Bail for Immigration Detainees
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Winner of the JUSTICE Human Rights Award 2010

Ministry of Justice consultation 'Judicial Review: proposals for reform'

Response from Bail for Immigration Detainees, 23 January 2013

Bail for Immigration Detainees

Bail for Immigration Detainees (BID) is a national charity established in 1999 to improve access to bail for those held under Immigration powers in immigration removal centres and prisons. BID exists to challenge immigration detention in the UK through the provision of legal advice, information and representation, alongside research, policy and advocacy work and strategic litigation. BID is accredited by the Office of the Immigration Services Commissioner (OISC).

BID is represented on a number of Home Office convened stakeholder groups, and won the JUSTICE Human Rights Award 2010. In the last year we assisted 2510 detainees to make their own bail applications and in 246 cases we prepared the bail application and briefed *pro bono* counsel. Many of our clients are referred on to public law firms for judicial review of the lawfulness of their detention. BID has made 30 such referrals in the last twelve months, most commonly on the basis of length of detention combined with a factor such as failure on the part of UKBA to obtain a travel document in a timely fashion to facilitate removal, failure on the part of the UKBA to observe its duty in relation to the safeguarding of children and promotion of their welfare when separated from their main carer by detention, and failure to provide adequate treatment for and release from detention detainees with severe mental ill health.

The courts have granted BID permission to intervene in a number of cases raising important issues on immigration detention, including: Mustafa Abdi v United Kingdom (European Court of Human Rights, Application 2770/08, on-going)[1]; Razai & Others v SSHD [2010] EWHC 3151 (Admin)[2]; SK (Zimbabwe) v SSHD UKSC 2009/0022[3]; and Walumba Lumba (Congo) and Kadian Delroy Mighty (Jamaica) [2011] UKSC 12[4].

In the proposal document it is acknowledged that growth in Judicial Review applications is almost entirely down to immigration and asylum cases. Rather than attempting to put this increase into context, and consider which factors might have led to the increase in claims based on the actions and decisions of the UK Border Agency, the proposals for reform of Judicial Review focus instead on simply trying to reduce the numbers of such cases. There is no evidence that the proposal has considered, in conjunction with proposals to reduce access to Judicial Review, any attempts to

[1] The sequel to the Court of Appeal's decision in R(A) v SSHD [2007] EWCA Civ 804
[2] In which the court considered evidence indicating systemic difficulties with the Secretary of State's policy of providing accommodation for immigration detainees who are considered to be high risk.
[3] Where the court considered whether a breach of public law duty involves non-adherence to a published policy (and delegated legislation) requiring periodic detention reviews.
[4] Established a breach of a public law duty involving non-adherence to a published policy identifying substantive detention criteria.

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increase the quality of UKBA casework. For further information on the quality of UKBA detention casework please refer to the joint thematic inspection report produced by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, (December 2012), '*The effectiveness and impact of immigration detention casework*' [5].

Our responses to specific questions raised in the consultation document now follow.

1. TIME LIMITS FOR BRINGING A CLAIM

Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end of latest incidence of the grounds.

It is of concern that the consultation document places great reliance on anecdotal evidence on the issue of time limits. At paragraph 64 the document notes:

> *"anecdotal evidence suggests that, at least in some cases, the claimant has been able to argue successfully that the time limit should start at a later point, either by challenging the latest point of continuing breach or the latest decision in a series of related decision, essentially frustrating the application of the three month time limit"(MoJ, 2012. Para 64).*

No evidence is offered in the consultation document that the current Judicial Review permission process is failing to weed out those cases that are not brought promptly enough at present.

The proposal does not offer clarity in relation to the timescale within which claims for Judicial Review can be brought. In BID's view the notion of a continuing breach of multiple decisions is misleading in the context of immigration detention. Decisions to detain are reviewed monthly by the SSHD, in the face of new facts (but a longer period in detention as the months pass is always a new fact), and are approved at escalating levels of authority within the UKBA. Thus monthly detention review decisions must be viewed as fresh decisions on each occasion. If they were not, then the SSHD would be failing in her legal duty to review detention monthly. Monthly detention reviews are not intended to simply 'rubber stamp' the decision to maintain detention made the previous month, nor indeed the initial decision to detain.

[5] Available at http://bit.ly/UBdHRN

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Over a period of time, the Hardial Singh principles (the authoritative statement of the implied limitations of the power to detain) make it clear that when it becomes apparent to the SSHD that she will not be able to effect the removal or deportation of an individual whom she is seeking to detain, then there is a duty on the SSHD to release that individual from detention. The monthly decision on whether or not to continue to administratively detain the individual precisely allows for this over time, and the forward-looking nature of the Hardial Singh principles support the view of each detention decision being a fresh decision. The SSHD is required to apply these principles on the lawfulness of continuing detention on a day to day basis. Unlawfulness of detention can therefore emerge over time and through the passage of time, though there is the potential of unlawfulness from the first day of administrative detention in some cases. A decision to detain that may have been lawful on the first day of detention may at some point become an unlawful decision. It is essential that each monthly review of the decision to detain is seen as a free standing ground in considerations of permission to bring a Judicial Review of unlawful detention, in order that continuing failures of the SSHD such as a continuing breach of the power to detain (for example in relation to the conditions of detention, or diligence of the UKBA in pursing removal) may be brought.

The Supreme Court has also affirmed the importance attached by the law to procedural safeguards against arbitrary detention and, specifically, the key function performed by detention reviews. In the case of Shepherd Masimba Kambadzi v SSHD [2011] UKSC 23, in which BID acted as intervener, the Supreme Court found that a failure to conduct a detention review required by published policy (or a material factual error in a detention review) is a material public law error.

- Detention reviews are 'fundamental to the propriety of continued detention' (Lord Hope §51 and Lady Hale §73, approving the dicta of Munby J); they are 'not only commendable; they are necessary', suggesting that even if the policy did not require detention reviews, the common law would (Lord Hope §51).

- Lord Hope and Lord Kerr considered the review to be an implied aspect of the SSHD's statutory duty to authorise detention: the detention reviews are the means by which the authority to detain is renewed (Lord Hope §§52, 54, Lord Kerr §87).

- All members of the majority also considered the review to be a public law duty, being the means by which the continued legality of detention is ensured, as well as an obligation imposed by policy (Lord Hope § 51, Lady Hale §73, Lord Kerr §§84-85).

- A failure to conduct a detention review being a material error of law, the inevitable consequence of the Supreme Court's judgment in Lumba is that there is no causation defence (Lord Hope §54, Lady Hale §74). The detention will, regardless of substantive justification for the detention, be unlawful until the next detention review is carried out.

It cannot be correct that, as the proposal for such a time limit implies, that a claim which states that detention has become unlawful after 12 months cannot be made at that point because it

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should have been made at the first of a series of multiple decisions to detain, namely on the first day in detention. This is to completely ignore the fluid nature of the lawfulness of decisions to detain, and in BID's view is simply not workable. Were this proposal to be enacted in would give carte blanche to future breaches by the SSHD, and remove any meaning from subsequent representations on behalf of immigration detainees.

The Public Law Project (PLP) has noted that this proposal is contrary to current practice in discrimination and human rights law. In a recent briefing document on these proposals PLP notes:

> *"In discrimination law a person can bring a challenge up to three months after the date of the last act of discrimination. In human rights law, the European Court of Human Rights considers that a claimant is within the time limit if the human rights breach is on-going" (emphasis added)*

This proposal offers the possibility for public authorities to simply wait out a challenge in order to defeat it. Under the proposals, it appears that if an immigration detainee does not realise that his detention might be unlawful within three months of the "point where the grounds giving rise to the claim first arose" then the detainee might be unable to bring a challenge through Judicial Review. This position is clearly unreasonable and will surely of itself lead to challenge.

In BID's view this proposal has the potential to lead to unlawful detention claims being issued at a much earlier stage, including a greater number by litigants in person/self-represented claimants who have been unable to access publicly funded representation.

Question 6: Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

In BID's view, the proposed shorter time limits will result in applicants issuing applications for permission to bring a Judicial Review at an earlier stage, without exhausting attempts to resolve the issue in other ways.

In cases where the SSHD (UKBA) is the respondent, it is BID's experience that time limits for lodging documents are routinely not observed by TSol. This proposal to shorten time limits may end up causing difficulties for the SSHD. Such a shortening of application timescales will undoubtedly further disadvantage claimants who will have less time to prepare their case and must observe any guidance on timescales, while the SSHD will still have the opportunity to overshoot deadlines for submission.

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Shorter time limits for application will make certain types of challenge more difficult, given the time needed to put together applications. This is especially the case for certain types of claimants, such as immigration detainees, who currently experience difficulty in accessing legal advice and information, and who it is expected will increasingly act as litigants in person in relation to judicial review in the absence of legal aid from April 2013.

BID's regular survey[6] across the UK immigration detention estate into advice seeking behaviour among immigration detainees has found that up to 19% of detainees at any one time may have never had the benefit of immigration legal advice while in detention, while typically over 30% of detainees at any one time have no on-going legal advice, some despite many months or years in detention.

Immigration detainees who are vulnerable or disadvantaged in such processes by virtue of their mental health or language barriers will be additionally disadvantaged by this proposal.

Where detainees are experiencing mental health problems this may adversely affect their ability to work with a legal representative, especially if they are held in segregation.

> *"BID's legal caseworkers routinely work with clients who are distressed and anxious as a result of being detained, who self-harm, or who are severely mentally ill. Some BID clients are mentally ill yet have been segregated as a means of behaviour control, and segregation can complicate legal work to obtain release. BID caseworkers report that it is more difficult to advise and represent someone who is mentally ill. It can take more time to gain their trust, and their capacity to instruct a legal advisor may be difficult to determine. Communication can be more difficult, as can getting documents or taking instructions where a client has disordered thinking.*
>
> *Where detainees' mental state deteriorates as a result of detention, or because their mental illness has not been identified or "satisfactorily managed" in detention, caseworkers report that it becomes harder for people to help themselves progress their case. Mental illness and mental distress can make it more difficult for detainees to give statements, for legal advisors to discuss a case with clients, and make it more challenging for bail applicants to appear at bail hearings" (BID & AVID, 2012: 12)*[7]

Where detainees are held in prison post-sentence under immigration act powers, access to immigration and public law advice is extremely difficult for a number of infrastructural reasons and specific prison regimes.

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[6] Bail for Immigration Detainees, (2012), *'Immigration detainees' experiences of getting legal advice across the UK detention estate: summary results for surveys 1 – 4*'

[7] BID & AVID, (May 2012), '*Positive duty of care? The mental health crisis in immigration detention*'. Bail for Immigration Detainees & Association for Visitors to Immigration Detainees.

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Although immigration detainees are required to be held under remand conditions, which imply greater access by telephone to legal advisors, this is often not the case due to overcrowding (detainees held in prisons are asked sign a disclaimer in these circumstances). In other circumstances, we have evidence that certain prison governors enforce a regime of communication with legal advisors that uniquely disadvantages detainees held in prisons post-sentence. For example, one prison governor wrote to BID in January 2013 in relation to a client that prison rules only allow a 5 minute telephone call where a person is facing removal from the UK.

UKBA has confirmed to BID recently (December 2012) that the upper ceiling for the number of immigration detainees that can be held in prison post-sentence under immigration powers is now 1000. The Immigration Removal Centre estate has the capacity to hold around 3000 detainees. Therefore constraints on adequate ability to communicate with legal advisors, against NOMS/UKBA guidance for this population, already apply to a significant proportion of immigration detainees.

Furthermore, immigration detainees held post-sentence in prisons are not provided with on-site immigration legal advice via a surgery system. There is no equivalent system for the 25% of detainees held in the prison estate to the Detention Duty Advice Scheme in immigration removal centres, which is funded by the Legal Services Commission. Immigration legal advisors generally provide the referral to a public law firm required in order for consideration of an application for Judicial Review.

The Legal Services Commission (LSC) has acknowledged to BID and other organisations recently (November 2012) that the geographic distribution across the UK of immigration providers willing to work in prisons with immigration detainees under legal aid is very patchy. In addition, the current LSC fee structure for immigration work where providers must first travel to prisons for individual cases, offers only financial disincentives to those firms still interested in doing this work.

In BID's view all these infrastructural factors, which already make a timely application for permission for Judicial Review extremely challenging at present for immigration detainees, including those held in the prison estate, suggest that any proposal to further curtail time limits for applications will disproportionately affect this particular group.

2. APPLYING FOR PERMISSION

Question 9: Do you agree it should be for the defendant to make the case that there is no right to an oral renewal in the Acknowledgment of Service? Can you see any difficulties with this approach?

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Question 10: Do you agree that where an application for permission to bring Judicial Review has been assessed as totally without merit, there should be no right to ask for an oral renewal?

Question 11: It is proposed that in principle this reform could be applied to all Judicial Review proceedings. Are there specific types of Judicial Review case for which this approach would not be appropriate?

Question 12: Are there any circumstances in which it might be appropriate to allow the claimant an oral renewal hearing, even though the case has been assessed as totally without merit?

At the present time the right of renewed oral application for permission to apply for Judicial Review leads to the initial refusal being overturned. Indeed, the consultation document notes at paragraph 31 that in 2011, from a total of 1200 grants of permission, 300 Judicial Review claims were granted permission to proceed at oral hearings having first been refused permission on the papers[8]. Under the proposed reforms these cases, which made up 25% of applications ultimately successful at the permission stage, and which were found to have merit on review, would never have proceeded further.

Oral hearings may be the only opportunity to fully develop and test arguments for permission. In BID's view the current position of an unqualified right to a renewed oral application is essential for unrepresented applicants, as only then are judges able to enquire and obtain clarification on cases.

The effect of these proposals on applying for permission, if enacted, will be to shift the burden from the Administrative Court to the Court of Appeal, as a number of those denied the right to an oral renewal hearing will simply apply instead to the Court of Appeal.

3. FEES

Question 14: Do you agree with the proposal to introduce a fee for an oral renewal hearing?

Question 15: Do you agree that the fee should be set at the same level as the fee payable for a full hearing, consistent with the approach proposed for the Court of Appeal where a party seeks leave to appeal?

[8] Source: Management information, Administrative Court Office, Ministry of Justice.

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In BID's view, any fee should be waived in circumstances where a person lacks adequate funds, including those held in immigration detention and unable to secure legal representation. The court already has the power to penalise those who make wasteful applications. It is of concern that it is proposed here that court fees should be increased in order to make access to the courts more difficult, when there is no obvious relationship between the merit of an application and the means to pay a fee for such an application.

In BID's view, an increase in the application fee for an oral hearing may simply have the undesirable effect of discouraging applications in general (the overwhelming growth of which has been in immigration and asylum cases), rather than reducing unmeritorious applications as stated in the proposal.

4. GENERAL CONCERNS IN RELATION TO THE PROPOSALS

There is too much reliance in the proposals (and the ministerial statement on the proposals) on anecdote, insufficient evidence, and impressionistic accounts.
No evidence is offered in the proposals for the wholesale failure of the existing permission system in the repeatedly invoked argument that too many "hopeless, frivolous or vexatious" claims are slowing down the court system. In BID's view it cannot be right that these proposals to curtail current access to a vital check on the use of state powers can be built on the basis of mere anecdote and unattributed and vague concerns.

Examples of this approach in the proposal document include:

> *"We believe that the current law ought to function so that the time within which proceedings must be brought starts at the point where the grounds giving rise to the claim first arose.* ***Nevertheless, anecdotal evidence suggests*** *that, at least in some cases, the claimant has been able to argue successfully that the time limit should start at a later point, either by challenging the latest point of continuing breach or the latest decision in a series of related decisions, essentially frustrating the application of the three month time limit." (paragraph 64, emphasis added)*
>
> *"****Anecdotal evidence suggests*** *that, in some cases, in the Judicial Review proceedings the claimant is seeking to reargue substantially the same points in a different forum in the hope that a different conclusion will be reached. Only a very small proportion of these cases are granted permission and even fewer are ultimately successful" (paragraph 79, emphasis added).*
>
> *"It is not just the immediate impact of Judicial Review that is a concern.* ***We also believe that the threat of Judicial Review*** *has an unduly negative effect on decision makers. There*

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*is **some concern** that the fear of Judicial Review is leading public authorities to be overly cautious in the way they make decisions, making them too concerned about minimising, or eliminating, the risk of a legal challenge" (paragraph 35, emphasis added)*

The impact assessment is lacking in any equality impact assessment data in relation to groups with protected characteristics under the Equality Act 2010 (e.g. race in relation to immigration detainees).

The consultation document refers to the fact that this lacuna "limits our understanding of the potential equality impact of the proposals for reform" (Ministry of Justice, 2012: para 110). Given that the consultation document itself acknowledges that by far the largest area of growth in the number of applications for Judicial Review have come in the area of immigration and asylum, this strikes us as a somewhat cavalier attitude to the effect of the proposed changes to this particular group, when it is precisely this group for which the proposals are likely to have a disproportionate impact. A large proportion of immigration detainees in the UK fall within the protected characteristics under the Equality Act 2010 (which include race, age, disability (which includes mental health), pregnancy and maternity, and sexual orientation). Immigration detainees routinely seek Judicial Review of their administrative detention on grounds which are directly related to these protected characteristics, for example in relation to their on-going detention despite severe mental illness.

