

Briefing for the Liberal Democrat Policy Review on Asylum, Immigration and Identity

Bail for Immigration Detainees

Bail for Immigration Detainees (BiD) is a registered charity that provides legal advice and representation to asylum seekers and migrants held in immigration detention to secure their release. BiD supported a total of 2,510 people in detention in the last year, 506 of whom were released.

Introduction

This briefing sets out evidence of the need for changes to policy and legislation in the following areas:

1. The Legal Aid, Sentencing and Punishment of Offenders Act 2012
2. The 'Transforming Legal Aid' consultation
3. The new Family Migration rules
4. Detention of children
5. Detention of pregnant women
6. Detention of trafficked people

The first two sections concerning legal aid also outline BiD's grave concerns about the separation of families for the purposes of immigration control. Recommendations are set out on the final page.

1. Legal Aid, Sentencing and Punishment of Offenders Act 2012

The Legal Aid, Sentencing and Punishment of Offenders Act removed the vast majority of immigration cases from scope for legal aid. In practice, this means that very many immigration detainees are no longer able to meaningfully challenge decisions by the Home Office to deport or remove them from the UK, even where these decisions are unlawful.

Foreign nationals of modest means who have lived in the UK, sometimes for decades, or who came to the UK as small children can no longer access legal aid for deportation appeals.

BiD works with large numbers of families where parents have been detained without their children. These parents and children are now unable to access legal aid to make immigration claims, or to appeal decisions by the Home Office to deport parents with or without their children.

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

- 85 of these children were in fostering arrangements or local authority care during their parent's detention.
- Some children moved between unstable care arrangements, experienced neglect and were placed at risk of serious harm.
- Parents were detained without time limit, for an average of 270 days.
- Children described the extreme distress they experienced – they reported losing weight, having nightmares, suffering from insomnia, crying frequently and becoming deeply unhappy and socially isolated.
- In 92 out of 111 cases, parents were eventually released, their detention having served no purpose.

- In one case, the Home Office deported a single father leaving his nine and 12 year old sons with his ex-girlfriend. They did not do anything to find out if the children's care arrangement was safe.

A number of the families in the study accessed legal representation funded by legal aid and successfully challenged their deportation or removal. However, since 1st April 2013, families in this situation have not been able to access legal aid for immigration claims, and BID has dealt with a number of cases where parents have been removed or deported without their children.

2. Transforming Legal Aid

On 9th April, the Ministry of Justice published the consultation document 'Transforming Legal Aid', which sets out further proposed cuts to legal aid. These include:

- The introduction of a residence test, which would remove access to civil legal aid for people who are not "lawfully resident" in the UK at the date of the application for civil legal aid. Furthermore, where people are "lawfully resident", they need to demonstrate that they have previously been "lawfully resident" for 12 months to qualify for civil legal aid.
- The transfer of the financial risk of work on Judicial Review cases to lawyers unless the case goes to full hearing, despite the fact that many Judicial Review cases are settled before a full hearing and public benefit is achieved as a result.

In practice, these changes would mean that people in immigration detention would not be able to access legal aid to apply for release on bail or to challenge the legality of their detention. The changes would also remove legal aid for the only route left open to many detainees to challenge their removal, that of a Judicial Review application.

People are held in immigration detention without time limit, in some cases for years, and BID is aware of many cases where detainees have successfully challenged the legality of their detention. It is therefore gravely concerning that the Government is proposing to remove the essential safeguard of access to legal aid.

Case study: Beth and Daniel

Beth's grandfather, who was caring for her and her disabled brother Daniel during their mother's detention, became seriously ill and was admitted to hospital three times. Beth had to stop attending school to care for her brother and grandfather and missed her GCSE exams.

Beth found it extremely difficult to look after her seven year old brother, who has very limited motor control and severe behavioural problems. During their mother's detention, a Children's Services assessment found that:

'Daniel has found it very difficult being separated from his mother, he is keen for her to return home and often states that she is "coming home today" when she is not and becomes upset when he realises this is not the case.

[A] concerned neighbour rang to report that Daniel was playing alone in the road at 8pm, he was seen to fall and lay in the road, which is a bus route... he walks into people's houses and has poor awareness of danger and his own safety.'

Two months after his mother's detention Daniel was hit by a car. Despite receiving reports about the children's welfare, the Home Office detained their mother for 160 days before she was released on bail by the Tribunal. She subsequently successfully appealed the Border Agency's decision to deport her and received compensation for her detention.

Under the proposed residence test, this mother would not have been able to access legal aid to apply for release on bail.

Families and children

At the time of writing, the High Court has on two occasions found that clients of BID have been unlawfully detained and separated from their children.¹ In addition, BID is aware of a number of separated family cases where legal proceedings were commenced but where the Home Office has paid tens of thousands of pounds in compensation prior to the case reaching trial. However, if the proposals set out in the 'Transforming Legal Aid' consultation go ahead, parents who are detained unlawfully will not be able to access legal aid to challenge their detention.

