



**Long term immigration detention: an expensive denial of rights and liberty**

**Briefing paper**

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# Long term immigration detention: an expensive denial of rights and liberty

## 1. INTRODUCTION

This briefing outlines a number of factors that contribute to the increasing numbers of people held for long periods in immigration detention in the UK with no realistic prospect of imminent removal.

BID is concerned at the failure of the Home Office, the immigration and asylum tribunals, and agencies of the criminal justice system to both follow their existing guidelines and cooperate effectively on immigration cases, especially where detainees are subject to deportation action. This is leading to increasing numbers of individuals being warehoused in immigration detention for months and years in costly and potentially unlawful indefinite detention. Long term and indefinite detention is costly both in financial terms and in the well documented toll it exerts on the mental and physical state of detainees.

Lack of legal representation combined with poor UKBA case management contributes to low levels of release on bail<sup>1</sup>. BID's own research shows that absconding risks are likely to be low, and community-based alternatives to detention remain underused, yet unevidenced assertions of absconding risk are routinely made by the UK Border Agency to oppose detainees' release on bail.

BID believes immigration detainees are being failed by the immigration bail process and denied the opportunity for meaningful independent scrutiny of their ongoing detention and release on bail. BID has significant concerns that immigration bail is not sufficiently bolstered with guidelines and safeguards that ensure uniformity and fairness in the process, including Home Office casework, immigration judge decision making, and eventual bail outcomes.

BID would like to see the new government introduce:

- Automatic bail hearings
- Time limited detention
- Evidence-based risk assessment processes for immigration detainees
- A requirement for documentary evidence to support contested facts in bail applications
- An end to the use of detention as an extension of the criminal justice system

This briefing provides a short overview of long term immigration detention, and raises general concerns as well as recommending specific improvements to policy and procedure which we urge the coalition government to support (more information can be found at [www.biduk.org](http://www.biduk.org) or using the contact details on this briefing).

## 2. BACKGROUND

### a) Facts and figures on immigration detention

Every year some 30,000 people enter detention in the UK for the purposes of immigration control, and around 2,500 are detained at any one time. Around 90% of immigration detainees are male and around 60% have claimed asylum at some point<sup>2</sup>. Asylum seekers and anyone with an ongoing immigration case can be detained, as can overstayers or illegal entrants who are apprehended, foreign national ex-

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<sup>1</sup> 18% of bail applications were granted at the Asylum & Immigration Tribunal in 2009. Source: Ministry of Justice response on 5 May 2010 to a Freedom of Information Act request made by BID.

<sup>2</sup> Home Office, Control of Immigration, Quarterly statistical summary United Kingdom, First Quarter 2010.

offenders subject to deportation action, and non-British citizen family members of all of the above. There are currently around 10,000 immigration bail hearings each year<sup>3</sup>.

There is no statutory time limit on immigration detention. The UK government has chosen not to opt into the EU Return Directive which sets a limit on immigration detention of 18 months. However immigration detention was never intended as a means of holding people for months or years at a time. UKBA guidelines state that for detention to be justified it must be used “sparingly, and for the shortest period necessary”<sup>4</sup>; all reasonable alternatives must be considered before detention<sup>5</sup>; and there must be strong grounds for believing that a person will not comply with conditions for Temporary Admission or Temporary Release. Once authorised detention must be kept under review to ensure that it continues to be justified<sup>6</sup>.

Two significant developments in the immigration and asylum arena have together and separately had an impact on the way immigration detainees are able to apply for and be granted bail. These developments, namely new deportation provisions for foreign national offenders, and the gap between the supply and demand for legal advice in immigration detention are outlined immediately below. They are followed by a list of specific factors that BID believes raise barriers to detainees who want to access immigration bail both as a means of applying for release and an independent check on the use of detention. These factors have contributed to the recent growth in numbers of detainees held for extended periods of months or even years in removal centres.

#### **b) New ‘automatic deportation’ provisions for foreign nationals convicted in the UK**

BID believes that recent legislation directed towards the deportation of foreign national ex-offenders from the UK has been enacted without due consideration of the need to effectively manage the subsequent transition of increased numbers of people from the criminal justice system to immigration detention. BID has become increasingly concerned that the so-called ‘automatic deportation’ regime permits detention for a growing number of people. BID caseworkers and the pro bono barristers we instruct often comment that it seems harder to obtain bail for a person with a deportation order due to the impact of such an order on judicial decision making, and the current failure of the Probation Service to carry out or make available ‘risk of reoffending’ assessments to detained bail applicants or immigration judges.

#### **c) Immigration detainees without legal representation**

A significant proportion of immigration detainees have no legal representation on their immigration matter. Observations of bail hearings by BID suggests that up to 50% of bail applicants are unrepresented in their bail application. Research carried out by BID found that 51% of represented cases were granted bail, while just 17% of unrepresented applicants were granted bail<sup>7</sup>. Unrepresented detainees have little idea of their options, rights, or responsibilities, yet are required to progress their immigration case and mount legal challenges, often without being able to read or speak English.

The Detention Duty Advice scheme administered by the Legal Services Commission undertakes to provide thirty minutes of free legal advice in immigration removal centres. BID’s monitoring shows that

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<sup>3</sup> Between January and December 2009 there were 10,076 bail hearings, between January and December 2008 there were 9,274 bail hearings. Source: Ministry of Justice response on 5 May 2010 to a Freedom of Information Act request made by BID.

<sup>4</sup> UKBA, Enforcement Instructions and Guidance, Chapter 55, section 1.3

<sup>5</sup> *ibid*, section 3

<sup>6</sup> *ibid*, section 55.8

<sup>7</sup> Bail for Immigration Detainees, (2010), ‘A nice judge on a good day’: immigration bail and the right to liberty.

many detainees are unaware of this service. Suppliers under the scheme have been restrained by their own matter start capacity from taking the cases of all detainees who pass a means and merits test. Frequent transfers around the detention estate can mean that relationships with lawyers are severed. This dislocation can have a disastrous impact on a detainee's ability to promptly challenge their detention and frequently leads to extended periods in detention while a new lawyer is sought and a fresh bail application prepared.

***BID recommends that publicly-funded legal advice should be provided to all immigration detainees to make an application for bail every 28 days or sooner if fresh evidence arises.***

### **3. FACTORS CONTRIBUTING TO LONG TERM DETENTION**

#### **a) Indefinite immigration detention where there is no possibility of removal**

BID is concerned that in many cases the government is using detention unnecessarily, and where the stated aim of removal cannot be achieved within a reasonable time scale. Detention may cease to be lawful in individual cases where it has outlasted the time deemed reasonable to achieve its original purpose, resulting in increased risk of high court action.

Home Office figures show that around 70% of detainees are held for 30 days or more, 20% for over 6 months, and around 10% of detainees at any one time have been held for over 12 months<sup>8</sup>. These snapshot figures do not reflect cumulative periods over multiple detention episodes or the fact that detainees surveyed may go on to be detained for weeks or months. BID now routinely encounters detainees who have been held for two, three or four years. This means that, for the majority of detainees, removal is not imminent at the point at which they are detained.

BID supports many individuals who have been detained for over 12 months and for whom there are real barriers to their removal, such as there being no forced returns to their country of origin at the time of their detention or problems obtaining travel documents from their embassy or High Commission in the UK. Many foreign national ex-offenders subject to deportation action are routinely held for longer in administrative detention while arrangements are made for their deportation than they served for their original custodial sentence. Research by BID found that over 20% of a sample of bail applicants had spent more time as an immigration detainee than they had serving their prison sentence<sup>9</sup>.

In the cases of many detainees supported by BID, while powers may have existed to lawfully detain at the point at which they were taken into detention, the legality of their continued, and often prolonged, detention is cause for serious concern given that it has arguably continued for longer than reasonable for the purpose of removal/deportation. In our view this, combined with the absence of a statutory time limit on detention, makes detainees' access to mechanisms to challenge their detention, such as immigration bail, of paramount importance.

***BID recommends that there should be a statutory time limit of 28 days on immigration detention so that resources are not wasted on detaining people who cannot be removed from the UK.***<sup>10</sup>

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<sup>8</sup> Home Office, Control of Immigration: Quarterly Statistical Summary United Kingdom First Quarter 2010.

<sup>9</sup> Bail for Immigration Detainees, (2010), 'A nice judge on a good day': immigration bail and the right to liberty.

<sup>10</sup> This time limit should be in line with the 2007 recommendation of the Joint Committee on Human Rights that "where detention is considered unavoidable [...] subject to judicial oversight the maximum period of detention should be 28 days". Joint Committee on Human Rights, The Treatment of Asylum Seekers: Tenth Report from Session 2006-07, 22 March 2007, para 276

***BID recommends that decisions to detain are subject to automatic judicial oversight to prevent unnecessary and expensive detention. The proposals for automatic bail hearings contained within the Immigration and Asylum Act 1999 should be re-introduced.***

**b) Extensive delays in obtaining travel documents**

Delays in obtaining travel documents are the one of the most common factors contributing to long term detention. A sizeable proportion of foreign nationals in immigration detention have no travel documents, having entered the UK without documents or with false documents, or having later lost or destroyed them. The cooperation of both foreign missions and immigration detainees is required in order to identify the individual as the national of a country and issue new travel documents for the purpose of removal. However, both missions and individuals may withhold or delay co-operation with the redocumentation process for a variety of political and personal reasons. Where individuals cannot be documented they may face long periods in immigration detention, sometimes amounting to years, in what becomes *de facto* indefinite detention

BID's casework experience suggests that the course of the redocumentation process as managed by the UKBA is routinely characterised by lengthy delays and failure to progress cases. Basic information on evidentiary requirements for travel documentation is currently not always shared between UKBA caseowners and the various units within UKBA that handle documentation. Reviews of complete case files obtained as Subject Access Requests show that immigration bail may be refused on the grounds that the SSHD asserts in the bail summary that documentation is imminent whilst a different unit in UKBA has noted elsewhere in the file that documentation is not possible for this individual.

Detainees are given little or no guidance from UKBA on the steps they might take to expedite the documentation process in a timely manner and thus end their detention. Detained long term UK residents subject to deportation action can face practical barriers to documentation as a result of loose ties with their country of origin after many years in the UK, and may have problems obtaining evidence of their life in their country of origin.

***BID recommends that the UKBA be required to provide documentary evidence at bail hearings to substantiate assertions that documentation is imminent, and judges be directed to release bail applicants where this evidence is not supplied.***

***BID recommends that the UKBA provide detainees and legal representatives detailed guidance on evidentiary requirements for travel documents on a country by country basis***

**c) Immigration bail used as an extension of the criminal justice system**

In BID's experience, where the Home Office has indicated its intention to deport a foreign national ex-prisoner, there is an expectation that the individual will be transferred to immigration detention at the end of their custodial sentence, and as a result foreign national prisoners are frequently not prioritised for a risk assessment as part of a pre-release plan. Post sentence detainees therefore frequently do not have access to documents that could otherwise help them argue their eligibility for bail in front of an immigration judge. This is one reason why so many of the people who have spent years in immigration detention are foreign national ex-prisoners.

The Immigration Act 1971 provides for certain circumstances under which an immigration judge is not obliged to grant bail. One of these is that the applicant is likely to commit an offence unless kept in

detention. BID believes that this restriction on bail to prevent future offending is inappropriate. Immigration detention is not an extension of the criminal justice system and should not be used to prevent future as yet uncommitted crimes. Foreign national ex-prisoners in immigration detention have served their criminal sentences in prisons and if they were British nationals would have been released. The government's inability to effect a timely deportation at the end of a foreign national's sentence should not be used to restrict access to immigration bail.

