. And she said 'why are you charging us 800?' And they said 'oh, we need to pay for the barrister and this and that.' So we give them 800 and what happened that day for bail hearing he didn't bring a barrister, he just turned up himself. And that time when the judge asked him the question why.....he doesn't know what he's doing, he doesn't have any clue."

Raphael reports that he can no longer access legal aid and has since been struggling to afford to fight his case, particularly having a family with three children. He also felt that he has since been misled by private solicitors.

"These solicitors are playing games because they took £200 off me for consultation and in the consultation they're not telling me nothing about what's going to happen when I come to pay the money."

“At first I had legal aid. But what I’m saying now it’s very difficult because I’ve got three kids, I’ve got bills to pay and my partner’s the one that – basically Immigration is saying that you’re the one that’s sponsoring me”

Carl also felt that private solicitors are not only prohibitively expensive but that some seek to ‘take advantage’.

“At the moment it’s very difficult to afford the private one because it’s only my partner who works and then the lawyer charges you thousands. And for the deportation cases, some take advantage; so it’s very difficult to afford it at the moment.”

Others shared the view that paying for private representation, difficult enough at any time, is unthinkable when the Home Office has also denied you the right to work.

“I cannot find a different lawyer because I haven’t got two cents worth each other [...] If I’m not going to be able to work, where am I going to get money from? After two and a half years, I’ve just come out of prison. And there’s a limit to family that can support you, you know.” (Adam)

“At the moment I’m not working, I’m not doing anything. It’s only my wife that supports me at times, and the money given to them that is out of the money I manage myself. So I cannot afford any money to pay any private solicitor at the moment.” (Mo)

“It’s very difficult, to find all this money. Not as simple as it might sound, it’s a big dent in our finances – with the rent and the children. It’s hard.” (Antonio)

“It’s cost over 20/25,000 thousand pounds – all of my savings gone [...] if families can’t afford to pay for things like this; it’s cost me loaning from friends and companies just to pay my solicitors’ bills. I believe there should be support for it” (Omar)

For **David**, the cost has become prohibitively high and when interviewed he stated that without an income he felt that he would have to give up fighting his case. He said he was informed by his lawyers that he would need an expert report from an independent social worker and that this would cost £1,173 in addition to thousands of pounds in legal fees.

“It was costing a lot of money; I don’t have money, I don’t have a source of income. I don’t have a source of income and no one is ready to help me about legal aid [...] So the situation is that there’s no money for me to pursue this case anymore.”

The evidence overwhelmingly suggests that it is virtually impossible to access a fair hearing for those facing deportation without the benefit of legal aid.

SECTION 2.3: Deficiencies in the Exceptional Case Funding scheme

Since 2013, when immigration law was largely removed from the scope of legal aid (under the LASPO Act 2012), people have been required to apply for ‘Exceptional Case Funding’ (ECF). This is the process for accessing legal aid for areas of law that fall outside the scope of mainstream legal aid.

Applicants must meet a financial means test, a merits test, and demonstrate that a grant of funding is necessary to prevent a breach or risk of a breach of human rights.

This section will examine the findings from BiD's own ECF project, as well as findings from our interviews.

Overall we have found the ECF scheme to be an inadequate safeguard that cannot eliminate the urgent need for legal aid to be reinstated for immigration cases.

BiD's Exceptional Case Funding (ECF) project:

Since 2013, when immigration law was largely removed from the scope of legal aid, people have been required to apply for 'Exceptional Case Funding'. This is the process for accessing legal aid for areas of law that fall outside the scope of mainstream legal aid.

In recognition of the barriers to justice for people facing deportation, and the fact that BiD only has a the capacity to make a small number of applications for ECF itself (as we continue to do - these are prepared by our Article 8 Deportation Advice Project (ADAP)), BiD set up a project to expand its capacity to make Exceptional Case Funding applications for people challenging deportation who were unable to access legal aid. The project was launched in January 2019 in collaboration with four commercial legal firms (Ashurst, Debevoise and Plimpton LLP, Dechert LLP and Orrick, Herrington and Sutcliffe LLP solicitors). The Legal Manager of the ADAP manages this project supervising pro-bono solicitors to make applications for ECF to advance their challenges to deportation at all stages of the deportation process, from the earliest 'One Stop' Notice of Liability to Deportation, through to appeals and fresh human rights applications to revoke the deportation order, or to assist clients with making fresh claims e.g. where they have previously omitted to provide necessary expert evidence. For fresh claims, the situation is often more complex than just obtaining expert evidence as the 'fresh claim test' in the Immigration Rules needs to be met, which is a complex test that unrepresented individuals cannot be expected to even be aware of, let alone understand.

