Bail for Immigration Detainees

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Submission to UN Human Rights Committee 2014-15 Treaty Body Process: the UK's compliance with the International Covenant on Civil and Political Rights

Bail for Immigration Detainees

Bail for Immigration Detainees (BID) is a registered charity that provides legal advice and representation to asylum seekers and migrants held in immigration detention to secure their release. From 1 August 2012 to 31 July 2013, BID assisted 3367 detainees.

Executive Summary

This submission sets out evidence on the UK Government's policies and practices in relation to immigration detainees. In particular, it covers:

- **Article 7** of the International Covenant on Civil and Political Rights (CCPR) - inhuman and degrading treatment of mentally ill immigration detainees.
- **Article 9** CCPR
    - Cases where detainees have been held unlawfully.
    - Restriction in access to remedies for unlawful detention following the April 2014 changes to fee arrangements for judicial reviews.
    - Further proposed restrictions to access to remedies:
        - The Criminal Justice and Courts Bill, which would further curtail access to judicial review, including judicial reviews challenging the legality of detention.
        - The proposed 'residence test' for legal aid, which would prevent ex-detainees who are not lawfully resident in the UK from accessing legal aid for civil claims to seek compensation for unlawful detention.
- **Article 10(1)** – cases concerning maltreatment of immigration detainees, and proposed restrictions to remedies for such maltreatment.
- **Separation of families by detention, deportation and removal**. BID is gravely concerned that very many children are separated from parents who are detained, removed or deported. These concerns have been exacerbated by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which removed the vast majority of immigration cases from scope for legal aid. Furthermore, Sections 17 (3) and 19 of the Immigration Act 2014 include a number of measures which will have a serious negative impact on families who are separated for the purposes of immigration control. BID considers that the above changes may engage the following articles of the CCPR: Article 23 (1); Article 14 (1) and Article 26.
- **Detention of children.** We note that the bulk of the UK Government's July 2012 seventh periodic report on immigration detention to the CCPR committee focuses on the issue of child detention. BID has a number of specific concerns about the new family returns process, which are set out below.

Article 7

Since 2011, there have been six cases in which the UK's High Court has found that mentally ill immigration detainees have been subjected to inhuman and degrading treatment in breach of Article 3 of the European Convention on Human Rights.[1] As is explained in detail at p6 below, the UK Government proposes to introduce a 'residence test' for legal aid, which would prevent detainees from accessing legal aid to challenge such treatment. Separate restrictions to access to judicial review are also proposed – see p3-5 for details.

Article 9

In the UK, immigration detainees are held without time limit. In numerous cases, detainees have been awarded substantial damages after the courts found that they were detained unlawfully. For the financial year 2012-13, the UK Border Agency incurred costs in relation to non-staff compensation, adverse legal costs, and ex-gratia payments totalling £19,702,000.[2] BID regularly refers ex-detainees to solicitors to make civil claims for compensation. In one case which settled last year the claimant and their child were awarded £68,500.

Case study: compensation for detention

During Christine's detention, her two children were cared for by their grandfather. He became seriously ill and was admitted to hospital three times. The older daughter, Beth, had to stop attending school to care for her brother and grandfather and missed her GCSE exams. Beth found it extremely difficult to look after her seven year old brother Daniel, who is disabled and has severe behavioural problems. Children's Services deemed Daniel to be at risk of emotional and physical harm, and found that: *'Daniel has found it very difficult being separated from his mother… [A] concerned neighbour rang to report that Daniel was playing alone in the road at 8pm... he walks into people's houses.'*

Two months into Christine's detention Daniel was hit by a car. Despite receiving reports about the welfare of these children, the Home Office detained their mother for 160 days before she was released on bail by the Tribunal. The Home Office subsequently awarded the family substantial compensation for the mother's detention.

The 2012 Legal Aid, Sentencing and Punishment of Offenders Act took the vast majority of immigration cases out of the scope of legal aid funding. Legal aid is still available for bail and judicial review applications challenging detention. However, very many immigration detainees are held on the basis of a decision which has been made on their immigration claim. The fact that detainees are no longer able to access legal aid to challenge such decisions, even where they are unlawful, creates barriers to them challenging their detention.