Strong ties to the UK

Families and children who are not lawfully resident, and therefore would be barred from accessing legal aid under the proposed 'residence test' may have extremely strong connections to the UK, and rights to private and family life under Article 8 of the European Convention on Human Rights.

BID's 'Fractured Childhoods' report examined a sample of 27 separated families' cases in detail. On average, parents arrived in the UK nine and a half years before they entered immigration detention. 42 out of the 53 children in these families were 10 years old or less when their parent was detained. Many of these children were therefore born and grew up in the UK, had never been to their parent's country of origin, did not speak the language and did not know anybody there.

Judicial Review needed to protect children

The 'Transforming Legal Aid' consultation proposes removing access to legal aid for Judicial Reviews for those who do not pass the residence test, including immigration detainees. Our experience is that access to judicial oversight is an essential safeguard to prevent the maltreatment of detainees.

To give one example, BID was recently involved in advocacy and litigation on the issue of use of force against children and pregnant women. Prior to a judicial review application in the case of *R (on the application of Yiyu Chen and ors) v Secretary of State for the Home Department* CO/1119/2013, BID and others had been pressing the Home Office to publish a policy on use of force for over 18 months, and they had failed to do so. This placed families subject to immigration enforcement action at risk of serious harm.

In January 2013 *The Guardian* published an account by a pregnant woman who had been forcibly removed to her country of origin. The woman's treatment had previously been criticised in HM Prisons Inspectorate's 2012 report on Cedars 'Pre-departure accommodation.' *The Guardian* quotes the woman as stating that:

"The ... woman from G4S pressed my belly. I cried from pain. I said: 'you hurt my belly, you hurt my baby' she refused to stop. They began to drag me from wheelchair to floor, from floor to wheelchair. I was resisting. They were like animals. I was dragged through corridors, I was dragged like a dog." She said her body was covered in bruises after the incident... an independent doctor warned that putting the woman on the plane without adequate monitoring while she was bleeding could lead to premature labour and ruptured membranes.²

Following an application for Judicial Review, in February this year, Mr Justice Collins granted an injunction preventing the use of force against the claimants – three children and a pregnant woman. Shortly before a hearing regarding an extension of this injunction, the Home Office re-published an old policy prohibiting the use of force against children and pregnant women save where absolutely necessary to prevent harm.

¹ *MXL, R (on the application of) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin) and *NXT, R (on the application of) & Ors v Secretary of State for the Home Department* [2011] EWHC 969 (Admin)

² *The Guardian* (Friday 11th January 2013) 'UK Border Agency rejects calls to stop using force on pregnant detainees'

The examples set out above show that detainee's access to legal aid for bail and Judicial Review applications is a badly needed safeguard – if this is removed as the consultation proposes, the Home Office will be able to maltreat detainees with impunity.

3. The new Family Migration rules

On 9th July 2012, new Immigration Rules were introduced (HC 194). The rules suggest that in a very wide range of circumstances, where parents have committed criminal offences, the best interests of their children should be routinely subordinated to considerations of immigration control.³

In our view, this is at odds with the need to properly consider children's individual circumstances in order to safeguard their welfare, and the provision in Article 3(1) of the UN Convention on the Rights of the Child that the best interests of children should be a primary consideration.

Wide powers already exist for the state to deport foreign national ex-offenders. According to Home Office figures only 185 appeals against deportation succeeded on Article 8 (right to private and family life) grounds in 2011.⁴ Many of these will have been cases where the courts found that grave harm would be caused to a child by deporting their parent.

Under the UK Borders Act 2007, any individual who has been sentenced to 12 months or more in prison is subject to automatic deportation unless specific exceptions apply in their case. Parents may be liable to deportation where, for example, they have been sentenced for non-violent crimes such as false document offences.

BID's research shows that children often experience extreme distress on being separated from their parents.⁵ Jenny, who cared for two year old Mary during her mother's immigration detention, said:

'She didn't want to eat; you had to force her to eat, she just start crying "mummy, mummy"... you know, the constant crying. Even when she was sleeping sometimes she just wake up crying "mummy, mummy." Whenever she hear the door open she would go to the door, knocking on the door saying "mummy, mummy."'

In many cases, the children of BID's clients have been born and brought up in the UK, and are British Citizens. They may have been separated from their parents by prison and immigration detention for years. When parents are deported, children face the impossible choice of being separated from their parent or leaving behind their life in the UK.

We are gravely concerned that the Government has announced further plans to restrict the circumstances in which foreign national ex-offenders can appeal their deportation on the basis of family and private life in the forthcoming Immigration Bill.

