28 Commercial Street, London E1 6LS
Tel: 020 7247 3590 Fax: 020 7426 0335
Email: enquiries@biduk.org www.biduk.org
Winner of the JUSTICE Human Rights Award 2010

BAIL FOR IMMIGRATION DETAINEES' RESPONSE TO THE MINISTRY OF JUSTICE CONSULTATION

Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders

March 2011

1. INTRODUCTION

Bail for Immigration Detainees (BID) is an independent charity established in 1999 which exists to improve and promote access to justice for foreign nationals held in immigration detention under Immigration Act powers. It pursues these ends through the provision of legal advice and pro bono representation for immigration bail hearings, by providing training and self-help materials to immigration detainees in order that they may represent themselves at bail hearings, through advocacy with civil servants and politicians, and by way of strategic interventions in litigation relevant to issues which fall within BID's core areas of expertise. BID does not receive legal aid funding, but rather provides free accredited legal advice and representation through the use of trained volunteers, legally-qualified staff and pro bono barristers and solicitors. BID is represented on a number of Home Office convened stakeholder groups, and won the JUSTICE Human Rights Award 2010.

BID's client group includes foreign national ex-offenders facing deportation action who are held in removal centres, and a smaller number of time-served foreign national prisoners who for various reasons remain in prison subject to immigration act powers at the end of their sentence. A recent survey by BID and ICAR (2011) across the UK immigration detention estate found that 60% of our clients surveyed were subject to deportation action as a result of their criminal sentence, and had been transferred to a removal centre straight from prison[1]. From 1 August 2009 to 31 July 2010, BID helped 2089 people held in immigration detention.

BID works with and provides training to prison officers who have the foreign national coordinator role in a small number of prisons and YOIs in England. The purpose of this work is an exchange of information about the needs of foreign nationals in the prison system, particularly with regard to immigration legal advice in prison and preparation for transfer to the immigration detention estate. We also provide materials on immigration detention and bail for foreign nationals in prison via prison library services.

[1] [1] Bail for Immigration Detainees & Information Centre about Asylum and Refugees, (2011), 'Provisional results of a survey of levels of legal representation for immigration detainees across the immigration estate', BID & ICAR, London. Available at http://www.biduk.org/471/news/bid-icar-survey-shows-1937-of-detainees-interviewed-never-had-any-legal-advice-while-in-detention.html

BID broadly welcomes the thrust of the Green Paper, namely to set out "how an intelligent sentencing framework, coupled with more effective rehabilitation, will enable us to break the cycle of crime and prison which creates new victims every day". However, BID is concerned that the consultation document treats foreign national offenders as a homogenous group, for whom the only remedy to the fact of their offending is deportation. As the former HM Chief Inspector of Prisons Dame Ann Owers noted in the first thematic report on foreign national prisoners by HM Inspectorate of Prisons

> *"A national strategy for managing foreign national prisoners should not begin and end with the question of the legal powers and processes of deportation. The first building block must be the identification, and provision of support for, foreign nationals within the prison system. As this report and our individual inspections show, this is far from the case." (2006: 1)*[2]

The proposals in the Green Paper signally fail to demonstrate a nuanced understanding of the composition and circumstances of this significant and growing minority of the prison population. As a consequence the proposals in the Green Paper fail to flesh out in anything like sufficient detail an appropriate response to foreign national offenders in the criminal justice system, specifically how to minimise their numbers in the custodial estate in both absolute and relative terms, and their fate at end of sentence.

The Ministerial Foreword notes that "foreign national offenders, unless they have a legal right to remain here, should be deported at the end of their sentence" (*emphasis added*). BID is deeply concerned that the Green Paper makes no mention of the importance of adequate access for foreign nationals in prison to immigration legal advice on deportation and other immigration matters, especially in light of current proposals, also from the Ministry of Justice, to remove advice on deportation and general immigration matters from the scope of legal aid in future reforms to legal aid provision in England and Wales[3]. We believe there is a danger of serious injustice for foreign nationals in the prison system. Foreign national offenders must be able to examine the legal basis of their right to remain in the UK via the provision, through legal aid if necessary, of independent immigration legal advice. However, in the recent Green Paper on reform of legal aid in England and Wales it is proposed that deportation and general immigration matters be taken out of scope of legal aid.