Access to remedies

Article 9(4) of the CCPR provides that:

'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

[1] R (HA) (Nigeria) v SSHD [2012] EWHC 979; R (S) v SSHD [2011] EWHC 2120 (Admin); R (D) v SSHD [2012] EWHC 2501 (Admin); R (BA) v SSHD [2011] EWHC 2748 (Admin); R (S) v SSHD [2014] EWHC 50 (Admin); MD v SSHD [2014] EWHC 2249 (Admin)
[2] UK Border Agency *Annual Report and Accounts 2012-13* www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/annual-reports-accounts/annual-report-12-13.pdf?view=Binary

Article 9(5) states:

'Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.'

We also note that Article 2(2) of the CCPR states:

'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.'

As is set out above, detainees in the UK continue, in theory, have access to judicial review as a remedy for unlawful detention. However, BID is gravely concerned that the reforms to judicial review which were implemented in April 2014, and the further reforms proposed in the Criminal Justice and Courts Bill, will curtail detainees' access to judicial review in practice. Furthermore, the Government proposes to introduce a 'residence test' for legal aid, which would prevent very many ex-detainees from making civil claims for compensation for unlawful detention.

April 2014 changes to fee arrangements for judicial reviews

On 22nd April 2014, the The Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 came into force. The regulations provide that judicial review proceedings will not be funded by legal aid unless: (a) the High Court or Upper Tribunal grants permission to proceed; or, (b) permission is neither granted nor refused ***and*** the Lord Chancellor considers that it is reasonable to pay remuneration in the circumstances of the case. Essentially, this provision transfers the financial risk of work on judicial review cases to lawyers unless the case goes to full hearing, despite the fact that many judicial review cases are settled before a full hearing and public benefit is achieved as a result.

We note that the regulations allow discretion for legal aid to be paid in cases which are not granted or refused. However, there are very serious concerns about the Legal Aid Agency's decision-making in cases where payment is discretionary. One example of the shortcomings of discretionary decision making is the 'Exceptional Case Funding' scheme, which was purportedly established to provide a safety net for cases which were removed from scope for legal aid funding in April 3013 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. 235 exceptional case funding applications were made in immigration cases in 2013/14; only four were granted funding.[3] On 13th June 2014, the High Court found that the Legal Aid Agency had made unlawful decisions to refuse exceptional case funding in six test cases. The court also found that the guidance applied by the Legal Aid Agency in refusing legal aid was unlawful.[4] A number of further cases challenging the legality of refusal of funding are stayed behind this case. Exceptional Case Funding applications are made at the risk of non-payment. Very few solicitors are willing to apply, as it is not financially viable for firms to keep carrying out this work, given the considerable risk of non-payment. BID assists over 3,000 detainees per year. As of April this year, we had only successfully referred two cases to solicitors to make exceptional funding applications.

On the basis of such experience, there are serious concerns about whether the Legal Aid Agency will make the correct discretionary decisions about whether to provide payment for work on judicial reviews where permission is not granted or refused. In any event, in very many cases it will not be financially viable for law firms to make judicial review applications given the risk of non-payment.

On 30th April 2014, the UK Parliament's Joint Committee on Human Rights published a report on the judicial review reforms, and noted that:

[3] Ministry of Justice (24 April 2014) 'Ad hoc Statistical Release: Legal Aid Exceptional Case Funding Application and Determination Statistics 1 April 2013 to 31 March 2014'

[4] *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [*2014] EWHC 1840 (Admin)

'We do not consider that the proposal to make payment for pre-permission work in judicial review cases conditional on permission being granted, subject to a discretion in the Legal Aid Agency, is justified by the evidence. Instead it constitutes a potentially serious interference with access to justice, and sufficient evidence to demonstrate its necessity is currently lacking.'[5]

Criminal Justice and Courts Bill

The Criminal Justice and Courts Bill received its first reading in the UK parliament on 5th February 2014. At the time of writing it is in House of Lords Committee. Part four of the Bill proposes restrictions to access to judicial review, which would curtail immigration detainee's ability to challenge the legality of their detention, unlawful treatment while in detention, and unlawful removals or deportations.

Clause 68: Protective Costs Orders

Under Clause 68(3), a protective costs order can only be made if permission to apply for judicial review has been granted. However, parties may accrue significant costs, in some cases exceeding £30,000, before permission is granted.[6] If claimant organisations cannot be protected against such financial risk, cases with substantial public interest will not be brought.

