

Rough Justice: children and families affected by the 2013 legal aid cuts

Bail for Immigration Detainees

Bail for Immigration Detainees (BID) is an independent national charity founded in 1998 to offer free legal advice and representation on bail to immigration detainees and to challenge arbitrary detention. As well as legal casework BID is involved in research, policy and advocacy work. BID's work was recognised in 2010 when it was awarded the JUSTICE Human Rights Award.

Summary

Following the April 2013 legal aid cuts, detainees can no longer access legal aid for the vast majority of immigration claims.

BID has carried out research to monitor the effect of the cuts on families with children. Without access to legal representation, most parents have little chance of successfully appealing their deportation or removal.

We investigated the cases of 102 parents who were separated from 219 children by immigration detention, deportation or removal from the UK.¹ Table 1 shows that 22 of the 102 parents were removed or deported without their children. More details of these cases are provided on p4. Even where parents were released, the Home Office had, in the majority of cases, detained them for the purpose of removal or deportation.

Over 80% of children for whom we were able to obtain these data were British citizens. 93% of the children for whom we have these data were born in the UK.² Their parents had typically lived in in the UK for long periods. The countries which the Home Office planned to remove or deport parents to included Zimbabwe, Somalia and Iraq.

95 of the 102 parents had been convicted of criminal offences and served sentences before being detained. In 70 of these 95 cases the parents' deportation or removal was triggered by non-violent offences including theft and false documents. In one of the cases involving a violent offence, a mother was convicted of Actual Bodily Harm against her partner. She was recognised by the court as a victim of domestic violence and had been acting in self-defence.

¹ See Appendix 1: Research Methodology for further details. The 102 parents left detention between 1st April 2013 and 30th September 2014; they had a total of 219 children under 18 living in the UK.

² Data were obtained on place of birth for 179 of the 219 children in the sample. Of these 179, 168 were born in the UK.

In public statements on ‘foreign criminals’, journalists and parliamentarians consistently cite headline-grabbing cases concerning people who have been convicted of rape or murder.³ However, our findings show that a considerable number of BID’s family team clients who are facing deportation have committed non-violent offences. Similarly, research by Oxford PhD student Luke de Noronha found that in 2006, during the foreign national prisoner crisis, around one third of media articles on ‘foreign criminals’ featured the word ‘rape’ or ‘rapist’, even though only 9 of the 1,023 released criminals had been charged with rape.⁴

Parents’ BID case files were reviewed to ascertain what legal advice and representation they accessed before and during their time as a bail client of BID. Worryingly, in these 102 cases, BID is only aware of two where an application for Exceptional Case Funding was made. Funding was granted in one of these cases after a prolonged court battle.

33 of the 102 parents either did not have a representative recorded on file, or were dropped by their representative. A number of the 28 parents who were privately represented reported that they could not pay for all the work needed, or that there were deficiencies in their solicitor’s work. Some parents received legal aid assistance for an asylum claim or Judicial Review, but this did not ultimately assist them with challenging their deportation or removal on the basis of their family life in the UK.

Findings

On average, parents were detained for 228 days each.⁵ A number of parents were detained for significantly longer; in one case a parent was held for 870 days. In some cases, children had no other parent to care for them and so were in foster care during their parent’s detention.

Table 1: Outcomes of detention

| Outcome | Number of parents |
|--|-------------------|
| Released on Temporary Admission | 8 |
| Released on Bail | 69 |
| Released – other ⁶ | 1 |
| Deported or removed from UK without children | 22 |
| Other ⁷ | 2 |
| Total | 102 |

³ See for example: Theresa May, 4th October 2011, Speech to Conservative Party Conference <http://bit.ly/qWR3dZ>; Daily Mail 2nd January 2013 ‘4,000 foreign criminals including murderers and rapists we can’t throw out. . . and, yes, you can blame human rights again’ <http://bit.ly/1185GtR>.

⁴ de Noronha, L. (29/10/2014) ‘Foreign Criminals: questioning the consensus’ *Open Democracy* <https://www.opendemocracy.net/ourkingdom/luke-de-noronha/%E2%80%98foreign-criminals%E2%80%99-%E2%80%93-questioning-consensus>

⁵ The 101 parents who we have these data for were detained for an average of 228 days.

