

March 2018

Briefing for the Home Affairs' Select Committee Immigration Detention, Deportation and Bail

Bail for Immigration Detainees is an independent charity established in 1999 to challenge immigration detention in the UK. We believe that asylum seekers and migrants have a right to liberty and access to justice. They should not be subjected to immigration detention. While detention exists, we assist people 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. We also provide free legal advice and representation to detainees facing deportation as there is extremely limited access to legal aid for human rights claims. BID is accredited to provide immigration advice and representation by the Office of the Immigration Services Commissioner (OISC). BID legal advisers visit Morton Hall and Yarl's Wood every month to carry out bail workshops and provide legal advice.

Key Concerns

- **Judicial oversight of detention**

The government's use of immigration detention powers underlines the need for greater judicial oversight. The Immigration Act 2016 introduced, for the first time, a limited provision for automatic bail hearings after 4 months of detention. This provision came into force in January 2018 but it has been operating in an entirely ineffectual way. **Each year, the government pays out more than £4,000,000 to people as compensation for having been detained unlawfully.** Detention has the potential to be harmful or unlawful from the very first day, but without proper judicial oversight, the government has no incentive to demonstrate the necessity of detention. **We believe that if the government continues to use detention, there should be judicial oversight of the original decision to detain as well as subsequent decisions to maintain detention.**

- **Time limit for detention**

BID's primary purpose as an organisation is to challenge immigration detention. Our ultimate aim is to end the use of administrative detention for people faced with deportation or removal from the UK. We do not advocate for a time limit ourselves as we believe it is possible to end immigration detention completely if there is the political will to do so. We believe the unnecessary use of immigration detention for administrative purposes leads to arbitrary detention because it is so easily and routinely applied without adequate legal redress. We also believe that setting a time limit legitimises detention. For many people, one day in detention will be immensely damaging. We are also gravely concerned by the practice of re-detention, which we fear would become commonplace if a time limit were introduced. Immigration detention is the only form of detention within the UK that operates with no upper time limit.



- **Restoration of legal aid**

The legal aid cuts introduced in 2013 when the Legal Aid, Sentencing & Punishment of Offenders (LASPO) Act 2012 came into force, have harmed the principle of access to justice across every aspect of UK law. We have found that detainees and those facing deportation have been particularly badly affected – **we conduct a survey on access to legal advice twice every year**. In the last survey pre-LASPO, 79% of those surveyed had access to legal advice with 75% of those having access to legal aid. In our latest report, only 44% of those surveyed had access to legal advice and only 55% of those have a legal aid solicitor. In our report, *Rough Justice*, we found that of 102 parents facing deportation from the UK, just half had any legal help. In that study, 22 of those parents, most of whom had British children and partners, were deported without their families. Just six had access to any legal assistance.

- **Burden of proof for detention: use of existing alternatives**

The Home Office most often relies on its power to detain – where, for example, a person is facing removal – as the justification for the use of detention. It rarely either justifies the necessity of its decision to detain, nor explains why alternatives to detention (such as bail with reporting restrictions or electronic monitoring) are inappropriate. The result of this is that the burden of proof, in practice, unfailingly rests upon the detainee to demonstrate why they should be released in an application for bail, rather than upon the Home Office in demonstrating why they must be detained. **This is contrary to the principle that the burden of justifying the use of detention is on the detaining authority and contrary to the right to freedom from arbitrary detention.**

- **Quality of decision-making**

Consequential to the misplaced burden of proof, bail hearings routinely result in decision-making based on erroneous assumptions and assertions. Over 50% of all detainees are released back into the community rather than being removed and 66% of our represented bail applications were successful last year. This clearly shows systemic errors in the decisions made by the Home Office, and in particular their decisions to detain. We see time and again clients being re-detained after complying with everything asked of them by the Home Office. We therefore call for judicial oversight of the initial decision to detain in all circumstances.

- **Detainees held in prisons under immigration powers**

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’. This distinction is unhelpful and inaccurate. 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 there has been severely limited access to 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 in prison once the custodial part of their sentence is completed.

Home Office figures show that as at 31st December 2017, there were 407 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. Last year, BID provided legal advice to 786 individuals held in prisons under immigration powers on their detention and/or deportation matter. **We call for an end to the use of prisons for immigration detention.**

- **Detention of vulnerable people**

The Home Office introduced its Adults at Risk (AAR) policy in September 2016. Its stated aim was to reduce the numbers of vulnerable people in detention. While we welcomed this aspiration, we were from the outset concerned that the new policy would in fact do the opposite and represented only a worsening of the status quo.

Through our work we routinely encounter people who have been detained despite suffering from mental health conditions or having been victims of torture. We witness that the very act of being detained increases an individual's vulnerability. Yet the new guidance as drafted did little to address the very real concerns raised in the Shaw Review. Worse, the act of categorising different levels of risk places a still higher threshold for individuals to have to reach to 'prove' their vulnerability. As in all cases when it comes to welfare, the presumption must be against detention if any risk or vulnerability exists. This policy does not come close to meeting that test.

The AAR policy was presented as though it was a wholly new approach to the issue of deciding whether to detain vulnerable people. Vulnerability was previously addressed in Chapter 55.10 of the Home Office's Enforcement instructions and guidance; the problems identified by the Shaw Review relate to the implementation of that policy and not with the policy itself. **While detention continues to exist, the Home Office should revert to the previous policy of exceptionality. However, we do not believe that vulnerable adults should ever be subjected to detention.**

- **Separation of families by immigration detention**

Currently parents can be separated from their children by detention. The Home Office makes a decision to detain an individual even though that person may be the main carer for a UK-based child or children. Many of our clients' children are British citizens. The Home Office has a statutory duty to safeguard and promote the welfare of children under Section 55 of the Borders, Immigration & Citizenship Act 2009. It is supposed to discharge its function having regard to the impact on the welfare of any children affected by its decision. In our experience, the Home Office considers this to be a reactive duty and does not make enquiries into the welfare of children in its decision-making. Our most recent research (***Rough Justice*** - the only research in the UK into parents separated from their children by immigration detention) which we undertook to provide evidence to Parliament's



Justice Committee on the impact of the legal aid cuts, investigated the cases of 102 people separated from 219 children by immigration detention. We found that:

- 80% of the children were British; 93% had been born in the UK;
- 22 of the 102 were deported without their children;
- 33 of them had no legal representative;
- On average, parents were detained for 228 days.
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The impact on children of their parents' detention is significant and damaging. Just one of the children affected by their parent's detention said: *'If Daddy goes to [his country of origin] I will feel very sad and I won't be able to do my work at school and I won't be able to sleep. And I will be very angry. I want him to read bedtime stories to me. If Daddy goes away it will be half of my heart. I will swim there [to country of origin] if I have to.'*

On 9th March 2018, one of BID's former clients who had been released by an independent judge was detained by the Home Office, despite being the sole carer for his four children as his partner was out of the country. One of the children has autism. The Home Office took the children into care in breach of its own policies: <https://www.theguardian.com/uk-news/2018/mar/11/home-office-broke-own-rules-family-separations-children-taken-into-care-father-deportation>.