Clause 64: Likelihood of substantially different outcome

Under 64(2), when someone seeks permission to bring a judicial review, the judge may have to look whether it is *'highly likely'* that the outcome for this person would have been similar if the actions they are challenging had not occurred. If the judge determines that this is *'highly likely',* the person must be refused permission to proceed. This matter would be considered at permission stage, when limited evidence will be available to judges. The problem is that what appears *'highly likely'* in the initial stages of a case could later be demonstrated to be very unlikely. Claimants whose cases have merit may therefore be denied the opportunity to properly present them.

Case Study: Single mothers detained unlawfully

In September 2010 and April 2011, following judicial review proceedings the High Court found that two single mothers had been unlawfully held in detention and separated from their children. The detention of these mothers had serious consequences for their children's welfare. In the latter case of 'NXT', one of the children changed foster placements six times during the mother's imprisonment and detention and experienced abuse and neglect.

It often far from clear whether detainees would have been detained anyway if the *'conduct complained of'*, such as the Home Office's failure to follow procedures, had not occurred. This question was considered in detail by the judges in both the cases cited above.[7] Unlawful detention cases often turn on this issue; it is not one that can be properly examined at permission stage. The ability to properly access judicial review proceedings was crucial in getting these mothers released.

[5] Joint Committee on Human Rights (2014) *The implications for access to justice of the Government's proposals to reform judicial review* Thirteenth Report of Session 2013–14, p4
[6] Jaffey, B. and Hickman, T. (2014) *UK Constitutional Law Association Blog* 'Loading the Dice in Judicial Review: the Criminal Justice and Courts Bill 2014' http://bit.ly/U6t61U
[7] See, for example, para 44 *MXL, R (on the application of) & Ors v SSHD* [2010] EWHC 2397 (Admin); para 124 *NXT, R (on the application of) & Ors v SSHD* [2011] EWHC 969 (Admin)

The UK Parliament's Joint Committee on Human Rights has commented on Clause 64, stating that:

'We accept that it is a legitimate and justifiable restriction on the right of access to court for courts to refuse permission or a remedy in cases where it is inevitable that a procedural defect in the decision-making process would have made no substantive difference to the outcome, as they do under the current law. However, lowering the threshold to one of high likelihood gives rise to the risk of unlawful administrative action going unremedied and therefore risks incompatibility with the right of practical and effective access to court, which the European Court of Human Rights recognises as an inherent part of the rule of law.'[8]

Clause 67: Interveners and costs

Clause 67 provides that the courts *'must order the intervener to pay any costs specified'* by a party or interested party that have been incurred *'as a result of the intervener's involvement.'* Interveners may have to pay costs even where they provide evidence of unlawful Government actions. Many charities including Bail for Immigration Detainees could not pay such costs, and would be prevented from intervening.

Currently, interveners must convince the court of the value of their involvement when seeking permission to intervene. The senior judiciary's response to the UK Government's consultation on Judicial Review reform states: *'The court is already empowered to impose cost orders against third parties [interveners]. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties.'*[9]

Case Study: Interventions & detention of children

In 2011, following judicial review proceedings in the 'Suppiah' case,[10] the Administrative Court found that two families had been detained unlawfully. Liberty intervened in this case; Bail for Immigration Detainees provided evidence to support their intervention. At paragraph 111, Justice Wyn Williams stated: *'On the basis of the evidence adduced by the Claimants and Liberty, no one can seriously dispute that detention is capable of causing significant and, in some instances, long lasting harm to children. That emerges with clarity from the observations of HM Inspector of Prisons, the Children's Commissioner, Members of Parliament, the Independent Inspector of UKBA and the detailed evidence of Mr Makhlouf [Bail for Immigration Detainees].'*

Since this judgment, there have been improvements to Government policy on child detention, and far fewer children are detained. In this judgment, Justice Wyn Williams is critical of the Home Office's failure to properly communicate the option of voluntary return to families before their detention. Subsequently, the Home Office changed their policy to ensure that families are given at least 4 weeks to consider returning voluntarily or by 'self check-in' before any enforcement action.[11]

[8] Joint Committee on Human Rights (2014) *The implications for access to justice of the Government's proposals to reform judicial review* Thirteenth Report of Session 2013–14, p3
[9] Judiciary of England and Wales (2013) *Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform'*
[10] *R (on the application of) Reetha Suppiah and others v SSHD and Interveners* [2011] EWHC 2 (Admin)
[11] Home Office *Enforcement Instructions and Guidance* Chapter 45

The 'residence test'

In July 2014, the UK parliament's House of Commons considered secondary legislation which would introduce a 'residence test' for civil legal aid.[12] The residence test would limit access to legal aid to those who are a) lawfully resident in the UK on the day of application and b) have previously lawfully resided in the UK for one year.