⁶ In this case, it was not possible to determine whether the parent was released on bail or temporary admission.

⁷ In one case, the client’s partner bought a plane ticket for him and he left UK the day before he was to be forcibly removed. This was because the client had been informed by the Home Office that if he was forcibly removed he would be banned from re-entering the UK for five years, whereas if he arranged his own return he would be banned from re-entry for one year. The couple informed BID that they hoped to get married and be reunited in the UK. In a second case, the client was returned to his country of origin from detention. It appears that he was forcibly removed. However, shortly before his return he had informed BID that he had decided to co-operate with his removal and there was limited information on the file about his return. There was therefore insufficient information to place him in the category of ‘deported or removed.’

Table 2: Children’s ages on the date their parent was detained

| Age | Number of children |
|--------------------------------|---------------------------|
| Born during parent’s detention | 2 |
| 0-2 years | 49 |
| 3-5 years | 49 |
| 6-10 years | 61 |
| 11-14 years | 37 |
| 15-17 years | 15 |
| Unknown | 6 |
| Total | 219 |

Table 3: Children’s Immigration Status

| Immigration status | Number of children |
|---------------------------------|---------------------------|
| British | 132 |
| Refugee status | 1 |
| European Economic Area national | 15 |
| Indefinite Leave to Remain | 6 |
| Leave to Remain | 1 |
| No immigration status | 8 |
| Unknown | 56 |
| Total | 219 |

Table 4: Criminal convictions which triggered parent's deportation or removal

| Criminal conviction which triggered deportation or removal | Number of parents |
|---|--------------------------|
| No criminal convictions | 7 |
| False document offence ⁸ | 14 |
| Theft | 2 |
| Burglary | 2 |
| Robbery ⁹ | 5 |
| Fraud | 11 |
| Assisting/facilitating unlawful immigration | 4 |
| Drugs – Class C | 2 |
| Drugs – Class B | 1 |
| Drugs – Class A | 24 |
| Actual Bodily Harm | 2 |
| Other violent offence | 4 |
| Other/multiple ¹⁰ | 24 |
| Total | 102 |

⁸ In 10 of these 14 cases, the parent had no previous offences. In two cases parents had been convicted of minor driving offences. In a further case, the parent had previously been convicted of a driving offence; a false document offence; theft; and making false representations to make gain for self or another, cause loss to another or expose another to risk. In a final case, the client had previously been convicted of: possession of a false identity document; breach of terms of a suspended sentence; obtaining money by deception and handling stolen goods; using a false instrument; and fraud and forgery (for this last offence he received a fine and a two year suspended prison sentence).

⁹ Robbery has been categorised as a violent offence in this report.

¹⁰ See Appendix 2 for an outline of these parents' offences.

Parents deported without their children

As is set out above, 22 of the 102 parents in the sample were removed or deported without their children. Table 5 sets out the criminal offences which triggered their deportation or removal. In 17 cases parents' deportation or removal was triggered by non-violent offences.

Table 5: Criminal conviction which triggered deportation or removal - parents who were deported or removed

| Criminal conviction which triggered deportation or removal | Number of parents |
|--|-------------------|
| False documents ¹¹ | 2 |
| Assisting/facilitating unlawful immigration | 1 |
| Theft | 1 |
| Drugs – Class C | 1 |
| Drugs – Class A | 10 |
| Other/multiple | 7 |
| Total | 22 |

Case studies from two of the 22 cases in which parents were removed or deported without their children are set out below.

Case study: parent being deported

Peter came to the UK from Angola fourteen years ago during the Angolan civil war. He was refused asylum and lived here undocumented. He married and had a child. He was eventually convicted of a false document offence and detained. He spoke to his young son from detention every day. His wife reported that the child cried every day, asking where his father was. Peter was then deported.

Case study: parent being deported

Duncan came to the UK in 2001. He lived in the UK undocumented for some time, but was granted periods of leave as a visitor and student, and later discretionary leave. He married a British woman and they had three children. He was then convicted of a drug-related offence. After he had served his sentence the Home Office held him in immigration detention for 16 months.

During Duncan's detention, his wife Loretta struggled to cope with caring for their three children – aged eight, five and four - and social services became involved. Loretta had clinical depression and was receiving counselling.

