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BRIEFING:
Immigration Bill, House of Lords Second Reading, 22 December 2015.

About BID

Bail for Immigration Detainees is an independent charity established in 1999 to challenge immigration detention in the UK. We assist detained asylum seekers and migrants in removal centres and prisons to secure release from detention through the provision of free legal advice, information and representation.

While detention exists, BID aims to challenge long-term detention and to improve access to justice for immigration detainees. We seek an immediate to end the separation of families for immigration purposes and to the detention of vulnerable people.

BID believes that asylum seekers and migrants in the UK have a right to liberty and access to justice. They should not be subjected to immigration detention.

This Briefing

The Immigration Bill proposes a wide range of measures, covering illegal working, border security, and access to services. This briefing focuses on the decision to detain for immigration purposes, the lack of a time limit for immigration detention, changes to immigration bail and the provision of bail addresses.

Time Limits

During its debate on the *Inquiry into the use of immigration detention* in September 2015, the House of Commons unanimously agreed to support the report's recommendations. Among these was a recommendation that a time limit for immigration detention of 28 days – other than in exceptional circumstances – be introduced.

BID is working to end the use of immigration detention. **We welcomed the recommendation of the inquiry that a maximum period of detention of 28 days should be introduced via statute, and believe that the Immigration Bill should be amended to include such a provision.** We remain wary that any time limit must not simply become the norm – detention has the potential to be harmful or unlawful from the very first day, and so the Home Office should operate in theory and in practice with a presumption against the use of detention.

In arguing for the introduction of a time limit, we note the following comparison between different powers to detain available to the Government:

TYPE OF DETENTION	MAXIMUM PERIOD	POWERS
Following arrest by the police	24 hours (extendable to 36 hours by police superintendent, to 96 hours by a magistrate)	Criminal
Pre-charge (arrested under the Terrorism Act)	14 days (in stages)	Terrorism
Post-charge custody time limit (remand)	56 – 182 days	Criminal
Immigration detention of parents with their minor children	**72 hours (extendable to 7 days with ministerial authority)**	**Immigration**
Immigration detention of adults	**None**	**Immigration**

During the full year 2014, a total of 857 (2.9%) of those people leaving detention in an IRC had been detained for longer than six months. Among the 857 detainees held for over 6 months by the time they were released, 26 people had been detained for between 2 and 4 years, and 1 person had been detained for over 4 years. These figures do not include those held in prisons under immigration powers.

During Commons Committee stage, the Minister stated that:

> "There is a common misconception that detention under immigration powers is indefinite. I want to make it clear to the Committee that that is not the case. Although there is no fixed statutory time limit on the duration of detention under immigration powers, it is not the case that there is no time limit. It is limited by statutory measures, the European convention on human rights, the common law, including principles set out in domestic case law, and the legal obligations arising from the Home Office's published policy, which states:
>
> > "Detention must be used sparingly, and for the shortest period necessary.""

BID strongly refutes this position as at best misleading, and at worst dishonest. As of September this year, there were 325 people in immigration detention in the UK who had been detained for more than 6 months, 18 of them having been detained for more than 2 years. During the full year 2014, in the majority of cases of prolonged detention, that detention served no purpose. Of the 161 people who left detention having been detained for more than 12 months, just 70 (43%) were removed from the UK, while 86 were granted temporary admission, temporary release or bail.

The Government does not currently abide by its own stated policy of detaining sparingly and for the shortest period necessary. Rather, people are detained under immigration powers as a matter of routine, and frequently for periods that are simply unacceptable. The power to deny a person's liberty - with all of the impacts on health, mental health and personal and family life that brings – cannot be left reliant on the good will or good intentions of a government to self-regulate. Britain is alone in Europe in not having a time limit on immigration detention, and immigration detention is alone in Britain in not having a time limit on powers to detain. This illiberal anomaly must be rectified.

Decision to Detain

As mentioned above, the Home Office's public policy on detention is that it should be used sparingly and for the shortest possible time. In the year to September 2015, 32,741 people were detained under immigration powers, an increase of 11% compared to the previous 12 months.

Immigration detention is designed to be used primarily to facilitate removal from the UK. Its operation should abide by the so-called "Hardial Singh principles" first set out in the case *R(Hardial*

Singh) v Governor of Durham Prison [1983] EWHC 1 (QB), and subsequently endorsed by the UK Supreme Court as recently as 2011. They are:

- The Secretary of State must intend to deport the person and can only use the power to detain for that purpose
- The deportee may only be detained for a period that is reasonable in all the circumstances
- If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention
- The Secretary of State should act with all diligence and expedition to effect removal.

During the full year 2014, 161 people left immigration detention having been detained for 12 months or more. Just 43% of them were removed from the UK, the others being granted bail, temporary release or admission. Even among the 857 people who left detention having been detained for 6 months or more, just 56% were removed from the UK.

BID's casework and advice line frequently brings us into contact with people who have been detained despite there being no prospect of them being removed from the UK, and certainly not within a "reasonable period". During the progress of this Bill to date, the Government have argued that a time limit on detention is not required because it is already limited by statutory law, the ECHR and case law. Our experience – and the government's own statistical evidence – demonstrates that detention is still far too often used as a default approach. Immigration detention is not a criminal enforcement measure, and must not be used as such. It also must not be used as a speculative administrative measure in an attempt to prevent possible future crime. BID strongly believes that, in reviewing the use and limits of immigration detention, more attention must be paid to the decision-making process.

Judicial oversight

While the introduction of a time limit and a review of the decision to detain would alleviate some of the worst injustices of immigration detention, it remains unacceptable that the detention system operates without any standardised form of judicial oversight. BID firmly believes that a newly introduced time limit should be operated alongside a new and robust system for reviewing detention at an early stage. One option for this would be via some form of automatic court hearing and a statutory presumption that detention is to be used only exceptionally and for the shortest possible time.

Amendments proposed in the House of Commons sought to introduce a form of judicial oversight for immigration detention in the form of automatic bail hearings. That proposal would have placed a duty on the Secretary of State to arrange for regular bail hearings – by the eighth day of detention and every 28 days thereafter – rather than placing the burden of applying for bail (and all the administrative obstacles that entails) on the detainee. Such a provision would help focus the Secretary of State on the need to provide reasons for maintaining detention while switching the burden from the administratively detained person's need to argue why they should be released.

BID strongly supports the need for judicial oversight, and recognises the previously proposed amendment as a simple but effective means of ensuring that access to the judicial system is automatic for any person detained under immigration powers. We strongly encourage members of the House of Lords to consider pursuing this measure during their consideration of the Bill.

Changes to Immigration Bail

BID recognises that existing laws and regulations around immigration detention, bail and support are complex, fragmented and in need of consolidation. Schedule 7 of the Bill seeks to do this.

It is the Home Office's stated policy that immigration detention be used as a last resort and for the shortest possible time. As was observed by the joint inquiry into immigration detention, this policy is "not being adhered to, or having its desired effect." We are concerned that the explanatory notes for Schedule 7 – reflecting the Government's intentions for the Bill, begin from the starting point that:

> "Prior [to this schedule] there were a number of provisions under which **a person who would otherwise have been held in immigration detention**, could be released or have avoided being detained altogether." [emphasis added].

We believe that, in attempting to devise a consolidated framework, it is inexcusable that the Government have not simultaneously addressed the use of immigration detention, alternatives and limits and restrictions.

The Government's decision to end the use of temporary admission and temporary release and to replace them with the new framework for immigration bail is indicative of the Government's attitude to people's right to liberty. The connotations of being 'released on bail' rather than 'temporarily admitted' are entirely negative; it appears that the Government is seeking to normalise the detention of all foreign nationals with irregular immigration status or outstanding claims and appeals.

The Secretary of State's power to detain a person for immigration purposes is limited by existing laws – provisions that this Bill does not seek to amend. A person may only be legally detained to allow investigation as to whether that person should be permitted to enter the UK, or for the purpose of removing the person from the UK – and then only for a "reasonable time".

We fail to see that an argument can be made for how a person who cannot be lawfully detained can be granted 'immigration bail'. Put simply – if detention is not possible, then there is nothing for them to be bailed from. Any suggestion otherwise would appear to be a move by the Government to give people – including those seeking decisions on their immigration cases – a negative label with little basis.

The futility of this attempt at consolidating the framework around temporary admission and bail without fundamental reform is even more apparent given the Home Office's continued misuse of immigration detention provisions as they currently exist. Over the 12 months to September 2015, 32,741 people had been detained under immigration powers for some period of time. Statistics on bail hearings are shown in the table below.

Immigration bail at the First-tier Tribunal (IAC) January – December 2013[1]			
		% of total number of applications received	% of applications fully heard (i.e. not withdrawn)
Bail applications received	12, 373		
Bail applications heard	12, 248		
Grants of bail	2, 717	22.18	34.68
Refusals of bail	4, 973	40.60	63.47
Withdrawals	4, 538	37.05	

In the year to 30 June 2014, 36% of people leaving detention were detained for seven days or less, and of these, 1% were bailed, compared with 60% who were removed. **But, of those people leaving detention who had been detained for 12 months or more, 30% were bailed, 24% were granted temporary admission or release, and 44% were removed.** Longer-term detainees were still less

[1] Source: HM Courts &Tribunals Service, '*Bail management information period April 2012 to March 2013*' & '*Bail management information period April 2013 to December 2013*', produced for HMCTS Presidents' stakeholder meeting. This is the most recent full year for which data is available.

likely to be removed at the end of their detention. Of the 5 detainees who left Immigration Removal Centres in 2013 after spending 48 months or more in detention, only 20% were removed from the UK.

Bail Addresses

BID submitted a response to the Government's recent consultation, "Reforming support for failed asylum seekers and other illegal migrants". In that response, we draw particular attention to the proposed removal of section 4(1)c of the Immigration and Asylum Act 1999. We are disappointed that the drafting of this Bill has pre-empted the conclusions of that consultation.

Schedule 5, section 7 of this Bill empowers the Secretary of State to grant an address for the purpose of bail, while Schedule 6 amends the Immigration and Asylum Act 1999 to insert a new section 95A on providing support for failed asylum seekers who are unable to leave the UK.

However, the new section 95A would not be accessible to people who have not previously claimed asylum, and the powers in section 7 of schedule 7 would be exercised only when "the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power." It remains to be determined what will quantify an exceptional circumstance, **however the likelihood appears to be that the removal of section 4(1)c of the 1999 Act will result in a large number of detainees denied access to a bail address.**

For detainees who are unable to propose a private address to support their application for bail and who can no longer obtain such an address via Section 4(1)c bail support as it stands, release from detention on bail would be impossible in our view. Without section 4(1)c support from the Home Office, a detainee who would otherwise have relied on such a bail address will be unable to lodge their application for release on bail. In BID's extensive experience it is normal practice for HMCTS hearing centres to refuse to list bail applications for a hearing without a bail address, save in very unique circumstances.

Home Office Section 4(1)c bail accommodation: applications, grants by accommodation type, and refusals of support since January 2010

	Number of APPLICATIONS RECEIVED for s4 (1)c bail accomm[2]	Number of grants for **Initial Accomm**	Number of grants for **Standard Dispersal Accomm**	Number of grants for **Complex Bail Accomm**	Total number of grants for the year
2010	3,367	1,916	66	19	2001
2011	3,138	1,568	218	55	1841
2012	3,465	1,961	382	35	2378
2013	3,841	2,081	529	14	2624
2014	3635	2233	613	14	2860

(Source: Data obtained from the Home Office by BID through a series of FOI requests since 2011)

53% of BID's clients rely on a section 4(1)c bail address to support their application. Abolishing this provision would leave thousands of detainees unable to apply for bail, with the potential for their detention to become unlawful as a result.

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[2] Some individuals made more than one application during this period.