We have responded to specific consultation questions where possible, namely on female offenders and on early guilty pleas and simple cautions for foreign nationals charged with document fraud offences as a means of diversion from prosecution. Many of the specific questions are beyond the scope of our expertise, so we offer some general observations on the nature of the foreign national population in prisons, on the consequences for the immigration detention estate of failure to properly support foreign nationals facing deportation action upstream in the criminal justice system, and on deportation policy.

---

[2] HM Inspectorate of Prisons, (July 2006), 'Foreign national prisoners: a thematic review'. Available at http://www.justice.gov.uk/inspectorates/hmi-prisons/docs/foreignnationals-rps.pdf

[3] See Ministry of Justice, (November 2010), Proposals for The Reform of Legal Aid in England and Wales. Available at http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf

2. GENERAL OBSERVATIONS ON THE NATURE OF THE FOREIGN NATIONAL POPULATION IN PRISON

The foreign national population in the prison estate exhibits extreme diversity in terms of country of origin, immigration status, length of stay in the UK, reason for entering and remaining in the UK, nature and strength of family and community ties in the UK, and caring responsibilities. This is in addition to the range of offences for which they have been charged or convicted that have resulted in their custodial sentence. Many foreign national prisoners have been UK taxpayers; many have UK citizen partners, children, and naturalised UK citizen siblings or parents. Others of course are not.
It is BID's experience that having committed a criminal offence, non-UK citizens, many of whom are long term UK residents, appear to forfeit the right to any consideration of their personal circumstances, strength of ties to the UK, and ability to reform and make a positive contribution to life in the UK[4]. Instead, they become a problem to be dealt with by summary deportation from the UK, to a country they may have left as a child with their asylum-seeking parents, effectively barred from return for a minimum of ten years under the so-called 'automatic deportation' provisions of the UK Borders Act 2007.

Prison officers that BID works with have told us that this cohort of long term UK resident foreign national prisoners are commonly distraught at the thought of forced return to their country of origin that they may have no memory of whatsoever. Such prisoners do not understand why they face cancellation of their leave to remain and subsequent deportation after several years in the UK, and are much less likely to cooperate with efforts to remove them. Where they have UK citizen children, parents or siblings, such foreign national prisoners may well have related but unexamined human rights claims grounds to challenge the deportation action being taken against them.

> *Amadou was seven years old when he came to the UK from Sierra Leone. In 1995 he was granted Indefinite Leave to Remain (ILR).*
>
> > *"My mum came first then she sent for me to come and I had to come over. She didn't claim asylum, she just came over. In those days you just got a visa and came over. I went through schooling here. When I was about 15 or 16 I got my own leave to remain."*
>
> *In 2005 Amadou was arrested and sentenced to five years for possession of a controlled drug with intent to supply. At the time BID met Amadou he had a court date pending to appeal his deportation order. While all of Amadou's family is here in the UK, including his three British-born children, he has no ties whatsoever with Sierra Leone.*
>
> > *"I would say England is my home country because I don't know nowhere else. I came here when I didn't know nothing else. I don't know Sierra Leone as my country, I don't know it at all. I don't know what I would do if I had to leave the UK, leave my kids."*

In BID's experience, such long term residents are over-represented among very long term immigration detainees (often detained for one, two, three or four years in addition to their prison sentence). These foreign nationals are often difficult to remove as their identity and right to a

[4] In 2005, just under half of foreign national prisoners interviewed by HMIP said their main country of residence was the UK (HM Inspectorate of Prisons, (July 2006), 'Foreign national prisoners: a thematic review'. P: 5). Available at http://www.justice.gov.uk/inspectorates/hmi-prisons/docs/foreignnationals-rps.pdf

passport from their country of birth may be difficult to prove after many years in the UK. They may resist attempts to remove or deport them without proper legal attention to their wider immigration case. They may be unwilling to cooperate with their re-documentation as they sense an injustice, but without adequate immigration legal advice and representation they are not in a position to determine whether or not they have a realistic claim to remain in the UK.

There is another prominent cohort of foreign national prisoners that is of concern to BID. These are individuals who have been apprehended at a port of entry to the UK while presenting false documents, or during a UK Border Agency enforcement raid in the UK during which they are found to be in possession of false identity documents. Typically these offences under Immigration Acts 1971 to 2006 (England and Wales) or the Identity Cards Act 2006 attract a sentence of 12 months, which then triggers automatic deportation action (UK Borders Act 2007).

This cohort, especially those charged after a port apprehension, include foreign nationals who have entered the UK specifically to seek protection through a claim for asylum. Some may not have received correct legal advice on the possibility of mounting a defence against the presentation of false documents under s.31 of the Immigration and Asylum Act 1999 where they had entered the UK seeking protection and presented themselves to the UK authorities without delay and made a claim for asylum as soon as reasonably practicable[5].