4. Detention of children

Despite having committed to ending the immigration detention of children in May 2010, the Government opened a new family detention facility in Crawley, Sussex in September 2011. A total of 222 children entered immigration detention during 2012.⁶

³ Home Office *Immigration Rules* Part 13: Deportation - Paragraph 399

<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>

⁴ *Hansard* HC Deb, 11 June 2012, c50

⁵ Bail for Immigration Detainees (April 2013) 'Fractured Childhoods: the separation of families by immigration detention'

⁶ Home Office (2012) 'Quarterly Immigration Statistics' <https://www.gov.uk/government/organisations/home-office/series/immigration-statistics-quarterly-release>

BID has campaigned for an end to child detention for many years. We recognise that the current Government has made significant improvements by limiting child detention to a maximum of one week, and in some cases improving the conditions children are held in. However, we are extremely disappointed that the Government has not fulfilled its commitment to end child detention, and have a number of concerns about the new family returns process:

- Ministers and MPs have repeatedly misled the public by claiming that child detention has ended when it has not. Clarity about the current situation is an essential first step towards improving it.
- For a long period, the Home Office retained the practice of using force against children to effect their removal from the UK despite having no policy governing the use of force. This put children at very serious risk of harm. The Government should make a clear commitment to only to use force where necessary to protect children or those around them.
- As an alternative to detaining children, the Home Office is separating families by holding parents in detention. There is currently no time limit on the separation of families, and considerable harm can be caused to children.
- In the new family returns process, families who, in many cases, have been in the UK for several years, and have children who were born in this country, can be expected to make a decision to leave the UK voluntarily in just two weeks.
- Families and their legal representatives are not given information about why a specific enforcement action is being taken against a family, and cannot provide the 'Family Returns Panel' with evidence. They are therefore not able to challenge the Home Office's decisions in a meaningful way.

5. Detention of pregnant women

BID is gravely concerned that the Home Office continues to detain pregnant women. Recently, the Royal College of Midwives outlined their position on the issue, stating that:

'The detention of pregnant asylum seekers increases the likelihood of stress, which can risk the health of the unborn baby. The very process of being detained interrupts a woman's fundamental human right to access maternity care. This is an untenable situation for midwives.'⁷

A June 2013 report by the charity Medical Justice, 'Expecting Change', found that 93 pregnant women were held in the main immigration detention facility for women, Yarl's Wood, in 2011. The report looked in detail at 20 cases; in 13 of these, independent doctors found that the women were detained for removal from the UK despite not being fit to fly. Concern was also expressed in a further three women's cases that forced removal would worsen existing mental health conditions and/or create a suicide risk.

In one case, a woman from sub Saharan Africa had claimed asylum on the basis of political persecution and disclosed a history of rape and torture. She had been receiving rehabilitation treatment for two years prior to her detention, but could not access this once detained. An independent doctor explained:

'We believe that continued detention is proving detrimental to our client's wellbeing... We are concerned that continued detention is adversely affecting [her] chronic mental health conditions, post traumatic stress disorder and clinical depression.'

The primary purpose of detention is removal, yet Medical Justice's research found that only around 5% of the pregnant women who were detained were successfully removed.

⁷ Louise Silverton, Director for Midwifery at the Royal College of Midwives (11th June 2013) Medical Justice Press Release: 'Detaining pregnant women seriously damages their health and puts their babies at risk, new report warns' <http://bit.ly/1bpRcX3>

6. Detention of trafficked people

BID has been increasingly concerned by the numbers of cases which we are coming across in which clients report to us that they were trafficked prior to being detained by the Home Office.

Research by the Poppy Project found that 21% of their trafficked clients had been detained in detention centres or prisons and that despite exhibiting symptoms of post traumatic stress disorder only 15% of these were given medication in detention.⁸

Last year, a parliamentary question revealed that the Government are aware of 67 women who were held in immigration detention between 1 April 2009 and 26 October 2011 and who were later identified as victims of trafficking.⁹ Furthermore, the findings of a 2010 report by the Anti-Trafficking Monitoring Group, which revealed very serious deficiencies in the Government's processes for identifying trafficking victims and assessing their claims, suggests that the actual numbers of trafficked women in detention are likely to be far higher.¹⁰

Recommendations

- **Immigration matters should be brought back into scope for legal aid.**
- **The 'residence test' and transfer of financial risk of Judicial Review cases to lawyers proposed in the 'Transforming Legal Aid' consultation should not be implemented.**
- **Families should not be separated by immigration detention.**
- **While the practice continues, a time limit should be introduced on the separation of families by immigration detention.**
- **Paragraphs 398-99 of the Immigration Rules should be revised to reflect the legal requirement for children's best interests to be treated as a primary consideration when decisions are made which affect them (*ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4).**
- **The forthcoming Immigration Bill should not place any further restrictions on people's ability to appeal their deportation on the basis of family and private life.**
- **The Government should fulfil their commitment to end child detention and commit to never using force against children to effect their removal from the UK.**
- **There should be a clear route for information-sharing between the Family Returns Panel, families and their legal representatives.**
- **Families in the family returns process should be given a longer period to consider returning voluntarily to their country of origin.**
- **Pregnant women should not be held in immigration detention.**
- **The Home Office should introduce effective processes to identify trafficked people and ensure that they are not detained.**

⁸ Stephen-Smith, S. (2008) 'Detained: Prisoners with No Crime' Poppy Project

⁹ *Hansard* HL Deb, 10 January 2012, c67W

¹⁰ The Anti-Trafficking Monitoring Group (2010) 'Wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons'