Bail for Immigration Detainees
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Submission from Bail for Immigration Detainees (BID) to the Home Affairs Select Committee in the wake of the Panorama programme: *Panorama, Undercover: Britain's Immigration Secrets*

About BID

Bail for Immigration Detainees is an independent national charity established in 1999 to challenge immigration detention in the UK. We assist those held under immigration powers in removal centres and prisons to secure their release from detention through the provision of free legal advice, information and representation. Alongside our legal casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice. Since 2014 we have also provided legal advice, information and representation to time-served foreign national prisoners, many with British partners and children who are facing deportation despite long-term residence in the UK, and for whom there is no legal aid. In the last 12 months, BID provided support to 5,840 people.

Background

Any individual subject to immigration control can be detained. However, there is a presumption in favour of liberty and, wherever possible, alternatives to detention are used, according to Home Office policy. However, our experience shows that, because of the lack of meaningful safeguards, detention if usually used as a first, rather than a last, resort. The decision to detain is taken by an immigration officer. It does not need to be overseen or sanctioned by a court. The decision to maintain an individual's detention is also made by a Home Office official. There is no time limit on immigration detention. There is no automatic legal aid and no automatic bail hearing, although there is provision in the Immigration Act 2016, for automatic bail hearings after four months, but this has not yet been put into practice, and, in any case, excludes former foreign national offenders.

The Home Office's own policy contained in Chapter 55 of the `Enforcement Instructions & Guidance' states that: "*Detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process, for example once any rights of appeal have been exhausted if that is likely to be protracted and/or there are no other factors present arguing more strongly in favour of detention. All other things being equal, a person who has an appeal pending or representations outstanding might have relatively more incentive to comply with any restrictions imposed, if released, than one who does not and is imminently removable*." And "*All reasonable alternatives to detention must be considered before detention is authorised. Each case must be considered on its individual merits, including consideration of the duty to have regard to the need to safeguard and promote the welfare of any children involved*." This statutory duty is enshrined in Section 55 of the Borders, Citizenship & Immigration Act 2009.

The bail tribunal does not have the jurisdiction to assess the lawfulness of detention.

Article 5(1) of the ECHR provides:

> "Everyone has the right to liberty and security of person"
> No one shall be deprived of his liberty save in the circumstances specified in Article 5(1) (a)-(f) and in accordance with a procedure prescribed by law.

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Article 5(1) (f) states that a person may be arrested or detained to prevent his effecting an unauthorised entry into the country, or where action is being taken against them with a view to deportation or extradition.

Article 5(4) states that everyone who is deprived of his liberty shall be entitled to take proceedings by which the lawfulness of his detention is decided speedily by a court.

This Article is apparently satisfied by a detainee's `right' to challenge the lawfulness of a decision to detain by habeas corpus or judicial review in England and Wales, or by judicial review in Scotland.

However, only detainees who are aware of their rights and have access to lawyers can exercise these rights. BID has intervened in two cases (*Draga* and *JN*) in the European Court of Human Rights, to argue that this is inadequate and that there should be initial judicial oversight of the decision to detain, as well as automatic bail hearings and meaningful access to challenge the lawfulness of detention.

During the 12 months to September 2016, the UK detained 29,762 people[1]. As at the end of March 2017, 2,930 people were in immigration removal centres (IRCs), short-term holding facilities (STHF) and pre-departure accommodation (PDA). In addition, as at 3 April 2017, there were 337 detainees held in prison establishments in England and Wales solely under immigration powers.

The United Kingdom is unique among European countries in not having an upper time limit beyond which people cannot be held in immigration detention. Similarly, immigration detention is the only power of detention within the UK that exists without an upper time limit.

