

Conditional Cautions Code of Practice
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**SUBMISSION FROM BAIL FOR IMMIGRATION DETAINEES (BID) FOR THE
CONSULTATION ON CODES OF PRACTICE FOR CONDITIONAL CAUTIONS**

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. From 1 August 2011 to 31 July 2012, BID helped around 2500 people held in immigration detention.

We are restricting our comments to provisions for the new foreign offender conditions contained in the 'Code of practice for Adult Conditional Cautions'.

Bail for Immigration Detainees (BID) agrees with the basic sentiment of diverting foreign nationals from prosecution and the prison estate. For those individuals that have no legal basis to remain here and as a result face administrative removal or

deportation 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 provision clause seeks to harness a means of disposal of offences via the criminal justice system for the purpose of immigration control, in the context of inadequate immigration legal advice within the criminal justice system. The Prison Reform Trust noted separately in their response to the Green Paper that

“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”¹.

It appears that the overall effect of the use of foreign offender conditions with adult conditional cautions will simply 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.

OUR KEY CONCERNS

- The inadequate provision of immigration legal advice in police stations, currently delivered as a 30 minute conversation via telephone with no sight of papers, carries a serious risk of bypass of due process. From April 2013 when most immigration matters, including deportation, will be taken out of scope of legal aid, foreign national with no current leave to remain but who may otherwise have a strong claim to remain in the UK (e.g. long term UK residents) will be particularly vulnerable to injustice.
- Most foreign nationals who are - on the face of it - suitable for this type of adult conditional caution will be required to agree or disagree with the caution without the benefit of any immigration legal advice at all.
- The apparent removal of CPS oversight of the use of conditional cautions
- The difficulties inherent in assessing removability from the UK (in immigration law terms) for custody sergeants in police stations.
- The use of foreign national conditions with adult conditional cautions appears to be an attempt to provide the exclusionary provisions found under the Immigration Rules at 320 (7B) but by operating outside the Immigration Rules and outside the protections afforded by appeal provisions relating to deportation (whether court-ordered deportation under Immigration Act (1971) or so-called ‘automatic’ deportation (UK Borders Act 2007)).
- There is no obvious protection for vulnerable individuals. Protection is currently required under PACE when considering cautions for individuals with mental illness or learning disability, but other vulnerable groups should include

¹ Prison Reform Trust, (2011) ‘Response to *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*’, p: 22

age-disputed foreign national minors, and foreign national victims of trafficking.

- It is unrealistic to expect victims of trafficking to reveal at the point of arrest that they have been trafficked in such a way that they can be properly excluded from the use of an adult conditional caution with foreign national conditions. By means of a case study we show that is typical of our client group not to reveal that they have been trafficked for weeks after arrest.
- Once held in immigration detention pending removal, and able to access immigration legal advice, foreign nationals who have received such a conditional caution may discover they have a strong case to remain in the UK and make the appropriate legal challenge.

OUR CONCERNS IN DETAIL

a. Insufficient access to adequate immigration legal advice at the time of arrest

Foreign nationals will be asked to agree with their enforced removal from the UK as a condition of accepting an adult conditional caution. Our understanding of arrangements currently in place to deliver immigration legal advice in police stations 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 remain in the UK.

An unknown proportion of these foreign nationals will have entered and lived in the UK entirely lawfully, often for decades, as taxpayers, and parents and partners of UK citizens. Any person subject to immigration control is theoretically subject to removal or deportation under certain circumstances linked mainly to criminal convictions, but this appears to be an attempt to invite foreign nationals to agree to their removal from the UK in an additional and entirely new circumstance under threat of prosecution and imprisonment.

Where the police are waiting to issue a conditional caution in the circumstances outlined, we have no confidence that such individuals will be able to access adequate immigration legal advice in a police station or otherwise, at short notice, to enable them to examine or assert any claim they have to remain in the UK.

Criminal solicitors are not qualified to provide immigration advice. Immigration advice is currently 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 currently limited because they are unable to examine documents, and will be further curtailed from April 2013 when reductions in scope of legal aid come into force. Getting good advice in these circumstances is dependent 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. It is not clear what attitude will be adopted by the police and UKBA towards the individual getting appropriate legal

advice at some later stage – and before a conditional caution can be issued - if that is what is required and recommended by the telephone legal 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 telephone 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. After April 2013 there will anyway be no legal aid for such matters via the Police Station Immigration Advice Line Service.

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

b. Insufficient immigration advice where an arrested foreign national has a strong human rights claims

Foreign nationals offered a conditional caution may have entered and been resident in the UK quite legitimately for months or years prior to the commission of a criminal offence which they admit to prior to accepting this type of caution with conditions attached that are directed to the effect of their leaving the UK. 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 they later refuse to leave the UK and such a claim is made.

