

HOUSE OF LORDS DEBATE 11TH JULY 2013
‘Effect of cuts in legal aid funding on the justice system in England and Wales’
debate in the name of the Baroness Deech and Lord McNally

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 provides evidence about the effect of cuts to legal aid on detainees, particularly families with children. It addresses the Legal Aid, Sentencing and Punishment of Offenders Act, and the further cuts proposed in the ‘Transforming Legal Aid’ consultation. The final page contains a case study which illustrates what the impact will be for parents detained without their children.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012

This 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. 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.

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 were neglected and 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 isolated.
- In 92 out of 111 cases, parents were eventually released, their detention having served no purpose.

A number of families in the study accessed legal representation funded by legal aid and eventually successfully challenged their deportation or removal; it is no longer possible for families in this situation to access legal aid for immigration claims.

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.

In relation to family cases, 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: a crucial safeguard

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.

For example, BID was recently involved in litigation on the issue of use of force against children and pregnant women, in the case of *R (on the application of Yiyu Chen and ors) v Secretary of State for the Home Department* CO/1119/2013. In January 2013 *The Guardian* published an account by a pregnant woman who was forcibly removed to her country of origin. She reported that she was dragged through corridors and a guard pressed her stomach repeatedly. The woman's treatment had previously been criticised in HM Prisons Inspectorate's 2012 report on Cedars 'Pre-departure accommodation.' *The Guardian* reports that:

'[The woman] 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, shortly before a hearing in February this year, 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'

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.

If this mother had been detained after 1st April this year, she would not have been able to access legal aid to challenge her deportation. Under the proposed residence test, this mother would not have been able to access legal aid to apply for release on bail.

For further information please contact:

Sarah Campbell, Bail for Immigration Detainees at sarahc@biduk.org or on 0780 363 0406