***BID recommends that HM Probation Service must produce pre-release reports for foreign national prisoners subject to deportation proceedings at end of their sentence in the same way as for British citizens and prisoners without deportation action pending.***

***BID recommends that probation records available for the Home Office (including the risk of re-offending pro forma) must also be available to bail applicants and their legal representatives.***

***BID recommends that the statutory restrictions on bail in the Immigration Act 1971 should be amended so that they relate solely to detention for the purposes of immigration control and not to prevent future criminal offending***

#### **d) Insufficient coordination between agencies of the criminal justice system and the immigration system**

Whereas post-sentence immigration detainees have experience of both the criminal justice and immigration systems, the legal representatives, immigration judges, prison and probation staff, and immigration officials working on their case are likely only to know one system or the other, not both. Foreign nationals in prison who are subject to deportation action are typically transferred from prison to immigration removal centre. However, BID is concerned firstly about the apparent lack of planning and provision for the procedural needs of agencies who now have to work together closely on this transition, and secondly about the barriers to making bail applications that are generated by these failures. BID's casework experience suggests that among other issues, the failure of the UKBA to engage with Family Courts adversely affects the case progress for women who have unresolved Family Court issues when they enter immigration detention

***BID recommends that the Home Office and Ministry of Justice jointly address the training needs for people working with this group of immigration detainees that links together the two jurisdictions.***

#### **e) Section 4 bail addresses**

A number of long term detainees are currently unable to apply for bail because of a lack of suitable Section 4 (publicly funded) bail accommodation, leaving them with no realistic prospect of release. Since mid-2009 the Home Office has been working with NOMS to develop policy and practice around a new risk assessment process relating to potential harm to the public when individuals are released from detention to Section 4 (publicly funded) shared accommodation. Pending completion of this provision, UKBA have simply failed to provide detainees they deem to be potentially 'high risk' with Section 4 accommodation for use as a bail address, rendering these detainees unable to apply for bail for several months in breach of their Article 5 right to challenge their ongoing detention. BID alone currently has around 30 long term detainees who have been unable to apply for bail for several months and have remained in detention. The total number of detainees who remain in detention with no realistic prospect of release is unknown but is likely to be much greater. High Court action on the grounds of unlawful detention has begun against the Home Office in some of these cases.

***BID recommends that the Home Office, working together with NOMS, expedite and publish its risk assessment policy for shared Section 4 dispersal accommodation used for immigration bail addresses without further delay.***

**f) Absconding risk and community-based alternatives to detention**

By far the most common argument used by the Home Office to oppose bail is the risk of the applicant absconding if released. Indeed, immigration judges are not obliged to grant bail if they believe an applicant is likely to abscond. BID has found that immigration judges routinely accept unevidenced Home Office assertions about propensity to abscond without challenge or a request for supporting evidence, and refuse bail accordingly.

- In 70% of a sample of bail hearings observed by BID between 2009 and 2010<sup>11</sup> the Home Office argued that the applicant would abscond if released. However BID believes that in the majority of cases detention is not necessary to prevent detainees from absconding despite knowing they are due to be removed from the UK. A 2001 study of asylum seekers found that only 10% of bailed detainees clearly failed to comply with their bail conditions.<sup>12</sup>
- File reviews show that UKBA assessment of absconding risk may be made on the basis of little contact with, or information about, the individual or family concerned, or otherwise rely on information on personal circumstances that is out of date.
- The UKBA contact management system for individuals liable to detention has the facility to increase the reporting frequency in cases where there is an adverse immigration history or previous non-compliance with reporting requirements<sup>13</sup>.
- The option of release from detention on bail with reporting requirements and electronic monitoring is an option that the majority of BID clients indicate on bail application forms that they would find acceptable, yet the option of electronic monitoring ('tagging' or voice recognition) is not routinely explored by immigration judges.