We repeat that we are not convinced that adequate immigration legal advice to examine human rights claims properly is currently present in police stations, and such advice as is currently available under legal aid on such matters will be out of scope from April 2013. There may be a disincentive for individuals to explore their legal rights to remain in the UK once in detention if they are to face prosecution after all as a result of taking such action.

c. Assessing removability

We have concerns about assessments of removability at the time a person is considered for a conditional caution. It is not clear at what point the removability of a “relevant foreign offender” will be examined in the police station, or how custody sergeants will be trained and accredited in immigration legal advice in order to make an evaluation that is a matter of immigration law. It cannot simply be a matter of UKBA informing a custody sergeant that a person is removable. For a removal or deportation from the UK to take place, the individual concerned will need to be in possession of some form of travel or identity document acceptable to the receiving

country, and removals to the country in question must not be suspended. In addition, where there are outstanding court hearings relating to immigration issues or family law issues, removal from the UK is not possible. It is not clear whether or not there will be a requirement to refer the issue of removability of an individual to the UK Border Agency before taking the caution process forward.

Those individuals subject to this process will be asked to sign a document containing details of their offence and their consent to being given the conditional caution, including the conditions of the caution, which will include their departure from the UK for a period of time, with no automatic right of return to the UK. Those individuals will then presumably be sent to a removal centre, where it may well transpire that they are not actually removable within a reasonable period of time. For example, individuals not in possession of travel documents will need to be re-documented, and for certain nationalities and for long term UK residents with weak ties to their country of origin this can prove difficult and take several months, or longer, creating a risk of unlawful detention and subsequent litigation.

d. Assessing the time it will take to remove a foreign national from the UK

Time limits for completing conditions

2.31 In relation to foreign offender conditions²

- Conditions to bring about the departure of the foreign offender should be completed as soon as reasonably practicable and in most cases within 16 weeks. Exceptionally, a longer period may be set where the administrative process in certain destination countries is likely to take longer than 16 weeks. This type of condition will not be appropriate where it will take longer than 24 weeks to complete.
- Conditions concerned with ensuring that the foreign offender does not return for a period of time, will generally, be in accordance with the Immigration Rules. Exceptionally, the condition may specify a period longer than that set out in the Immigration Rules. For example this may be required for serious offences that are either triable either way or that are indictable only offences.

² From Ministry of Justice, (2012), 'Code of practice for Adult Conditional Cautions'

Considering the views of others³

2.44 The decision maker will have in mind, where appropriate, the views of others, for example, victims, neighbourhood justice panels, and the UKBA in relation to foreign offender conditions.

Foreign offender conditions

2.50 The decision maker should consult with the UKBA before deciding whether to give a foreign offender condition to an offender. In particular the decision maker should obtain confirmation about the offender's immigration status and the likelihood of removal from the United Kingdom within a reasonable period and whether any dependants are required to be removed too.

Aside from the difficulty in assessing removability in the police station, in our experience it is simply not possible for UKBA to assess with any certainty on first encountering an individual whether or not removal can take place within 16 weeks or in less than 24 weeks. We see this clearly in the immigration detention estate, where people are first held – generally speaking - when their detention is deemed to be imminent by UKBA. However, around 20% of the 3000 or so people in the detention estate at any one time have been held pending removal for more than 6 months, and around 10% are held for over 12 months (for anything up to 5 years). This problem is most obvious in those cases where an individual has no travel document and there are practical difficulties in obtaining such documents from their country of origin. While UKBA has its own guidance for staff on estimated timescales for obtaining a travel document (with original papers, copy papers or without papers) these timescales are estimates only and subject to change. It is not clear how the existence or not of a travel document is to be determined by the police on the spot in a police station without further investigation.

e. Range of cautionable offences under this clause: removal from the UK is a disproportionate response

The Crown Prosecution Service Guidance on Adult Conditional Cautions⁴ states that the following specific offences may be considered for diversion by way of a Conditional Caution: summary only offences, and either way offences and attempts to commit these offences⁵. This is a wide range of offences, and raises the spectre of a foreign

³ From Ministry of Justice, (2012), 'Code of practice for Adult Conditional Cautions'

⁴ Available at <http://bit.ly/zrgP7m>

⁵ Any summary only offence, including: Common assault (level 5), assaulting a police officer (level 5), Section 4 and 4A Public Order Act 1986 (level 5), unlawful taking of a motor vehicle (level 5), interference with vehicles (level 4), Section 5 Public Order Act 1986 (level 3), obstructing a police officer (level 3), drunk and disorderly (level 3), simple drunk (level 1), loitering or soliciting for the purposes of prostitution (level 2 or level 3 if previous conviction). The following offences triable either way specified in the Theft Act 1968: theft, removal of articles from places open to the public, abstracting electricity, false accounting, handling stolen goods, going equipped for stealing etc, The following offence triable either way specified in the Theft Act 1978: making off without payment. The following offences triable either way specified in the Fraud Act 2006: making a false representation, failing to

national being encouraged - without adequate immigration legal advice early enough in the process - to agree to their removal from the UK for the possession of an amount of a Class C drug consistent with personal use, or for soliciting for the purpose of prostitution. We do not consider removal and exclusion to be a proportionate response in these circumstances without adequate immigration advice provision in place.