A social services report produced almost 10 months into Duncan's detention found that: 'The father's absence has had a huge impact on the children's emotional health and well-being and it has now reached a point where the mother is almost at breaking point. The children appear to be blaming their mother for

¹¹ One of these parents had no previous offences. The other had previously been convicted of: possession of a false identity document; breach of terms of a suspended sentence; obtaining money by deception and handling stolen goods; using a false instrument; and fraud and forgery (for this last offence he received a fine and a two year suspended prison sentence).

their father's absence... they appear to be extremely distressed and angry. There is a high risk of the family breaking down if support is not provided.'

The report describes the children crying and screaming for Loretta's attention. The two younger children were regularly wetting the bed and wetting or soiling themselves at school. The elder child became very angry and would hit her younger siblings and broke the family's TV. She was referred for counselling by social services. In addition, Loretta was unable to find work because she couldn't afford childcare.

Duncan won an appeal against his deportation. However, the Home Office challenged this decision and the case went up through the higher courts. Duncan could no longer afford to pay for legal representation. He submitted his own appeal, and the papers he sent did not include all the necessary documents. His case was refused and he was later deported. Before this happened, his eight year old daughter wrote a letter stating:

'If Daddy goes to [his country of origin] I will feel very sad and I won't be able to do my work at school and I won't be able to sleep. And I will be very angry. I want him to read bedtime stories to me. If Daddy goes away it will be half of my heart. I will swim there [to country of origin] if I have to.'

Legal representation

Parents' BID case files were reviewed to ascertain what legal advice and representation they accessed before and during their time as a bail client of BID. Findings are set out in Table 6 below. Table 7 sets out the position of parents who were removed or deported.¹² These findings concern advice and representation for parents' substantive immigration or asylum cases - assistance with criminal matters, bail, challenges to legality of detention and so on are not included here.

Table 6: Legal representation

| Legal representation | No. of parents |
|---|----------------|
| No legal representative | 16 |
| Dropped by representative | 17 |
| Legal aid for asylum claim | 4 |
| Represented for Judicial Review – legal aid or private | 8 |
| Some private representation | 28 |
| Represented by BID's Deportation Project | 4 |
| Pro-bono assistance | 5 |
| Represented on a legal aid certificate awarded before the April 2013 legal aid cuts | 4 |
| Awarded Exceptional Case Funding | 1 |
| Unknown/not clear | 15 |
| Total | 102 |

¹² The research principally sought to clarify what assistance parents accessed after the April 2013 legal aid cuts, although in some cases details of help received before April 2013 are included. When BID caseworkers begin work on a case, they routinely ask clients whether they have a legal representative and if so what is being done by them. However, it is worth noting that BID's bail casework files often do not include full details of the client's situation in terms of legal representation - the findings set out here are based on the information available. In addition, there were some cases where the parent's situation in terms of legal representation changed repeatedly. In such cases, we have sought to place them in the category which most accurately summarises their situation. For example, one parent who is counted in 'pro-bono assistance' had a private solicitor who she was unhappy with before she accessed pro-bono help.

Exceptional Case Funding

Worryingly, in these 102 cases, BID is only aware of two where an application for Exceptional Case Funding was made. Before the April 2013 legal aid cuts were introduced, parliament was told that those affected would be able to apply for Exceptional Case Funding. This was to provide ‘an essential safeguard for the protection of an individual’s fundamental right to access to justice.’¹³ However, the Exceptional Case Funding scheme is inaccessible and unfit for purpose.

Many detainees are unaware that the Exceptional Case Funding scheme exists. The process for applying is complex and detailed. If legal representatives make applications for clients, they do so at the risk that they will receive no payment if the application is refused. Given that a very low number of immigration cases have received funding, this financial risk is considerable. It is therefore not financially sustainable for firms to make applications in very many cases.