The vast majority of immigration claims are already out of the scope of legal aid funding, following the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The residence test would prevent undocumented migrants accessing civil legal aid, for example to challenge unlawful acts by the UK Government. Immigration detainees would be prevented from accessing legal aid to:

- bring civil claims seeking compensation for unlawful detention after release
- challenge abuse suffered in detention

As is noted on page 2, and below on pages 6 and 7, there have been numerous cases in which the courts have awarded ex-detainees compensation for unlawful detention, and found that detainees have been suffered mistreatment. If the residence test is introduced, the Home Office will be able to maltreat immigration detainees with impunity.

Certain exceptions are provided. It would still be possible for immigration detainees who fail the residence test to access legal aid for judicial reviews challenging the legality of their detention.

The residence test regulations were passed by the House of Commons. However, before the regulations were considered by the House of Lords, the residence test was found to be unlawful by the High Court.[13] In the judgment, Lord Justice Moses finds that it is 'beyond question that the introduction of such a test is discriminatory.' The Ministry of Justice are appealing the court's decision.

The Ministry of Justice argues that 'Exceptional Case Funding' would provide a safety net for people affected by the residence test. The shortcomings of this scheme are set out on p3.

Article 10(1)

There are numerous examples of cases where detainees have been maltreated. In 2013, an 84 year old terminally ill man with dementia died after having been handcuffed by immigration staff for five hours. The handcuffs were only removed after his heart had stopped.[14] In the last seven years, 10 staff have been dismissed in relation to allegations of improper sexual contact with female detainees at Yarl's Wood immigration removal centre.[15]

Case study: Use of force against pregnant women

The use of force against children and pregnant women during their removal from the UK only ceased as a result of legal action funded by legal aid. In January 2013 *The Guardian* reported that force was used against a pregnant woman during an attempt to remove her from the UK: *'She said her body was covered in bruises after the incident.. an independent doctor warned that putting the woman on the plane without adequate monitoring while she was bleeding could lead to premature labour and ruptured membranes.'* [16] Despite having no published policy governing the

[12] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014
[13] *R (On the Application Of The Public Law Project) v The Secretary of State for Justice the Office of the Children's Commissioner* [2014] EWHC 2365 (Admin)
[14] *Guardian* 16/1/14 'Detention Centre castigated over death of elderly man'
[15] *Guardian* 24/6/14 'Serco apologises after dismissals related to Yarl's Wood allegations'
[16] *Guardian*, 11/1/2013 , 'UK Border Agency rejects calls to stop using force on pregnant detainees'

use of force, and widespread criticism, the Home Office continued to use force against children and pregnant women to effect removals.[17]

This situation only changed as a result of a judicial review application in the case of *R (on the application of Yiyu Chen and Ors) v Secretary of State for the Home Department* CO/1119/2013. Shortly before a court hearing, the Home Office re-published an old policy prohibiting the use of force against children and pregnant women save where absolutely necessary to prevent harm. However, we note that the Government have stated that the use of force may resume after a consultation on the matter.[18]

As is noted above, the Government has implemented some restrictions on access to judicial review, and is proposing further restrictions in the Criminal Justice and Courts Bill. These measures could prevent detainees in the situations described above from challenging their treatment. Furthermore, under the 'residence test', people who are not lawfully in the UK would not be able to access legal aid to challenge maltreatment in detention.

Separation of families by detention, deportation and removal

As the Committee will know, there have been a number of improvements to the UK Government's policy on detention of children since 2010. However, BID is gravely concerned that very many children are separated from parents who are held in immigration detention. These concerns have been exacerbated by the Legal Aid, Sentencing and Punishment of Offenders Act, which removed the vast majority of immigration cases from scope for legal aid. Furthermore, Sections 17 (3) and 19 of the Immigration Act 2014 include a number of measures which will have a serious negative impact on families who are separated for the purposes of immigration control. BID considers that the above changes may engage the following articles of the CCPR: Article 23 (1); Article 14 (1) and Article 26.