The use of conditional cautions this way appears to be an attempt to provide the same exclusionary provisions which can be found under the Immigration Rules at 320 (7B) but by operating outside the Immigration Rules and outside the protections afforded by appeal provisions relating to deportation, whether court-ordered under Immigration Act (1971) or so-called 'automatic' deportation (UK Borders Act 2007).

f. Insufficient protection for vulnerable adults

We note that the Police and Criminal Evidence Act 1984 (PACE)⁶ 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”.

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

g. Unrealistic expectations about disclosure of involvement in trafficking (particularly for victims of trafficking)

disclose information, fraud by abuse of position, possession of articles for use in frauds, making or supply articles for use in frauds, obtaining services dishonestly. The following offences triable either way specified in the Criminal Damage Act 1971: destroying or damaging property, threats to destroy or damage property, possessing anything with intent to destroy or damage property. The following offence triable either way specified in the Misuse of Drugs Act 1971: possession of any class of drug (consistent with personal use). The following offence triable either way specified in the Road Traffic Act 1988 and Schedule 2 of the Road Traffic Offenders Act 1988: forgery of documents (including offences involving use of driving licence and insurance with intent to deceive). The following offence triable either way specified in the Vehicle Excise and Registration Act 1994: forgery and Fraud (including fraudulent use of excise licence).

⁶ 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>

Conditions⁷

2.21 Foreign offender conditions cannot be given

- where the offender is suspected of committing document or identity fraud in order to claim asylum or to raise a Human Rights claim; or
- where there are reasonable grounds for believing that that the offence is connected to human trafficking, where the offender is either a victim or perpetrator.

BID's legal casework with immigration detainees demonstrates that the fact of trafficking when dealing with a victim of trafficking may not be immediately revealed. We believe that there will be similar problems with the expectation contained in this code of practice at 2.21 which appears to assume that 'reasonable grounds' that a person is a victim of trafficking will emerge in a convenient and timely fashion in a police station immediately following arrest, thus enabling the use of a conditional caution to be properly excluded.

Trafficking case study

A few months ago BID was contacted by a Nigerian woman in her late teens, who was being held in Yarl's Wood Immigration Removal centre. She had been detained for six weeks at the point when she got into contact with BID.

She disclosed to us that she had been trafficked to the UK two years earlier. She said that her mother died when she was a young child and she didn't have anyone to support her in Nigeria. When she arrived in the UK, she was taken to a residential flat, and forced to work in prostitution, alongside other women. Several months later, the police raided the flat and arrested her. She was held in a police station for two days. She told us that she thought she had been charged with overstaying her visa, but was not sure about this. She did not disclose to the police that she had been trafficked. After being released from the police station she became destitute and met a man in the street who offered her a place to stay in his house, and became her 'boyfriend.' She was told by the police that she was required to report regularly, but she said to us that she did not do this as she was afraid of being forcibly removed to Nigeria. The police then raided the house where she was staying earlier this year and she was arrested and taken to Yarl's Wood Immigration Removal Centre. She was held in immigration detention for three months, and was released on Temporary Admission following an assessment being carried out by the Poppy Project.

Two of the reasons given by the UK Border Agency for detaining the client in her Monthly Progress Report were that:

'You do not have enough close ties to make it likely that you will stay in

⁷ From Ministry of Justice, (2012), 'Code of practice for Adult Conditional Cautions'

one place. Your health gives serious cause for concern on grounds of your own wellbeing and/or public health or safety.'

The UK Border Agency's intention in detaining this client was to forcibly remove her from the UK. The client informed us that her passport was with the person who brought her into the UK. The UKBA stated in a Monthly Progress Report to the client that the only barrier to removing her from the UK was that they were waiting for the Nigerian Embassy to provide her with travel documents. Without this delay, the client might well not have had the opportunity to come into contact with the Poppy Project and therefore be released from detention.

h. A note on the Ministry of Justice/UKBA/CPS pilot of the use of Simple Cautions with foreign nationals

During a six month period in 2010-2011 the UKBA, Ministry of Justice, and Crown Prosecution Service piloted 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, who committed specified travel document fraud offences, and who agreed to be removed from the UK.

In a submission to the consultation on the Justice Green Paper, BID expressed concerns about the use of simple cautions while the pilot was in operation. Subsequently, the Immigration and Border Policy Directorate at the Home Office has told BID (letter 16th December 2011) that during the lifetime of the pilot 109 cases (75 cases at Heathrow, 25 cases at Stansted and 9 cases in the East Midlands Region) were adopted for investigation. Five cases met the criteria for the pilot exercise (3 cases in Stansted and 2 cases in the East Midlands Region). Five individuals accepted the simple caution in return for consent to removal from the UK on a voluntary basis. Of those, four individuals have subsequently been removed from the UK, and one case from the East Midlands Region was released on bail pending removal at the time the pilot came to an end.

It is not clear what lessons have been learned from this pilot as to date, for example on evaluating removability in police stations, since none of the agencies involved have responded yet to our requests for sight of their project evaluations. Both the absolute number of people removed, and the proportion of those considered who were eventually removed, seem very low. We recommend that the project evaluation is published.

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