BiD felt the project was necessary for a number of reasons. In our experience the vast majority of people are not aware of the existence or function of ECF and so are not accessing it. This is particularly true of people in prison or detention. The application process itself is complicated and time-consuming, and difficult for individuals to navigate by themselves. The information required includes a full means assessment with evidence, often requires medical evidence, and numerous other factual bases. In addition, the client is expected to put forward a legal argument rooted in human rights legislation or EU law to reach the merits threshold.

The client group for this project is particularly vulnerable. All have been told they face deportation, many to countries of which they have no memories, having moved to the UK as children. Many have children in the UK who are British citizens and deportation would separate them from family, friends and their support network. Many are deprived of their liberty in immigration removal centres and prisons, isolated from communities and support networks.

Without legal aid, access to ECF is crucial given the enormous significance of deportation to the lives of families and people affected.

Findings from BiD's ECF project:

Since the beginning of the project in 2019 we have made 25 complete applications for ECF. Of the 25 applicants, all were facing deportation and required legal aid, and 17 were parents with minor children in the UK.

All 25 applications have been granted.

Timescales:

From the date of application it took an average of 18.8 days for the Legal Aid Agency to grant ECF.

Of the 25 cases in the sample, 21 have been successfully referred to solicitors. In many cases we have struggled to find solicitors who will accept cases. We attempt to make referrals through contacting individual firms that we have established links with, and making requests on the Refugee Legal Group and the Immigration Law Practitioners' Association's Google Groups, but despite their wide memberships, this method is not always successful. This work uses up a lot of valuable time.

There are four cases where ECF has been granted but we have not yet been able to find a lawyer to take on the case. In three of those four cases more than 100 days have passed since the grant of ECF and we have been unable to find representation for the client. In one case a client has been waiting more than 6 months to find legal representation. There have been instances where we have had to apply for appeals to be adjourned pending the referral of cases. We have also had to assist clients in other ways, such as writing to the Home Office to seek an extension of time for an individual to respond to requests for information and helping individuals complete Case Management forms from the court.

Out of the 25 cases, it has taken an average of 52.3 days to find a solicitor. That figure is an underestimate as it includes the four cases where we are still looking for a solicitor.

In the 25 cases, it took an average of 71.2 days from the point at which we made an ECF application, to the point where the client had secured legal aid representation (in the same way as the previous figure, this is an underestimate).

Problems with the ECF scheme

Our experience of the ECF scheme has demonstrated that it is a wholly inadequate replacement for properly funded legal aid in the context of Article 8 deportation cases.

Firstly, the timescales for ECF applications, decisions and referrals to solicitors are not compatible with the strict timescales that appellants are required to meet. For instance, once an appeal has been lodged with the Tribunal, an appellant must comply with directions for the provision of information and documentation to the court. Whilst these deadlines can usually be extended on application, it requires detailed reasons to be provided to the court as to why more time is required.

In five instances we have had to apply for appeals to be adjourned in order for legal aid representation to be secured.

Secondly, the process is unnecessarily burdensome. We found that it took on average 73.2 days from the date of ECF application to that individual securing legal aid representation, but this figure does not account for the amount of time that it takes to complete an ECF application. This is a lengthy and time-consuming process including a full means assessment with evidence, various pieces of evidence depending on the nature of the case, and legal arguments rooted in human rights legislation. Compiling this evidence can be a lengthy process and may involve gathering documents from various different sources and contacting multiple third parties. This is particularly time consuming if the applicant is in prison. In certain cases this process, conducted by pro bono lawyers under BID supervision, can take months.

Thirdly, there is not enough capacity within the sector to complete ECF applications for all those who need them. Those people lucky enough to have been taken on by BID's ECF project are a minority of the total who need assistance. The project is very small scale with just one member of staff, and the help of pro bono lawyers, and we are unable to take on all the clients that require ECF. There will be many others who miss out. While ECF applications are prohibitively complex for applicants to complete without assistance, lawyers are disincentivised from completing the applications as they run the risk that they will receive no payment for work conducted on the file if the application is unsuccessful. The financial risk for legal aid practitioners, who are already stretched, is considerable and it is not financially viable for firms to make applications in many cases.

Finally, given the high grant rate it is unclear what purpose the ECF process serves beyond an unnecessary layer of administration. All of BID's ECF applications thus far have been granted. Looking at the overall picture, the Public Law Project reported²² that there were 2,525 immigration ECF applications made in the 2019/2020 financial year and over 80% of those applications were successful, but that ECF 'continues to be underutilised compared to figures projected prior to LASPO'.