***BID recommends that the UKBA's criteria for assessing absconding risk for individuals liable to detention should be consulted on with stakeholders and revised in the light of the evidence that is available on risk of absconding.***

***BID recommends that UKBA risk assessments must be based on adequate up to date evidence, must be properly fact-checked, must take into account all relevant evidence, and must be provided to the courts.***

***BID recommends that the UKBA's processes for assessing absconding risk should be subject to independent oversight and regular independent audits.***

**g) A circle of inaction centred on the immigration bail process**

BID's recent research on the immigration bail process<sup>14</sup> found too many bail applicants stranded in the middle of a circle of inaction caused by mutually reinforcing failures on the part of immigration judges, the Home Office, the Probation Service and legal services. Immigration judges routinely fail to identify steps to be taken by the Home Office or the applicant. As a result bail cases are not sufficiently

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<sup>11</sup> Bail for Immigration Detainees, (2010), 'A nice judge on a good day': immigration bail and the right to liberty.

<sup>12</sup> Irene Bruegel & Eva Natamba, (June 2002), Maintaining Contact: What happens when detained asylum seekers get bail? South Bank University.

<sup>13</sup> UKBA, (June 2005), Contact management policy, process and implementation (CMPPI) Version 4, available at <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/contactmanagement/contactmanagement/Contactmanagementpolicy.pdf?view=Binary>

<sup>14</sup> Bail for Immigration Detainees, (2010), 'A nice judge on a good day': immigration bail and the right to liberty.

progressed from one hearing to the next and subsequent bail refusals show little or no attempt to move outstanding issues towards a resolution. Future bail hearings repeat the same discussions again and again. As a result immigration removal centres and prisons are have greater numbers of detainees who have been warehoused for prolonged periods of time because of the failures of various judicial and government departments.

***BID recommends that the First Tier Tribunal's forthcoming Practice Directions for immigration judges should include a direction to release bail applicants if the Home Office has not opposed bail through the service of a bail summary.***

***BID recommends that the First Tier Tribunal's Practice Directions for immigration judges should include a direction that the Home Office must defend contested facts in bail summaries through the use of documentary evidence. These directions should be replicated in the Home Office's Enforcement Instructions and Guidance.***

#### **h) Detention costs and damages awarded for unlawful detention**

Lastly, the costs of holding people in immigration detention for extended periods, and the damages now beginning to be awarded in unlawful detention litigation, are considerable. The latest publicly available figure on the average direct cost (not including overheads) of holding an individual in an immigration removal centre for one week shows this to be £1,440<sup>15</sup>. The Home Office does not collect data on awards paid in unlawful detention cases. A survey carried out for a BBC World Service in 2010<sup>16</sup> found that over the last three years five law firms have secured damages for a total of 121 clients amounting to £1.7 million, not including costs.

#### **4. ABOUT BAIL FOR IMMIGRATION DETAINEES**

Bail for Immigration Detainees is an independent charity that exists to challenge immigration detention in the UK. We work with asylum seekers and migrants held in removal centres and prisons to secure their release from detention.

BID provides free legal advice and information to detainees to help them to exercise their right to liberty by making their own bail application before an immigration judge if they have no legal representative. BID provides written materials, telephone support, and runs workshops inside removal centres. We prepare applications for release on behalf of vulnerable detainees who are unable to represent themselves, in particular families with children and long term detainees, using free assistance from barristers to present the bail application.

Drawing on extensive casework experience BID engages in research, policy and strategic litigation to influence detention and bail policy and practice to ensure that people deprived of their liberty are better able to exercise their legal rights, and to bring an end to indefinite detention.

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<sup>15</sup> Response by Rt Hon Phil Woolas, Immigration Minister to a question from Rt Hon Keith Vaz, 1 Nov 2008.

<sup>16</sup> BBC News online, 11<sup>th</sup> February 2010, "Minister 'admits paying millions to detained migrants'". Available at <http://news.bbc.co.uk/1/hi/uk/8509417.stm> [accessed 23.07.10].