Despite the positive duty of care of the Secretary of State towards people held in administrative detention under immigration powers, the full range of releases available to the UK Border Agency are not being deployed where mentally ill detainees are identified and where release is clinically indicated. Over the last two years, there have been four cases[9] of Judicial Review in which the court has made a findings of a breach of Article 3 of the European Convention on Human Rights in the case of severely mentally ill immigration detainees.

It is therefore somewhat ironic that the consultation document notes at para 13 that:

"The expansion of statutory duties on Government and other public bodies has also led to an increase in Judicial Reviews based on failure to comply with these duties (for example, duties under the Equality Act 2010)."

[9] These cases are *R (HA) (Nigeria) v SSHD* [2012] EWHC 979 available at http://www.bailii.org/ew/cases/EWHC/Admin/2012/979.html ; *R (BA) v SSHD* [2011] EWHC 2748 (Admin) (26 October 2011) available at http://www.bailii.org/ew/cases/EWHC/Admin/2011/2748.html ; *R (S) v SSHD* [2011] EWHC 2120 (Admin) (5 August 2011) available at http://www.bailii.org/ew/cases/EWHC/Admin/2011/2120.html ; and *R (D) v SSHD* [2012] EWHC 2501 (Admin)

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In BID's view, the Government should not consider proceeding with these proposals in relation to immigration and asylum cases without discharging its duty under the Equality Act 2010, and without evidence of impact on those with protected characteristics such as race, including immigration detainees.

The negative effect of judicial review on decision-makers
Paragraph 55 of the proposal notes:

> *"It is not just the immediate impact of Judicial Review that is a concern. We also believe that the threat of Judicial Review has an unduly negative effect on decision makers. There is some concern that the fear of Judicial Review is leading public authorities to be overly cautious in the way they make decisions, making them too concerned about minimising, or eliminating, the risk of a legal challenge"*

BID can see no good reason for public authorities, in our case the UK Border Agency, to be shielded from Judicial Review. The threat of Judicial Review does not at present, in our extensive legal casework experience, lead UKBA decision makers to be "overly cautious" in their approach to decision-making and detention casework in relation to our clients. Quite the reverse is true. It is often only the initiation of proceedings that results in action being taken. For example, UKBA has recently acknowledged to BID that in the context of extensive delays in the provision of Section 4 (1)(c) bail accommodation for detainees, it is only the receipt of a pre-action letter from the applicant that pushes that individual further up the waiting list towards a grant of this support. Indeed, this may be seen as a positive effect of access to Judicial Review proceedings from the perspective of claimants, especially those who have been held in administrative detention for periods of two or three years without removal from the UK having been achieved. For many immigration detainees and their legal representatives, Judicial Review is the only means of enforcing or clarifying relevant law and policy, and acts as a critical check on the power of the State.

Similarly, BID has not noticed that Judicial Review proceedings cause uncertainty for UKBA with the effect of rendering certain policies unusable pending a court decision. For example, pending legal challenge, heard in 2012, of the interpretation of Section 55.10 of UKBA's Enforcement Instructions and Guidance, Chapter 55 '*Persons considered unsuitable for detention*'[10], UKBA continued to operate the existing policy. In the case of the UK Border Agency, it is BID's view that judicial review proceedings do not act as a fetter on the agency's continuing work, in quite the same way as proceedings may do in the area of planning, which has also been mentioned in the context of the reform of Judicial Review.

[10] This section provides guidance to UKBA caseowners on 'Persons considered unsuitable for detention'. Chapter 55 is available at http://bit.ly/L6Lhwm

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'Pyrrhic victories'
At paragraph 32 the proposal notes:

> *"But even where the claimant is successful, it may only result in a pyrrhic victory with the matter referred back to the decision-making body for further consideration in light of the Court's judgment."*

A pyrrhic victory is not a pointless or empty victory as this comment appears to suggest, but rather a victory that comes at crippling cost to the victor. In BID's experience this is often the case for those held in detention, who must attempt to initiate Judicial Review proceedings in order to challenge their detention, while remaining in detention at great personal cost to them, their children from whom they may be separated, and their mental health. Success in a Judicial Review of the lawfulness of administrative detention cannot be characterised as without merit, even where it does – as the proposal notes - no more than refer the original decision to detain back to the SSHD. And in many such cases where release is sought as interim relief as part of an application for Judicial Review, and is subsequently granted (the other grounds falling away as a result), the value of such success is of great significance to the detained applicant.

Judicial Review is about more than helping individuals get what they want. In many detention related Judicial Review cases success may go some way towards achieving systemic change in

i) interpretation of or adherence to existing policy or case law,
ii) the content of existing policy or rules.

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