BID's experience of separated family cases

BID's 2013 report 'Fractured Childhoods: the separation of families by immigration detention' examined the cases of 111 parents who were separated from 200 children by immigration detention:

- 85 of these children were in fostering arrangements or local authority care during their parent's detention.
- Some children moved between unstable care arrangements, experienced neglect and were placed at risk of serious harm.
- Parents were detained without time limit, for an average of 270 days.
- Children described the extreme distress they experienced – they reported losing weight, having nightmares, suffering from insomnia, crying frequently and becoming deeply unhappy and socially isolated.
- In 92 out of 111 cases, parents were eventually released, their detention having served no purpose.
- In one case, the Home Office deported a single father leaving his nine and 12 year old sons with his ex-girlfriend. They did not do anything to find out if the children's care arrangement was safe.

In view of these findings, BID already had grave concerns about the separation of families before the 2013 legal aid cuts and the Immigration Act 2014.

[17] HM Inspector of Prisons (2012) *Report on an announced inspection of Cedars Pre-Departure Accommodation*; Home Affairs Select Committee (2012) *The work of the UK Border Agency (April–June 2012) Eighth Report of Session 2012–13*
[18] *Hansard* HL Deb, 10 April 2013, c313W

Legal Aid, Sentencing and Punishment of Offenders Act 2012

The Legal Aid, Sentencing and Punishment of Offenders Act removed the vast majority of immigration cases from scope for legal aid. In practice, this means that very many immigration detainees are no longer able to meaningfully challenge decisions by the Home Office to deport or remove them from the UK, even where these decisions are unlawful. This includes cases where the Home Office has decided deport or remove parents with or without their children.

We note that under Article 26 CCPR, all persons are 'entitled without any discrimination to the equal protection of the law.' BID notes that, in other circumstances where parents are separated from children by the actions of the state, legal aid is available. For example, legal aid is available for cases where local authorities are taking legal action to take children into care. However, legal aid is not available for parents to appeal decisions by the Home Office to remove or deport them from the UK without their children.

In many cases, a parent's deportation means that their child will effectively be separated from them for the remainder of their childhood. Children may have been born in the UK, have strong ties to another parent or carer in the UK, and be in the appalling position of having to choose between their parents. Where such cases meet the requirements of the legal aid means and merits tests, we believe that legal aid is necessary for evidence regarding the best interests of children to be properly gathered and considered.

Between April 2013 and February 2014, BID carried out a small-scale monitoring exercise involving families separated by immigration detention.[19] 11 of the 47 parents in the research sample were removed or deported without their children. These 47 parents had a total of 101 children under 18 living in the UK. In the 46 cases where we were able to obtain these data, the parents were detained for an average of 286 days. In some cases, children had no other parent to care for them and so were in foster or Local Authority care during their parent's detention. 91 of the 101 children in the sample were born in the UK, and the majority were British Citizens.

Case study – impact of legal aid cuts

Leonard came to the UK 13 years ago, when he was 21. He met his partner Mary, and became stepfather to her two infant daughters. Three years later the couple had a son. Mary and the three children all have British citizenship.

Some years later, Leonard was convicted of possessing a handgun. He had previous offences, and following this the Home Office detained and sought to deport him. Probation have assessed his risk of reoffending as 'clearly low.'

Following the Legal Aid, Sentencing and Punishment of Offenders Act 2012, Leonard was unable to access legal aid. He represented himself in his appeal to the Upper Tribunal. Leonard is unable to read or write. He said that he felt 'intimidated and distressed' during the hearing. He didn't know how to speak to the judge and couldn't understand what the judge said: 'They just said "go and stand there" [in the courtroom]. Because I've got a criminal record, I don't think they really listened to what I said. They thought I was lying. A lot of what they were saying wasn't true, but I didn't know what to say, how to challenge it. It didn't take them long to reject my case.'

During Leonard's time in immigration detention his partner, who is HIV positive and has chronic arthritis, struggled to cope. His youngest child had nightmares, lost weight and had difficulties eating. His eldest began getting involved in fights at school. The middle child tried to self-harm, and has begun receiving counselling for depression. Leonard's doctor produced a report stating that if Leonard was returned to his country of origin 'his life expectancy would be severely curtailed' as he is HIV positive and would not be able to access the medication he needs.

[19] For full details including methodology please see: Bail for Immigration Detainees (16th May 2014) 'BID response to Justice Select Committee Inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012' http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html

However, Leonard did not know that evidence such as his doctor's report or evidence of his partners' difficulties caring for the children were needed to support his appeal, and did not provide this to the court. **BID is gravely concerned that in cases such as this, where legal aid is unavailable, Article 8 ECHR and the best interests of the child cannot be properly considered by the court.**

Immigration Act 2014

Section 17: Deport first and appeal later

Section 17(3) of the Immigration Act provides that *'foreign criminals'* and people the Home Secretary deems not conducive to the public good *'can be deported first and appeal after, unless that would cause serious irreversible harm.'*[20]

There will be huge practical barriers to individuals appealing their deportation from abroad. In practice, 17(3) will prevent people from challenging their deportation, including where they would have won their appeal if they had been able to bring one in the UK. There are serious problems with the quality of Home Office decision-making, and in 2012/13, 32% of deportation appeals succeeded.[21] In BID's view, Section 17(3) will have grave consequences for child welfare; it has been criticised by the Joint Committee on Human Rights.[22]

Section 19: Private and family life

Section 19 seeks to limit the circumstances in which someone can successfully appeal their removal or deportation on the basis of the right to private and family life. Section 19 suggests that in a very wide range of circumstances, the best interests of children should be routinely subordinated to considerations of immigration control. For example, children who have lived in the UK for less than 7 years and are not British do not fall within the Section's definition of 'qualifying children' whose welfare is to be taken into account. Plainly, a parent's deportation or removal may create a desperate situation for a 6 year old, particularly if the child has special needs.

Detention of children

We note that the bulk of the UK Government's July 2012 seventh periodic report on immigration detention to the CCPR committee focuses on the issue of child detention.

As the committee will know, in May 2010, the Government committed to ending the immigration detention of children. BID and others welcomed this change; there is considerable evidence that detention can seriously harm children.[23] There have been significant improvements in Government policy on child detention since 2010. Far fewer children are detained for much shorter periods.

However, the Government is yet to meet its commitment to end child detention, and a new family detention facility was opened in Crawley, Sussex in September 2011. A total of 222 children entered immigration detention during 2012.[24] 130 of these children were subsequently released, raising serious questions about why they were detained in the first place.[25] BID has a number of specific concerns about the new family returns process. In addition, as is noted at p6/7 above, concerns have been raised about the use of force against children in the returns process.

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[20] Home Office October 2013 *Immigration Bill Factsheet: appeals (clauses 11-13)* http://bit.ly/1gOp7y8
[21] Home Office 15/7/12 *Impact Assessment of Reforming Immigration Appeal Rights,* p7 http://bit.ly/1cygmWm
[22] Joint Committee on Human Rights 18/12/13 *Legislative Scrutiny: Immigration Bill* Eighth Report of Session 2013-14
[23] See for example Lorek, A. Entholt, K. et al. (2009) "The mental and physical health difficulties of children held within a British immigration detention center: A Pilot Study" *Child Abuse and Neglect* Vol. 33 Issue 9, pp573-585*;* Children's Commissioner for England (2010) *Follow up report to: The arrest and detention of children who are subject to immigration control*
[24] Home Office (2012) 'Quarterly Immigration Statistics' https://www.gov.uk/government/organisations/home-office/series/immigration-statistics-quarterly-release
[25] Home Office *Immigration Statistics April to June 2013* https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2013/immigration-statistics-april-to-june-2013#detention-2

Decision making and access to legal advice
The UK Government states in paragraph 717 of its seventh periodic report to the committee that 'decision-making [has been] strengthened through the training of specialist family case owners.' However, no evidence is offered to support this assertion. Two reports published by the UN High Commission on Refugees in 2013 raised serious concerns about Home Office decision-making in family asylum cases.[26]

In 187 of the 377 family cases which were concluded during the Home Office commissioned evaluation of the Family Returns Process, a return was not in the end pursued.[27] This raises serious questions about why these families entered the returns process in the first place.

The UK Government states in paragraph 715 of its seventh periodic report to the committee that the family returns process is used in cases concerning 'families and children who do not qualify to be in the UK.' However, barriers to accessing legal advice mean that families who *do* qualify to be in the UK may not have had the opportunity to properly present their immigration or asylum case, and therefore may face removal action. As is noted above, the vast majority of immigration cases, including those of children, have been removed from the scope of legal aid funding by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. There are also numerous barriers to asylum seeking families accessing competent legal advice, which have been exacerbated by the repeated cuts which have been made to legal aid funding in recent years.[28]

Timescales to consider voluntary return and seek legal advice
The Family Returns Process allows families who may have been in the UK for years a minimum of just two weeks to consider voluntary return. In BID's view this is inadequate, particularly given that children may have strong ties to the UK including having attended school here for years. Families may well not be able to get an appointment with a legal representative to discuss their options within a two week timeframe.

Lack of welfare support
Serious concerns have been raised about the way in which Family Return Conferences and Family Departure Meetings have been carried out. The Home Office commissioned evaluation of the Family Returns Process notes that in some cases parents became distressed during Family Return Conferences and that there were incidents of 'actual or threatened self-harm' in the course of the return process.[29] The evaluation also found that in some cases children found encounters with Immigration Officers 'distressing' and that 'older children felt that they had not been listened to.'[30]

Furthermore, the evaluation stated:

'Views from a range of interviews suggested that better engagement with families, to address welfare and safeguarding issues, was needed. Most NGOs and several strategic stakeholders (both UK Border Agency and independent) felt involving third party organisations could help.'[31]

Indeed, at p36 the evaluation found that one of the key reasons given for detaining families was 'for Barnardos [a third sector organisation] to provide preparatory support for children before the return.' In BID's view, support should be provided to non-detained families in the returns process – it is perverse that families should be detained simply in order to access support.

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[26] UNHCR (June 2013) *Untold stories: families in the asylum process*; UNHCR (December 2013) *Considering the Best Interests of a Child Within a Family Seeking Asylum*
[27] Home Office (2013) *Evaluation of the new family returns process*, p15
[28] Trude, A. and Gibbs, J. (2010) *Review of quality issues in legal advice: measuring and costing quality in asylum work*; McClintock, J. (2008) *The LawWorks Immigration Report: Assessing the Need for Pro Bono Assistance*; Refugee Action (2008) *Long term impact of the 2004 Asylum Legal Aid Reforms on access tolegal aid*; Smart, K. (2008) *Access to legal advice for dispersed asylum seekers*; London; Constitutional Affairs Select Committee (2007) *Implementation of the Carter Review of Legal Aid Third Report of Session 2006–07 Volumes I & II*
[29] Home Office (2013) *Evaluation of the new family returns process*
[30] Home Office (December 2013) *Evaluation of the new family returns process,* p31
[31] Home Office (2013) *Evaluation of the new family returns process* p33

Operation of the family returns panel
Families and their legal representatives are not given information about why a specific enforcement action is being taken against a family, and cannot provide the 'Family Returns Panel' with evidence. They are therefore not able to challenge the Home Office's decisions in a meaningful way.

Separation of families
As an alternative to detaining children, the Home Office is separating families by holding parents in detention. There is currently no time limit on the separation of families, and considerable harm can be caused to children.

Recommendations

- **Immigration matters should be brought back into scope for legal aid funding.**
- **While immigration matters remain out of scope, the 'Exceptional Case Funding' scheme for legal aid should be revised so that it provides a meaningful safety net for cases which have been removed from the scope by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.**
- **The UK Government should drop its plans to introduce a legal aid 'residence test' under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014.**
- **The April 2014 changes to fee arrangements for judicial reviews introduced by the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 should be repealed. While the arrangements are in place, the UK Government should carry out a review of the provision to make discretionary payments to assess whether this is operating effectively.**
- **The UK Government should revise part 4 of the Criminal Justice and Courts Bill to remove the aspects of Clauses 68, 64 and 67 which would place restrictions on immigration detainees' access to judicial review to challenge their detention.**
- **Guidance should be produced to ensure that the rights of children and their family members are not violated in the implementation of Sections 17 and 19 of the Immigration Act 2014.**
- **Families should not be separated by immigration detention. While the practice continues, a time limit should be introduced on the separation of families by immigration detention.**
- **The UK Government should publish statistics on the numbers of children who are separated from their parents by immigration detention, removal and deportation.**
- **The UK Government should fulfil their commitment to end child detention and commit to never using force against children to effect their removal from the UK.**
- **Families in the family returns process should be given a longer period to consider returning voluntarily to their country of origin.**
- **Adequate welfare support should be provided to non-detained families in the return process, so that families are not detained in order to access support.**
- **There should be a clear route for information-sharing between the Family Returns Panel, families and their legal representatives.**