The additional layer of bureaucracy created by the ECF scheme simply builds an additional barrier to legal aid for people facing deportation, meaning that people are more likely to be wrongfully deported, with children more likely to grow up without a parent, simply because they were unable

²² Public law Project *The case for broadening the scope of immigration legal aid*
<https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf>

to access justice. It is costly to the Legal Aid Agency that is required to have additional bureaucratic structures to determine applications. Finally, it is harmful to the legal aid market and makes it more difficult for high quality providers to remain viable²³ and has contributed to the collapse in the number of providers since LASPO came into force²⁴. It is also worth noting that even once ECF is granted, it is subject to the non-asylum standard fee of £234, which is ‘far too unprofitable for many providers’²⁵. All of these factors make it more difficult to find a representative able to take on the case once ECF has been granted, a problem BID has frequently encountered in the course of its ECF project.

ECF project – experience of BID interviewees

We asked all interviewees whether they had made applications for Exceptional Case Funding. Out of the 11 interviewees, six people had not heard of Exceptional Case Funding Scheme. Four people had made ECF applications, with varying results.

Omar filled out the ECF application form without assistance and was refused. He felt that he did not have the legal knowledge or understanding to make a successful application.

“I made an ECF application – my first time ever doing it they told me it was refused but I did a review and they told me I’m ineligible for ECF. They told me to make a fresh application and I really don’t understand why. I’ve had to do it on my own because my lawyer doesn’t do legal aid.”

“I’m just using my general knowledge to fill it – I really don’t know what they expect me to put in there, lawyers know that.”

Carl also made the application without assistance and at the time of interview was waiting for a reply. He said *“it’s very tricky, a lot of it is very difficult.”*

Ali and **Charles** both made applications for ECF and were successful, although both had received assistance from others. In both instances the application was made by their legal representative. **Ali** had been referred to his lawyer by BID whereas **Charles** had been referred by a different NGO.

Paul said that he didn’t have time to look for legal aid because the timeline of the Home Office had been so tight.

²³ For more details see Dr Jo Wilding’s report on the immigration legal aid market, *Droughts and Deserts* (2019)

²⁴ According to Saira Grant, the overall number of providers able to undertake immigration (non-asylum) work has decreased from 249 (pre-LASPO levels) to 178 (2019). There were 94 local areas with Law Centres or agencies offering free legal services in 2013–14, but by 2019–20 there were only 47. From Saira Grant, “An overview of immigration advice services in England and Wales” Research commissioned by the Paul Hamlyn Foundation March 2020. <https://www.phf.org.uk/publications/an-overview-of-immigration-advice-services-in-england-and-wales/>

²⁵ Ibid

“It would have been better if I could get legal aid, but the problem is how can I get legal aid? I wouldn’t be able to get it on time or even get it at all.”

This is generally a significant problem for appellants, particularly where they are deprived of liberty and where this takes place in a prison.

SECTION 2.4: Accessing immigration advice in prison

All interviewees had spent time in prison and some were also detained under immigration powers at the end of their sentence. It is common for crucial parts of the deportation appeals process to take place while the individual is in prison, either during the course of their custodial sentence or held post-sentence under immigration powers.

BID provides legal advice and representation to people detained under immigration powers in prisons and we are all too familiar with the multiple, mutually compounding barriers to accessing justice that our clients face.

In IRCs, people can access legal advice under the ‘detention duty advice scheme’ (DDAS) established in 2005. Under the DDAS detainees are entitled to a free half-hour appointment with a legal aid immigration lawyer. The scheme is not perfect – in BID’s experience the quality of advice on the DDAS is frequently poor and many of the firms delivering advice have very little experience in what is a very complex, fast-changing and specialist area of immigration law²⁶. However it is an important safeguard that ensures people have at least some access to immigration advice, and people detained in prisons are disadvantaged by the lack of access to an equivalent scheme.