BID's policy paper *Safeguards against arbitrary and prolonged detention*[2] compares the lack of time limit in immigration detention with other powers of detention:

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
Immigration detention (parents with their minor children)	72 hours (extendable to 7 days with ministerial authority)	Immigration
Pre-charge (arrested under the Terrorism Act)	14 days (in stages)	Terrorism
Post-charge custody time limit (remand)	56 – 182 days	Criminal
Immigration detention (adults)	None	Immigration

[1] Government quarterly immigration statistics - https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2016/detention

[2] http://www.biduk.org/sites/default/files/media/docs/BID%20policy%20paper%20on%20detention%20time%20limits%202015.pdf

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In the year to September 2016, 1,836 people leaving detention had been detained longer than 4 months. Of those, 203 had been detained for between 1 and 2 years, and 37 people had been detained for more than 2 years. These timeframes refer only to the most recent period of detention. Many people subject to immigration control will experience multiple periods of detention, and the government does not track cumulative time in detention.

The proportion of detainees being returned or voluntarily departing the UK on leaving detention increased from 45% in year ending March 2016 to 48% in year ending March 2017. Among all people leaving detention, fewer than half leave detention for the purpose of being removed from the UK – most are granted temporary admission, bail, or otherwise allowed to remain in the UK. BID's experience is that the vast majority of long-term detentions serve no purpose, but cause immeasurable hardship and suffering to the detainee and their family.

BID believes that immigration detention exists for administrative convenience, and thus campaigns for its end. People facing removal can be monitored and managed within the community with the same success as they would have been within an IRC, and often at far less cost. We welcomed, as a first step towards this, the recommendation of the 2015 APPG Inquiry – endorsed by the House of Commons – that a maximum period of detention of 28 days should be introduced via statute. We were disappointed that Parliament rejected amendments to this effect during the passage of the Immigration Act 2016.

Former foreign national offenders and immigration detention

There is an unhelpful element in public discourse around immigration detention that seeks to divide asylum seekers and others in detention from `foreign national offenders'. And yet, the UK Borders Act 2007 provides for automatic deportation for any foreign national with a criminal conviction of 12 months or longer. Many immigration offences are now punishable with a prison sentence. Since 2013 when the Legal Aid, Sentencing & Punishment of Offenders (LASPO) Act 2012 came into force, there has been no legal aid for people facing deportation to argue that it would be disproportionate to deport them because they have established a private and family life in the UK. Many people caught up in this nightmarish scenario have committed a minor offence, have lived in Britain either all or most of their lives and have British partners and children. They can also be detained (usually in the prison in which they have served their sentence) once the custodial part of their sentence is completed, under immigration powers. This distinction is unhelpful and inaccurate as any individual is capable of violence, it is not solely the preserve of those who may have served prison sentences. To advocate separation of categories of detainees is discriminatory.

The latest Home Office figures show that as at 3 April 2017, there were 337 detainees held in prison establishments in England and Wales solely under immigration powers. Our research report published in September 2014, ***Denial of justice: the hidden use of UK prisons for immigration detention*** highlighted the multiple and systemic disadvantages faced by those detained in prisons, usually at the end of the custodial element of a prison sentence, pending a decision to deport.

If individuals are detained in a prison following the completion of the custodial part of their sentence, they are held as if they were serving prisoners, with no access to legal advice or representation, and often held in prisons in which a 23-hour lockdown regime operates.

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The same protections against arbitrary detention cited above also apply to time-served foreign national prisoners – presumption in favour of liberty, alternatives to be considered before detaining, and decisions must be taken having regard to the need to safeguard and promote the welfare of children.

Many of the clients that we represent, as well as having lived in the UK all, if not most of their lives, with British partners and children, had no idea they were not British until they were served with papers notifying them of an intention to deport them as well as an instruction for their detention under immigration powers. As alluded to above, the Home Office has a statutory duty under Section 55 of the Borders, Citizenship & Immigration Action 2009 to safeguard and promote the welfare of children. There is no evidence in our case files of Home Office attempts to establish the effects of detention on the individual nor on their children, nor indeed the effects of deportation, other than a cursory statement about families being able to keep in touch through `modern methods of communication'.