> *A is a businessman and his wife B has completed a degree in architecture. He and his wife were arrested and charged with the use of false documents when they entered the UK to claim asylum in 2009. They each received a 12 month sentence on conviction and went to prison. They were eventually reunited in immigration detention when they came out of prison. After several months in detention B was released as she had become pregnant. A was released on bail just before the birth of their child. Their asylum case is ongoing.*

Other foreign national prisoners are serving a custodial sentence following arrest as they depart the UK using false documents. This cannot be seen as a proportionate or helpful response to their offence.

> *Janet was arrested at check-in at Gatwick Airport trying to leave the UK to return to Nigeria. Instead of boarding a plane to go home, she was sentenced to 12 months in prison for using a false passport to leave the UK. On top of her sentence she spent nearly two years in immigration detention. Janet's lawyer told her not to claim asylum while she was still serving a prison sentence for trying to use a false passport to leave the UK. She had suffered serious domestic violence in Nigeria which left her requiring hospitalisation. Janet took the solicitor at his word and waited to claim asylum until her sentence had ended. Her credibility was later rubbished by the Home Office because she had not claimed asylum earlier and her claim was refused. She was then detained, released and re-detained, spending nearly two years in immigration detention. After six months on immigration bail she was deported to Nigeria three years after she first tried to go home.*

A simple caution project for disposal of identity document fraud offences committed by foreign nationals is currently being piloted by the Ministry of Justice, the UK Border Agency, and the Crown Prosecution Service. BID has serious concerns about this pilot which are addressed below.

[5] See Mohamed v R. [2020] EWCA Crim 2400 (19 October 2010)

It is BID's experience that women who have been trafficked into the UK to provide commercial sexual services are still facing prosecution and deportation for criminal offences related to their illegal entry to the UK, despite having experienced abuse and exploitation, where protection mechanisms relating to victims of trafficking have not been correctly applied. BID continues to encounter other victims of trafficking who have been criminalised, for example foreign nationals serving sentences in Young Offender Institutions (YOIs) for their involvement in cannabis factories for whom the fact of their having been trafficked seems to emerge only after they have been sentenced.

We highlight here recent comments from the Immigration Law Practitioners' Association on the operation of the National Referral Mechanism for victims of trafficking

> *"When cases are dealt with by the UK Border Agency it is frequently the same individual dealing with the question of whether an individual has been trafficked and the substantive immigration decision. This leads to a focus on immigration law and the timescales of processing for immigration cases, even where this may have a deleterious effect on gathering the evidence for prosecutions of traffickers or for, potentially, for the presentation of the eventual case against traffickers in court".*
>
> *"Prosecution of people who have been trafficked for alleged crimes committed while under the control of traffickers is a barrier to collaborative working, as are [such] people being held in prison or immigration detention centres"*[6]

Clearly much remains to be done to remove barriers to the effective functioning of mechanisms designed to ensure that foreign nationals who commit immigration or other offences under duress are identified as early as possible and diverted from prosecution and prison. Vulnerable foreign nationals will continue to enter the criminal justice system unnecessarily until the problems identified with these mechanisms, and the collaborative working across agencies required to make them fully effective, are resolved. BID believes this failure extracts a high cost, both to the individuals concerned who have been unjustly criminalised and also to the public purse.

3. GENERAL OBSERVATIONS ON DEPORTATION POLICY

The Green Paper points out that the population of foreign national offenders in the prison system has doubled over the last decade to 11, 135, or 13% of the prison population, as the total prison population increased by one third[7]. HM Inspectorate of Prisons points to a longer term picture of a rise in the number of foreign nationals in the prison estate, going back to at least the early 1990s[8], as

---

[6] See 'UK Border Agency questionnaire on first twelve months of operation of the National Referral Mechanism: Immigration Law Practitioners' Association Response', June 2010. Available at http://www.ilpa.org.uk/

[7] Green Paper: 2.20, Ministry of Justice Offender Management Caseload Statistics 2009 Statistics Bulletin (July 2010). Tables 7.21 and Ministry of Justice Population in Custody monthly tables June 2010 England and Wales Statistics Bulletin (July 2010) Table 5.