One of the two cases where an Exceptional Case Funding application was made received funding. This case was part of the litigation in *Gudanaviciene and Ors v Director of Legal Aid Casework* [2014] EWCA Civ 1622. In this case, a group action was taken to challenge Legal Aid Agency decision-making on Exceptional Case Funding. Following a prolonged court battle, on 15th December 2014, the High Court found that the Legal Aid Agency had made unlawful decisions to refuse exceptional case funding in four of these cases, including the case of BID’s client. The vast majority of detainees will not be fortunate enough to find a legal representative who is willing to apply for Exceptional Case Funding for them, and to then to engage in a lengthy legal battle to challenge an unlawful refusal of funding.

Parents dropped by legal representative

In nine of the cases where parents were dropped by their representative, the file explicitly stated that this occurred due to lack of funding for the work to continue. In one case, the Home Office moved the parent from a detention centre in Scotland to one in England – the representatives could no longer act as the case moved out of the Scottish legal system. In three cases, it was not clear why the client had been dropped – in one of these, there was an ongoing application for permission to appeal when the solicitor ceased acting. In two cases, representatives ceased acting after permission to appeal to the Upper Tribunal was refused, and in two further cases the representatives said they did not think there was merit in pursuing the case.

Legal aid for asylum

As detailed above, four parents had a legal aid representative for their asylum claim. However, it is worth noting that these parents may have had claims to remain in the UK based on long residence and family life which will not have been addressed in an asylum claim, and legal aid is no longer available for private and family life claims.

¹³ *Hansard* HC Committee, 8 Sept 2011: Column 419

Judicial Reviews

Eight parents made applications for Judicial Review.¹⁴ In some cases, directions for a parent's removal were cancelled as a result of Judicial Review proceedings. However, this did not resolve the underlying issue of the parent's deportation appeal, which legal aid is no longer available for.

BID commonly sees cases where parents have not been adequately represented in their deportation appeals by private providers, particularly where expert reports which would have assisted the case are not obtained. When the case is refused and appeal rights exhausted, the parent is served with directions for their removal from the UK. In some cases, Judicial Review applications are then brought, and succeed in challenging the removal on the basis that the parent's claim has not been adequately considered. However, in order to resolve their immigration matter, the parent is likely to need to lodge a fresh Article 8 human rights application and an application to revoke their deportation order. Legal aid is not available for such applications, and this means that many people are not able to resolve their underlying legal problem.

In one of the cases in this study, a parent's removal was stopped by Judicial Review proceedings. The solicitors then applied for Exceptional Case Funding to represent the client in his deportation appeal in the Court of Appeal. Funding was refused. The solicitors informed BID that they could not go on representing the client. They said that even if they were willing to do the work for free, they could not take the financial risk that they would have to pay the costs of the Court of Appeal case if they lost and 'it is hard enough to cope [financially] as it is.' The parent then represented himself and was refused. He was released on bail, but the underlying problems with his immigration status remained unresolved.

Private representation

Twenty eight parents obtained some representation which they paid for privately. However, in a number of cases, parents repeatedly informed BID that they couldn't afford to pay their solicitor for all the work that needed doing. In one case, BID was in contact with a bail client after his release. His solicitors had told him that an Independent Social Work report about his children was needed as evidence for his case. This would cost hundreds of pounds and he could not afford to pay for it.

In addition, some parents reported that they were not satisfied with the work their representatives were doing. In some instances, parents reported being given misleading information about what was being done on their cases. In others, parents or BID caseworkers had difficulty contacting private representatives as they did not answer or return calls. One client told his solicitor that he had received notice that he would be removed from the UK imminently. His solicitor informed him that they would lodge an appeal, but did not do so.

Pro-bono help

Five parents received some pro-bono assistance from various sources. However, it was not always clear that it would be sustainable for the legal representatives who were assisting them to continue to do so.

¹⁴ In three cases, these Judicial Reviews were funded by legal aid, and in five cases it was not clear whether they were funded privately or by legal aid.

Table 7: Legal representation for parents who were removed or deported

| Legal representation for parents who were removed or deported | Number of parents |
|--|--------------------------|
| No legal representative | 3 |
| Dropped by representative | 8 |
| Some private representation | 6 |
| Unknown/ not clear | 5 |
| Total | 22 |

BID's deportation project

Four of the 102 parents were represented for free by BID's Article 8 Deportation Advice Project. This is a charitably funded project which has been set up to provide free legal advice and representation to foreign national ex-offenders who are challenging their deportation. BID established the project in April 2014, and started taking referrals in June 2014. The four cases mentioned above are all ongoing at the time of writing, and none of the parents have been removed or deported.

BID's deportation project has very limited resources, and can therefore only assist a small fraction of the many people who are appealing their deportation and cannot access legal aid. In addition, the project was established to assist people with criminal convictions who are appealing their deportation. The seven parents who had no criminal convictions would therefore not normally be eligible for this service.

In principle, all of the remaining 95 parents in this research study could have been referred to BID's deportation project for assistance. However, there are a number of reasons why parents in this sample were not, or could not be referred to the project:

- BID's deportation project only started taking referrals in June 2014, so people who BID was dealing with between April 2013 and May 2014 could not be referred.
- The project has very limited capacity, and for periods has had no capacity to take on any more clients. BID's family team could not make referrals during these periods. Detainees may be removed or released from detention during these times, so the family team would cease representing them for bail.
- Even when the project has capacity, it may well not be possible to take on clients who need very urgent assistance. For example, if a detainee contacts BID with an appeal deadline in a few days time, it may be impossible to assist them due to the pressure of other urgent work for existing clients.
- The project does not undertake Judicial Review work. It is therefore not possible for the project to assist in cases where Judicial Review applications are needed. This includes cases in which removal directions have been set, or which have been certified – for example where the Home Office plans to deport somebody before their appeal. The family team has found it difficult to find legal aid solicitors with capacity to take on Judicial Reviews in these types of cases.
- In some cases, parents who BID is representing for bail have instructed private solicitors for their substantive immigration case. This is not always an ideal arrangement, as for example the parent may not be able to afford to pay for expert reports. Nevertheless, parents who are privately represented in their deportation matter would not be a priority for referral to the BID's deportation project, in comparison to people who are completely unrepresented.

Five of the 102 parents in the research sample were referred to BID's deportation project but not taken on.

Two of these parents were deported. In one of these cases, the parent was referred after he had already been deported from the UK. BID advised him of the procedure for making a fresh human rights application and application to revoke the deportation order and the type of evidence that would be required. However, he did not get back to us with any of the evidence. In the second case, BID again advised the parent to come back to us with further information about his family's situation, which he did not do. BID was therefore unable to progress the matter.

In three cases, parents were referred to BID's deportation project, not taken on, and subsequently released from detention. The project was unable to take on one of these cases due to lack of capacity. In the two further cases, BID provided detailed advice on the information and evidence that would be needed to support a fresh human rights application. However, in neither case was the information or evidence provided.

Appendix 1: Research Methodology

This research considered all the clients of BID's family bail team who:

- a) left detention between 1st April 2013 (when the legal aid cuts were introduced) and 30th September 2014;
- b) were parents detained without their children;
- c) and had children living in the UK aged less than 18 years old.

In total, BID's family bail team dealt with 118 cases of parents who met the above criteria. We sought to include all these cases in the research sample. However, one parent did not want their data to be used for research purposes, and we were unable to contact eight more parents to seek permission to use their data. A further seven of the 118 cases were referred on to other caseworkers at BID by the family team because it became clear that they didn't fit the family team's criteria for representation. These cases were therefore not included in the research sample.

A number of parents were held in immigration detention on more than one occasion. The data presented in this document relates to their most recent period in detention as a bail client of BID, within the research period ending on 30/9/14, with one exception. In this case, the parent was released on bail during the research period, and then re-detained for a very short period and released. As the parent had previously been detained for over a year, their penultimate period in detention is recorded here.

In a small number of cases, during the course of our research, we became aware of developments in a parent's case which took place after they were released from detention and BID's family team closed their file. For example, one parent was re-detained and deported, but did not contact BID after his re-detention. As we had come across this information by chance, and did not have the capacity to consistently follow up with parents after their release from detention, the information presented above is based on the parent's most recent period of detention as a client of BID's family bail team.

The 102 parents in our research sample had 219 children aged under 18 years old living in the UK. 27 of these 219 children were stepchildren. In one case, a parent had five children but four of these had been adopted and are not counted in this sample. The fifth child was in local authority care, and the information on file indicates that due to issues with the mother's parenting she would not have lived with her child on release, but would have had contact with her more frequently than she was able to from detention.

The data presented in this submission is based on the information available in BID's family team's legal casework files. The amount of information available in these files varies – in some cases files run to hundreds of pages, while others are fairly brief, for example in cases where parents are released or deported shortly after the case is taken on by the family team. The information presented is accurate to the best of our knowledge. In the majority of cases, the entire case file was analysed to validate the data. In a small number of cases where we had very large files for bail clients, key documents including the parent's witness statement in their bail application, the Home Office bail summary and Monthly Progress Reports were analysed.

Appendix 2: List of 'other or multiple' offences committed by parents

Table 4 sets out the convictions which triggered parents' deportation or removal. 24 parents are marked 'other/multiple.' A list of all these parent's offences, including the offences which triggered their deportation or removal, is provided below. These lists are based on all the information which was available on the parent's BID family bail team files. In 10 cases, no violent offence was recorded on the file.

Client 1: Assault, theft and driving offences.

Client 2: Attempting to/perverting the court of justice, driving motor vehicle with excess speed.

Client 3: Driving offences, using licence with intent to deceive, failure to surrender to custody, resisting a constable, fraud, several counts of possession of false or improperly obtained identity documents, theft, making a false statement to obtain a driving licence, making false representations for gain.

Client 4: Class A drugs, possession of an imitation firearm and obtaining property by deception.

Client 5: Possession of a handgun, Class A drugs, battery and resisting or obstructing a constable, driving offences.

Client 6: Obtaining a money transfer by deception; using threatening, abusive, insulting words or behaviour with intent to cause fear; common assault; false documents.

Client 7: Racially aggravated intentional harassment, robbery.

Client 8: Violent disorder (rioting) and breach of a conditional discharge; robbery; Class A and Class B drugs; using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence.

Client 9: Deception & attempted deception, Class A drugs.

Client 10: Driving offences, several counts of shoplifting, resisting/obstructing a constable, breaches of community orders and suspended sentence, theft, several counts of failing to surrender to custody, burglary and assault occasioning actual bodily harm.

Client 11: Possession of a bladed article.

Client 12: Deportation triggered by convictions for burglary and possession of a Class B drug. A Home Office Monthly Progress Report notes that the client had '12 previous convictions' but no details of these are available on the file.

Client 13: Acquiring criminal property and proceeds of crime, theft and fraud.

Client 14: Burglary, commission of a further offence, attempting to sell firearms.

Client 15: Driving without a licence and without insurance; possession of class B drug (cannabis). Cautioned for sending a letter or other article conveying a threat. Intent to supply class B drug (cannabis); possession of imitation firearm with intent to commit indictable offence; child cruelty. Note: the conviction for child cruelty did not relate to any physical abuse or neglect, but the fact that this man had stored an imitation firearm under his child's mattress.

Client 16: Robbery and false imprisonment.

Client 17: Failing to comply with community requirements of a suspended sentence, failing to surrender to custody, possession of false documents, destroying and damaging property, robbery.

Client 18: Convicted of causing one person's death on three counts: causing death by careless or inconsiderate driving; causing death by driving whilst unlicensed and causing death by driving with no license.

Client 19: assaulting a police constable; resisting or obstructing a police constable; causing racially or religiously aggravated harassment or distress; assault to injury and robbery; assault to severe injury and robbery; attempting to pervert the course of justice.

Client 20: Deportation triggered by conviction for theft. A Home Office bail summary notes that the client had 24 convictions including assault occasioning actual bodily harm, offences against the person, theft, attempted theft, going equipped for theft, shoplifting, using threatening, abusive, insulting words or behaviour to cause fear or provocation of violence, common assault, failing to surrender to bail, breaches of community orders and interfering with a vehicle.

Client 21: Deportation triggered by conviction for attempted robbery and assault occasioning actual bodily harm. A Home Office Monthly Progress Report notes that the client had 25 convictions including several counts of theft, handling stolen goods and burglary.

Client 22: Robbery, handling stolen goods, theft, fraud, attempting to obtain Indefinite Leave to Remain in the UK by deception.

Client 23: Class A drugs, and possession of a prohibited weapon and ammunition.

Client 24: Burglary and assault during the riots in 2011, Actual Bodily Harm.