> ***Case study***
> *Sarah was brought to the UK by her mother as a 6-month old baby. She is now 46 and has never left the UK. Her childhood was troubled and she was abused. She got involved in petty crime such as shoplifting, had two children who were taken into care, developed a substance abuse problem and was diagnosed with various learning disabilities and mental health conditions. Following a 30 month prison sentence, she was detained post-sentence and served with a Notice of Intention to Deport. She remained in the prison in which she had served her sentence. After 12 months' immigration detention post-sentence, we finally secured her release on bail. None of her vulnerabilities was taken into account in decisions to detain her, nor was her long-term residence in the UK taken into account in the decision to deport her. We also took on her deportation case, which is currently still ongoing.*
>
> *Peter also came to the UK as a baby with his parents. He was born not in the country of his parents' nationality but in an adjoining country. He has lived in the UK ever since and has never left. He is now in his mid-twenties. He was convicted of a crime and served half of a 4-year sentence. He thought he was British and was shocked to be served with deportation and detention papers at the end of his sentence. Unlike Sarah, he was transferred to a detention centre after a few months of detention in prison post-sentence. We applied for bail for him several times before he was released after 18 months' immigration detention. We also took on his deportation appeal, which he lost having been poorly represented before. He is now living in limbo: unable to work, unable to claim benefits - as he cannot be removed to the country to which the Home Office thinks he should be deported.*

It is important to remember that for most people, removal or deportation is not something that only affects the individual facing deportation. Many people who BID encounters have no family, friends or connections in their country of origin. Their life is in the UK, yet the UK is not interested in giving them a fair chance in making their case. BID's 2015 research, *Rough Justice* https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/151/Rough_Justice.pdf, looked at the impact of the 2013 legal aid cuts on families separated by detention and facing deportation. In that study, we investigated the cases of 102 parents subject to deportation action and for whom there

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was a real possibility they would be deported away from their families in the UK. Of the 219 children who were put through the trauma of seeing a parent detained, of prolonged separation, and the agony of potentially having their loved one sent away permanently, more than 80% were British citizens, and 93% were born here in the UK.

Decisions to detain and detention of vulnerable adults

BID regularly deals with cases where people are detained despite there being no prospect of their imminent removal. Seriously mentally ill detainees, survivors of torture and trafficking and parents separated from their children are ending up in detention. The most urgent problem in relation to the detention of vulnerable people is the quality of Home Office decision-making on detention.

BID's 2013 research *Fractured Childhoods* provides evidence of cases in which parents were detained despite barriers to their removal which meant that it was not possible, lawful or in their children's best interests for the parent to be removed. The study found serious failings in the Home Office's processes for assessing risk of absconding and re-offending, and considering the welfare of children.

Putting to one side Home Office decisions to detain and maintain detention, it is BID's experience that mental illness may make it more difficult for detainees to seek and obtain release, or get released in a safe way. There are additional barriers to release from detention faced by people who are mentally ill, with or without legal advice or representation. Once a person is in detention, it can be significantly more complex, and take more time, to secure their release if they are severely mentally ill, for reasons that are directly related to their illness.

A significant percentage of our client group is mentally ill, and some are severely mentally ill. BID's legal managers routinely work with clients who are distressed and anxious as a result of being detained or being refused release, or who self-harm. Most of our clients are longer term detainees (for BID's purposes any period over six months detention), and many are ex-offenders, who are of course as susceptible to mental illness as anyone else.

Some of our detained clients may have entered detention with a mental health diagnosis, only for their condition to worsen either through failure of the Home Office and healthcare contractors to properly recognise and manage their condition, or the effect of long-term indefinite detention on their mental health, or both. Others may develop mental distress, mental ill-health, or begin to self-harm while in detention.

Access to legal advice and representation in detention

The Legal Aid Authority funds the `Detention Duty Advice' scheme in immigration removal centres. Legal aid lawyers provide 30 minutes' free legal advice to those who sign up. Based on the 30 minute consultation they decide whether or not to take on the case. Asylum matters are still within scope of legal aid, but not immigration or human rights claims. Detention is still within scope but is subject to a means and merits test. There is no automatic legal advice, nor, as stated above, automatic bail hearings.

BID is unique in conducting six-monthly surveys into legal representation in detention and has been doing so for seven years. In the last survey https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/213/Legal_Advice_Survey_-

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_Spring_2017.pdf , a third (33%) of respondents were unaware they could access free legal advice in detention; almost half (49%) were not able to access the free legal advice and 70% were not taken on under legal aid. Half of those without a legal representative cited lack of money as the reason they were unrepresented. One in ten had never had any legal advice while in detention.

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