[8] HM Inspectorate of Prisons, (July 2006), 'Foreign national prisoners: a thematic review'. Foreign national prisoners in England and Wales have trebled in number since the early 1990s, increasing from 3,446 (7.8% of the prison population) in 1993 to 10,289 (13%) on 30 April 2006. The number of foreign national women has risen from 283 in 1993 to 880 in April 2006, when they made up 20% of the female prison population. P: 3. Available at http://www.justice.gov.uk/inspectorates/hmi-prisons/docs/foreignnationals-rps.pdf

well as a dramatic rise in the number of foreign nationals charged with fraud and forgery offences (usually related to the use of false identity documents)[9].

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, and more widely at the improper use of the criminal justice system for the purpose of immigration control.

Deportation procedures, including the so-called 'automatic deportation' provisions under the UK Borders Act 2007 apply to a wide range of foreign nationals, from those criminalised while entering the UK to seek protection who rely on false documents for entry, to long term UK residents (often with family and other ties to their community) who have been convicted of non-immigration related offences. The UK Borders Act 2007 removed the discretion of the Secretary of State over whether or not to pursue deportation action against foreign nationals who are convicted of an offence in the UK and who (if they are non-EEA nationals) are sentenced to imprisonment for 12 months or more, even where there are compassionate grounds or mitigating circumstances. Non-EEA foreign nationals who commit a number of offences with short sentences that together add up to 12 months or more within a 5 year period, for example motoring offences, also become subject to the automatic deportation provisions.

In practice this means that at the end of their custodial sentences, instead of being released back into the community, possibly under Licence and Probation Service supervision as a UK citizen prisoner would be, these foreign national ex-offenders are placed in immigration removal centres while their deportation is arranged, often with little prospect of early removal from the UK.

The consequences of deportation from the UK are extremely serious. Deportees are excluded from the country for a minimum of 10 years, and must apply to have their deportation order revoked before they are even able to seek an entry visa again. Non-EEA nationals suffer the most serious consequences of automatic deportation. There are a number of exclusions that apply to EEA nationals that make deportation action much less likely for all but the most serious EEA national offenders. Clearly, whilst deportation must be distressing for most people, those foreign national prisoners and ex-offenders who have been in the UK since childhood, or who have families in the UK and few connections in their country of origin are likely to have greater difficulties on return than a person who at least has extant networks in their country of origin.

Although deportation action is appealable, it is BID's experience that our bail clients in immigration detention, including many who are long term UK residents, who are in receipt of signed deportation orders are currently unable to examine their legal position in relation to deportation action, including any human rights challenges they may have (for example under ECHR Article 8, the right to family life), let alone mount a legal challenge to proposals to deport them where this might be an appropriate course of action. Access to justice for foreign national offenders is curtailed on entering prison by a lack of availability of immigration legal advisors in the geographical area where they have served their prison sentence.

[9] 229 foreign national prisoners were charged with such offences in 1994, but by 2005 this figure had reached 1,995. Ibid: 3

A recent survey by BID and the Information Centre about Asylum & Refugees (2011)[10] across the entire UK immigration detention estate found that 78% of immigration detainees facing deportation surveyed had received no immigration legal advice while they were serving their sentence in prison. These foreign national prisoners had been unable to examine the legal basis for their deportation, let alone do it at an early a stage as possible to minimise delays in the process. As a consequence they have little or no understanding of the strength or otherwise of their immigration case and they are not aware of their rights. For example they may have unexamined human rights claims. This state of affairs is not conducive to early voluntary removal from the UK or cooperation with the Facilitated Returns Scheme for foreign national prisoners and other voluntary return schemes.

It is BID's experience that the majority of long-term immigration detainees (those held for 12 months or more) are foreign national ex-offenders. Recent survey evidence[11] shows that 49% of immigration detainees had no legal advisor at the time of the survey, and 19% of immigration detainees had never had any legal advice while in detention. Without advice and explanation from a properly funded independent legal advisor, their removal from the UK by means of deportation often progresses slowly if at all, prolonging detention at great financial cost to the state and personal cost to the individual.

Worryingly, we have been told by prison officers that they are somewhat reassured that though foreign national prisoners have no easy access to immigration legal advice they are at least getting advice from the UK Border Agency on their immigration case. We cannot stress strongly enough that information and suggestions given by UK Border Agency staff to foreign nationals about their immigration case is in no way equivalent to nor a substitute for independent legal advice for foreign national prisoners. We believe this lack of understanding should be addressed as a training issue for all NOMS personnel who come into contact with or have responsibility for foreign nationals in the criminal justice system. This especially applies to prison officers with the role of Foreign National Coordinator or Diversity Officer in their establishment, as well as custody officers in police stations.

The opportunities for foreign nationals to examine the legal basis for their deportation are already severely restricted at present due to the geographical mismatch of demand and supply for immigration advice which hits foreign national prisoners especially hard[12]. However, the Ministry of Justice now proposes to go further and remove from scope completely all legal aid for deportation-related work[13]. This proposal can only create greater inequality of arms between individuals facing deportation and the State. BID has strongly opposed this proposal in a separate consultation exercise.

Not all immigration detainees facing deportation wish to challenge their deportation, indeed some are keen to return to their country of origin. However, BID believes that foreign national prisoners

[10] Bail for Immigration Detainees & Information Centre about Asylum and Refugees, (2011), 'Provisional results of a survey of levels of legal representation for immigration detainees across the immigration estate', BID & ICAR, London. Available at http://www.biduk.org/471/news/bid-icar-survey-shows-1937-of-detainees-interviewed-never-had-any-legal-advice-while-in-detention.html

[11] Ibid.

[12] The Legal Services Commission operates the Duty Detention Advice scheme in immigration removal centres, under which exclusive contracts are given to immigration advice providers to hold legal advice clinics under legal aid. No such facility is in place for foreign nationals held in prison, whether on remand, serving their sentence or as time-served prisoners on an immigration hold.

[13] See Ministry of Justice, (November 2010), Proposals for The Reform of Legal Aid in England and Wales. Available at http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf

and ex-offenders must be enabled to exercise their rights, including their right to family life in the UK where appropriate, and for this they need access to publicly funded legal advice, subject to existing means and merits tests. If deportation-related matters are taken out of the scope of legal aid for foreign nationals, many of BID's immigration detainee clients, some of whom have lived in the UK for ten, twenty, forty and even fifty years, many with UK citizen partners, children, and grandchildren, will be denied access to justice. We have therefore strongly argued that deportation matters should be kept in scope for legal aid. We would go further and recommend that all foreign nationals held in prison should have access to immigration legal advice, either through regular on-site legal advice clinics or by telephone in those prisons with small numbers of foreign nationals.

BID recommends that the Ministry of Justice adopt a more nuanced approach to foreign national offenders in the criminal justice system. This should encompass proper consideration of the circumstances of foreign nationals at all stages of their movement through the criminal justice system.

BID recommends that

- **the low levels of awareness and understanding of the immigration system and the complexities of immigration status, and**
- **the meaning and importance of independent legal advice**

both be addressed as training issues among frontline staff in the criminal justice system, such as prison officers and police station custody officers.

BID believes it is essential that the implementation of any of the proposed reforms to punishment, sentencing, and rehabilitation be accompanied by adequately funded immigration legal advice to foreign nationals in prison early on in their sentence and throughout their time in prison.

BID recommends that in any reform to the legal aid system in England and Wales deportation matters and general immigration matters should be kept in scope for legal aid.

BID recommends reform to the deportation legislation that removes from the scope of the 'automatic deportation' provisions of the UK Borders Act 2007 the following groups of foreign nationals

- **Those who have Indefinite Leave to Remain in the UK**
- **Those who entered the UK as a minor [or aged under ten years old]**
- **Those who have lived in the UK for more than ten years**
- **Those who are recognised by the National Referral Mechanism as having been trafficked into the UK**

Q14: In what way do female offenders differ from male offenders and how can we ensure that our services reflect these gender differences?

BID has extensive experience over a number of years of working with female foreign national ex-offenders in immigration detention who are subject to deportation action. Those women with children in the UK are overwhelmingly the primary carers or only carers for those children. During their custodial sentence their children are either in local authority care (with a care order), or with a relative or partner (with or without a care order).

It is BID's experience that most foreign national women who were the main carer for their children leave prison and enter an immigration removal centre with decisions around their deportation and associated family court issues unresolved[14]. This process then continues while they are in immigration detention, but under the added constraint of poor communication between UK Border Agency and the various agencies involved in looked-after children. Social Services' parenting assessments cannot take place in the environment of a removal centre, but women are not given temporary release for the purpose of such as assessment. Social Services will generally say they can support the removal of children with their mother, but they need to carry out a parenting assessment. However it is BID's experience that ex-offenders must first get released on immigration bail before they can be given a parenting assessment, and this may take several months. As BID's own research has shown, 78% of foreign national prisoners and 49% of immigration detainees at any one time have no legal representation[15]. Many women are currently therefore obliged to navigate their way through these legal steps relating to the deportation of themselves and their children without the benefit of legal advice

Typically, a foreign national prisoner subject to automatic deportation provisions and whose children are the subject of a care order during their prison sentence will be served in prison with a letter notifying her of her liability to deportation, and inviting her to submit reasons why she should not be deported.

For such women ongoing legal applications, lack of travel documents, family court proceedings, and requirements for Children's Services to assess parenting capacity outside a removal centre setting prior to reuniting parent with child make many of these women unremovable pending the resolution of these matters. During this time the mother and her child or children remain separated.

> *S received a 2 years 6 month sentence for a drug related offence in July 2008. In November 2008 she was notified while in prison of her liability to deportation, and in response she informed the UK Border Agency she had two children in private fostering arrangements. At this point UK Border Agency investigations began. In March 2010 the results of a social*

[14] In respect of immigration detention for foreign nationals subject to automatic deportation, the UK Borders Act 2007 allows for detention under these circumstances, stating at that 32 (5) that "The Secretary of State must make a deportation order in respect of a foreign criminal. 36. A person who has served a period of imprisonment maybe detained under the authority of the Secretary of State (a) *while the Secretary of State considers whether section 32 (5) applies* and (b) where the Secretary of State thinks that section 32 (5) applies , *pending the making of the deportation order*" (emphasis added).

[15] Bail for Immigration Detainees & Information Centre about Asylum and Refugees, (2011), 'Provisional results of a survey of levels of legal representation for immigration detainees across the immigration estate', BID & ICAR, London. Available at http://www.biduk.org/471/news/bid-icar-survey-shows-1937-of-detainees-interviewed-never-had-any-legal-advice-while-in-detention.html

services assessment of her younger child was received by UKBA, and in April 2010 contact was made with the Children's Champion to update on childcare issues in the case. In June 2010, twenty months after the deportation process began, a Deportation Order and refusal papers were served on S. In March 2011 S is still in immigration detention, and still separated from her children.

T was convicted of a drug related offence and spent over two years in prison. She has three children in the UK under the age of 18, each under the care of different social services departments. One year before the end of her sentence and while still in prison she was notified of the intention of the Secretary of State to deport her. She made an asylum claim while still in prison but this was refused. She was then detained in a removal centre for a further 9 months under immigration act powers while her deportation was considered. Only after 4 months in detention was information first sought by the UK Border Agency from social services to obtain an assessment of T's parenting skills. The Children's Champion advised that T be released to allow for a parenting assessment and to reunite the family but when this was refused by the UK Border Agency an impasse was reached.

BID's experience suggests that arrangements for visits by looked-after children seem to work well when foreign national women are in prison but then disintegrate when the women are transferred to Yarl's Wood Immigration Removal Centre. There is generally poor communication between the UK Border Agency and the Family Courts, and escort services do not prioritise the transport of detainees to Family Court hearings, making reliable attendance at hearings difficult. There is little or no provision for child visits to their mothers in detention, despite a regime intended to be more relaxed than prison. Home visits and special circumstances under which mothers are allowed to visit their child (for example if the child is in hospital) are not routinely possible for detained ex-offenders. There is no clarity around arrangements for children to visit their mothers in immigration detention under the supervision of social services, for example, for the purposes of reunion.

In addition, we also note that the prolonged detention of a parent and separation of a family increases the harm which would be caused to a child's welfare if they were forcibly removed with their parent, and therefore potentially creates further barriers to their removal. Children who have spent their formative years in the UK are in any case likely to find removal to a country which is foreign to them very disruptive. This disruption will be seriously exacerbated if they are to be removed with a parent from whom they have been separated for a considerable period by immigration detention. Prolonged separation of parent and child is likely to be a significant factor in relation to whether or not the child can safely or reasonably be expected to adjust to life in a country that may be largely or entirely foreign to him or her, because the child's capacity to make such an adjustment is likely to be seriously impaired or damaged to the extent that he or she does or does not have a strong, stable and familiar relationship with his or her parent.

It is of major concern that the Ministry of Justice now proposes to remove from scope all legal aid for family matters[16], a step which we believe can only lead to longer periods of separation between women foreign national offenders or ex-offenders and their children, and exacerbate existing delays in the deportation and removal of such women. This is clearly at odds with the duty of the UK Border Agency under s.55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of children in discharging its immigration and nationality functions.

[16] See Ministry of Justice, (November 2010), Proposals for The Reform of Legal Aid in England and Wales. Available at http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf

In the light of these significant problems noted for women ex-offenders who have been separated from their children in prison, but who separately or together face removal or deportation from the UK, BID supports the Corston Report[17] recommendation of community sentences as the norm for women who have committed non-violent offences, and the development of alternatives to custody for those with childcare responsibilities. This would allow foreign national women mothers to remain with their child pending resolution of their immigration case. By removing the need to separate the mother from her child during a custodial sentence, the need for associated family court proceedings and supervised reunion are also removed. Neither of these processes is currently managed in a timely fashion by the UK Border Agency when foreign national ex-offenders are transferred from prison to the detention estate, leading to unnecessarily extended periods of time in detention and further damaging separation between mother and child.

Q44. HOW CAN WE BETTER INCENTIVISE PEOPLE WHO ARE GUILTY TO ENTER THAT PLEA AT THE EARLIEST OPPORTUNITY?

We comment here specifically on the joint Ministry of Justice, UK Border Agency and Crown Prosecution Service pilot scheme currently in operation to test

> *"the use of a simple caution as an alternative to prosecution for foreign national offenders who have no legal basis of stay in the UK, commit specified document fraud offences, and agree to be removed from the UK"* (emphasis added)[18].

The pilot is running for port arrivals at Heathrow Airport and Stanstead Airport, and at the time of writing is starting for in-country apprehensions in the East Midlands region. There are criteria for eligibility for action under this pilot process, for example it should not be applied to individuals reasonably believed to be involved in human trafficking, either as victim or perpetrator.

One of the aims of this policy is to "reduce the burden on the criminal justice system and UKBA from dealing with foreign national offenders who commit specified offences and are liable to be removed from the UK"[19].

Until the pilot schemes are concluded it would be premature to offer lengthy comment. However, BID has a number of serious concerns about the scheme at this early stage which we have laid out in brief below.

We agree with the basic sentiment of diverting foreign nationals from prosecution and the prison estate for certain document fraud offences. For those that have no legal basis to remain here and as a result face administrative removal from the UK it appears sensible to remove a period of imprisonment, which comes with a financial cost to the state and a personal cost to the individual. However, this diversion scheme appears to involve a significant risk of bypassing due process.

---

[17] *Ministry of Justice, (2007), 'The Corston Report: A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system'. Available at http://www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf*

[18] *Letter from Ministry of Justice to John Facey, Legal Services Commission, dated 2nd December 2010.*

[19] *Ministry of Justice, (2010), 'Simple Cautions for Foreign National Offenders: Pilot Policy Statement'. Section 4(i).*

a. Access to adequate immigration legal advice

Individuals "who have no right to stay in the UK" are being asked to agree with their administrative removal from the UK. But under what circumstances is this assessment being made and by whom before individuals are transferred to a police station? The pilot outline and our understanding of arrangements currently in place to provide immigration legal advice in police stations provided under the Police Station Immigration Telephone Advice service does not provide sufficient reassurance that those individuals apprehended will receive adequate immigration legal advice on their right to be in the UK.

Criminal solicitors are not qualified to provide immigration advice. Immigration advice is available in police stations via the Police Station Immigration Advice Line Service but the ability of advisors to give full and detailed advice on a person's right to stay in the UK is limited as they are unable to examine documents. Getting good advice in these circumstances is depending on the ability of the client to remember all the details of their situation, and their willingness to disclose this information in front of a police officer. The caveat to telephone advice from this service is always to find a local legal advisor to give detailed advice. It is not clear what steps will be taken by the police and UKBA to the individual getting appropriate legal advice at a later stage if that is what is required and recommended by the telephone advice service.

We believe that the chances of getting sufficiently specialist advice in the time available to a telephone advisor working under a fixed fee scheme, unless the merits of the case are obvious, is extremely low. Cases that appear to be borderline to a legal advisor with limited time and no sight of documents, especially those cases that might engage Article 8 human rights issues, are especially at risk of injustice.

Once in an IRC and able to access limited immigration legal advice under the Detention Duty Advice scheme (DDA), many cautioned foreign nationals may discover that they have unresolved legal issues and rights that understandably they may wish to exercise. There has to be concern that prosecution and imprisonment is being used as a coercive incentive to people to make decisions which may be detrimental to or have consequences for their future immigration status.

b. Human rights claims

Those foreign nationals who are apprehended in-country in possession of false documents (under the East Midlands element of the pilot) may have entered and been resident in the UK quite legitimately for months or years despite having been apprehended more recently in possession of false documents. Such individuals may have a strong Article 8 human rights claim to remain in the UK, but it appears that they face referral of their case back to the CPS for consideration of prosecution for their original offence if such a claim is later made"[20] We are not convinced that adequate immigration legal advice to examine such cases properly is currently present via police stations or will be provided under this pilot, and there is clearly a disincentive for individuals to explore their legal rights if they are to face prosecution after all as a result. The Prison Reform Trust has noted separately in their response to this consultation that

[20] Ministry of Justice, (2010), 'Simple Cautions for Foreign National Offenders: Pilot Policy Statement'. Section 18-19

"A system that used conditional cautions for people already living and working in the UK, on the condition that they left the country would be racially discriminatory and open to challenge under the Equalities Act"[21].

c. Protection claims

Those foreign nationals who are apprehended as port arrivals in possession of false documents (under the Heathrow Airport and Stanstead Airport element of the pilot) may have protection issues and wish to make an asylum claim. The issue of protection is not mentioned specifically in the pilot policy statement, other than in the section on non-compliance with attempts at removal from the UK. Those who sign for the scheme but who, before the simple caution is administered nearer to their removal, make a claim to remain in the UK on asylum or human rights grounds may also have their case referred back to the CPS for consideration of prosecution for the original offence[22]. This group of individuals is not mentioned as an exclusion from eligibility for disposal under the pilot, unlike individuals reasonably believed to be involved in trafficking.

d. Removability

We have concerns about assessments of removability at the time a person is put through the simple caution pilot scheme. The pilot policy is intended to apply to those individuals "for whom there is a realistic prospect of removal from the UK within a reasonable time period"[23]. It is not clear at what point an individual's removability will be examined in the police station. For example, a check on whether removals are currently taking place to the country in question, possession of travel documents for those that are living in the UK at the time they are apprehended (East Midland pilot) There is nothing in the caution policy statement that describes a need to refer the removability of an individual to the UK Border Agency before taking the caution process forward. .

Those individuals that do consent to being removed from the UK on a voluntary basis, to receive a simple caution at a later date, will be sent to a removal centre[24] , but they may not actually be removable within a reasonable period of time. Individuals not in possession of genuine travel documents will need to be re-documented, but for certain nationalities this can prove difficult and take several months, or longer, creating a risk of litigation.

It appears that the overall effect of the proposals on the use of simple cautions as a diversion scheme will be to shift responsibility for foreign nationals facing removal to the Home Office at the point they are transferred to immigration removal centres, but without in any way addressing or resolving the underlying immigration issues in individual cases.

We would welcome greater clarity from the UK Border Agency over anticipated timescales to redocument individuals from particular nationalities were this simple caution project to be rolled-out. Those individuals who can be removed immediately on apprehension will continue to be removed immediately.

e. Vulnerable adults

---

[21] Prison Reform Trust, (2011) 'Response to *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders', p: 22*

[22] Ibid. Section 19

[23] Ibid: Section 5 (v)

[24] The pilot policy statement notes that "those who commit these offences and are suitable immediately to be administratively removed from the UK rather than prosecuted or cautioned will continue to be dealt with in this way during these pilots" (point 2)

The simple caution policy statement notes that foreign nationals suspected of document fraud offences whose case is referred to the policy will be interviewed under the provisions of PACE in the normal way. The Police and Criminal Evidence Act 1984 (PACE)[25] requires that

> *"When the custody officer has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and an appropriate adult called".*

In addition, Home Office circular 016 / 2008 notes at point 16 that

> *"A simple caution will not be appropriate: where a person has not made a clear and reliable admission of the offence or has otherwise raised a defence. This includes occasions where …there are doubts about their mental health or intellectual capacity"*[26]

It is not at all clear that the needs of foreign nationals with mental health and learning difficulties have been taken into account in the policy statement for the simple caution scheme. It cannot be acceptable for vulnerable individuals to have their alleged offences disposed of in this manner, yet there is no indication in the pilot of how foreign nationals with mental health problems or learning difficulties will be identified, especially if they cannot speak English.

Dr Adeline Trude
Research & Policy Manager
Bail for Immigration Detainees
biduk.adeline@googlemail.com

[25] Code C, 'Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' , Section 1D. Available at http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/pace-code-c?view=Binary

[26] Home Office Circular 106/2008, 'Simple cautioning of adult offenders' Available at http://www.homeoffice.gov.uk/about-us/home-office-circulars/circulars-2008/016-2008/