Detainees in prisons are required to find an immigration solicitor while imprisoned, and must convince them to come to the prison to take on the case. This is difficult enough for anybody deprived of their liberty in a prison and but for those who do not speak English or who have mental health problems or learning difficulties this barrier may be insurmountable. Prisons in which immigration detainees are held post-sentence are often located far from any source of publicly-funded immigration legal advice, since firms providing immigration advice are overwhelmingly concentrated in cities. In March 2020, 66 prisons were used for immigration detention purposes²⁷. Of those, 22 do not have any legal aid immigration advisors within at least a 25 mile radius²⁸. To make matters worse, lawyers are structurally disincentivised from visiting the prison for an initial appointment as they run the risk of not being paid by the LAA if it later transpires that legal aid will not be available. Her Majesty’s Inspector of Prisons (HMIP) set out the problem in their 2015 position paper on issues facing immigration detainees in prisons:

²⁶ For instance see BID Spring 2019 Legal Advice Survey https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/890/190523_legal_advice_survey_spring_2019.pdf

²⁷ This data was obtained through a Freedom of Information request made to the Ministry of Justice by the Association of Visitors to Immigration Detainees

²⁸ According to the Law Society website

"The terms of the contract with the LAA mean that lawyers may be reluctant to visit immigration detainees in prisons because of the long travel times associated with getting to some prisons. In addition, lawyers will only visit detainees if they know they will get paid by the LAA. However, the LAA will only fund a protection case if it has a 50% chance of success. To assess whether the case meets this threshold a face-to-face interview is required between the lawyer and the detainee. In an IRC this assessment can be conducted in the free 30 minute advice slot. But for prisons lawyers find themselves in a catch 22 situation: they are unlikely to risk travelling, sometimes long distances, to take instructions from a detainee if there is a chance they will not be paid²⁹."

Most people in prisons do not have access to mobile phones, and certainly not to the internet, and most communication happens via a very slow postal system. Telephone access is often highly restricted and may depend on the time that a detainee has out of their cell (often an hour per day, or less, particularly during the pandemic³⁰), the amount of credit they have on their phone account, and normally the upper limit of 10 minute phone calls. This poses a particular problem when people are served with Home Office documents that require urgent advice and assistance in order to respond within the deadline, such as the 'one-stop notice' in deportation cases³¹. Often people who have appeal deadlines do not know when or if their appeal against deportation will arrive with the court. HMIP has also found that barriers to communication for those held in prison prevent people from researching information about their country of origin (for instance, for an asylum claim) and means they cannot *"contact friends and family to gather evidence to show the strength of their family and social ties in the UK."*³²

These concerns have been echoed by the parliamentary Home Affairs Committee and the Joint Committee on Human Rights³³.

In a landmark judgment handed down by the High Court in February 2021 in the case of *R (SM) v the Lord Chancellor*³⁴, Mr Justice Swift found that the arrangements governing access to legal aid for immigration detainees in prisons are unlawful. The court found that people held in prisons are

²⁹ *People in Prisons: Immigration Detainees: A Findings Paper* <https://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2015/11/HMIP-Immigration-detainees-findings-paper-web-2015-1.pdf>

³⁰ *The Guardian* Torture victims kept in solitary by Home Office for up to a year <https://www.theguardian.com/uk-news/2021/may/15/torture-victims-kept-in-solitary-by-home-office-for-up-to-a-year>

³¹ This is also known as the 'Notice of Decision, Decision to Deport'. It sets out that the Home Office intends to deport an individual and invites the individual to provide reasons why they should be allowed to stay in the UK. It is important to provide a response within the deadline.

³² Ibid.

³³ See for example: Joint Committee on Human Rights *Immigration detention* <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf> pg 20

Or Home Affairs Select Committee *Immigration Detention* https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/913/91306.htm#_idTextAnchor020
Paragraph 97

³⁴ [2021] EWHC 418 (Admin) Case No: CO/454/2020 [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2021/418.html&query=\(duncan\)+AND+\(lewis\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2021/418.html&query=(duncan)+AND+(lewis))

disadvantaged by the lack of an advice scheme such as the one that exists in IRCs, and this difference in treatment has not been justified and amounts to discrimination.

BID intervened in the case and provided evidence to show that the problems faced by the claimant were systemic. BID had previously provided assistance to the claimant, SM, when he was detained in prison under immigration powers, and referred him to Duncan Lewis solicitors. At this point he had been without solicitors for 10 months and unable to appeal the refusal of his asylum claim. We have encountered many people in a similar situation to SM and our evidence to the court was based on long-term data collection to show the practical obstacles that our clients face in gaining representation, and statistics showing the lower levels of legal representation among our clients in IRCs.

The problems identified by the court in SM were reflected in the experiences of the interviewees in this research. In the course of most interviews the issue of access to legal advice in prison arose.

Jonathan had a unique experience, having worked inside the prison on the information desk, helping signpost people to relevant information and had witnessed first-hand the lack of access to legal aid. He said that he had seen many people “just because they didn’t have money, they just signed and they left the country. And you know, they could have easily won their cases, they had very small sentences and stuff like that, but because they didn’t have money to hire a solicitor.” **Jonathan’s** (and indeed BID’s) experience suggests that the combined effect of harsh deportation law, removal of legal aid and the lack of access to justice for those held in prisons may have a chilling effect on deportation appeals, and that people who may have strong claims to remain in the UK agree to return home because they are not aware of, or able to exercise, their right to challenge deportation.

Some of the people **Jonathan** is referring to may have been subject to the Early Removal Scheme, whereby foreign nationals can be removed up to 9 months before the end of their sentence. According to a report by the Immigration Inspector produced in 2018-19 this scheme accounts for 46.8% of all removals³⁵.

Some interviewees commented on the fact that while they were in prison they lacked support or they needed their friends or a partner on the outside to contact a lawyer, or contact BID, on their behalf³⁶.

“[I was] all alone. I was desperate and that’s why I paid that guy [private solicitor] £5,000. I was desperate because I was in jail. If not for people like Bail for Immigration Detainees, guys like me, I wouldn’t be here. I’d probably be dead” (**Ali**).

During the pandemic immigration detainees have been held indefinitely in their cells for 23 hours per day or more. This has had an appalling impact on our clients’ mental health. Those with pre-

³⁵ Independent Chief Inspector of Borders and Immigration, ‘ (2018–19) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881648/Annual_inspection_of_Adults_at_Risk_in_Immigration_Detention_2018-29.pdf

³⁶ 2 interviewees did not provide an answer to the question and 1 had not sought immigration advice in prison.

existing mental health conditions have deteriorated significantly in this environment while others who were previously healthy have developed mental health problems as a result.

As one client told us

“I feel that foreign nationals are treated like they don’t matter and that the Home Office wants us to be forgotten. I don’t have a good understanding of the law, but I find it hard to believe that solitary confinement for so long could be legal. It just feels illegal because of what it’s doing to my mind and body. If this isn’t breaching my rights, then what will?”

This practice has also had implications for access to justice as there are no legal visits and less access to organisations that might be able to provide other forms of practical support. This leaves people held in prisons unable to access justice to appeal deportation, or to challenge their detention or apply for bail.



Conclusion and recommendations:

The evidence is overwhelming and presents a compelling case for an overhaul of the existing system. This harm is sanctioned by primary legislation which allows cruelty to children provided that it is not excessive. This is fundamentally incompatible with the Home Office's duty to make the best interests of children a primary consideration in all decisions.

People appealing deportation decisions face multiple barriers to justice. Meeting the legislative tests for successfully appealing deportation is exceptionally demanding and requires substantial expert evidence. People are pushed through an adversarial system where they are confronted with the immense bureaucracy and practically limitless resources of the Home Office, often without legal aid to assist them. The ECF scheme is beset with problems and inaccessible to many. For those that are held in prison there are additional practical hurdles that make accessing legal advice very difficult if not impossible.

Primary legislation states that 'deportation of foreign criminals is in the public interest'. Our research reveals this to be a gross simplification. The harms caused by the deportation system are not reserved for the individuals targeted, and span many different areas of life, over many years. Very often it is children that suffer the most, with long-term consequences for communities and society as a whole. It is not clear what part of this broken system serves the 'public interest'.

The government needs to take bold steps to remove the harm that is being caused by the existing system. Unless and until such bold changes are implemented this national scandal will continue to unfold.

We call on the government to:

1. Overhaul the entire legislative framework surrounding deportation, including;
 - a. Repeal of the automatic deportation provisions introduced in the 2007 UK Borders Act
 - b. Repeal 117c (the 'Unduly Harsh' test) of the Nationality Immigration and Asylum Act 2002 and the corresponding provisions of the Immigration Rules at paragraphs 398, 399 and 399A.
 - c. Make the 'best interests of the child' *the* primary concern in immigration and deportation cases.
 - d. Strengthen provisions for those challenging deportation on the basis of Article 8 of the ECHR
 - e. Place greater weight on other types of relationships and the impact on the community (currently only parental or spousal relationships are recognised)
 - f. Recognise that deportation of parents is never in the public interest.



2. Reinstate legal aid for immigration cases
3. Ensure that there is access to high quality immigration advice for people in prisons serving a custodial sentence.
4. End the use of prisons for immigration detention
5. Reform the way that best interests assessments are conducted in an immigration context, including by
 - a. Facilitating expert reports to assess and evidence best interests of children.
 - b. Shift the burden of proof on to the Home Office, requiring that they take proactive steps to gather evidence for best interests' assessments.



BiD Bail for Immigration Detainees

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