**Submission from Bail for Immigration Detainees (BID) to the Joint Committee on Human Rights’ inquiry into immigration detention**

*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 5,941 people.*

1. Whether current legal and policy frameworks are sufficient in preventing people from being detained wrongfully and whether current practices in the detention system protect human rights

No. Decisions to detain are frequently flawed. People are most frequently detained as a first resort with no evidence to show that existing alternatives have been considered and rejected. That current legal and policy frameworks are insufficient to prevent unlawful detention is confirmed by the Home Office unlawfully detaining 850 people from 2012-2017, and being ordered to pay £21million in damages[[1]](#footnote-1).

The lack of independent judicial oversight combined with the ease with which administrative detention is used all too easily results in its wrongful use. In a letter dated 26 July the Home Secretary described the use of detention “as an important part of our immigration system. It encourages compliance with our immigration rules, protects the public from the consequences of illegal migration, and ensures foreign criminals can be removed when all else fails.” BID’s experience is that administrative detention is often used as a coercive means of enforcing ‘compliance’ with the immigration authorities. This is despite the courts having ruled that administrative detention cannot be used as a form of coercion.[[2]](#footnote-2) BID believes that independent judicial oversight is essential.

Those who can find lawyers to mount unlawful detention claims are lucky. There is no automatic legal representation. There is a legal presumption in favour of liberty, but with no judicial oversight of the decision to detain or to maintain detention, this safeguard is rendered meaningless. Detention policy contains provisions designed to prevent or limit long-term detention, detention of vulnerable adults, and the detention of parents. Our experience is that these mechanisms are ineffective because decisions made by the Home Office lack transparency and independent oversight.

**Vulnerable adults**

The Home Office’s ‘Adults at Risk’ (AAR) policy is designed to protect vulnerable adults from detention. However, BID’s research [“Adults at Risk: the ongoing struggle for vulnerable adults in detention”](http://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/667/Adults_at_risk_2018.pdf), found that the policy is structurally flawed and misapplied. Not one vulnerable person in [BID’s study](http://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/667/Adults_at_risk_2018.pdf) was released as a result of the policy. Home Office detention statistics show that the policy has weakened protections for vulnerable adults - in the first quarter of 2018, only 12.5% of rule 35 reports (which are used to identify vulnerable adults) led to release from detention, compared to 35.3% when the AAR policy was introduced.

We are particularly concerned about vulnerable adults detained in prisons under immigration powers. The absence of a rule 35 process for detainees held in prisons means there is no systematic way of identifying and reviewing the appropriateness of detention.

**Long term detention and reviews of detention**

Monthly reviews of detention and case progression panels are internal Home Office processes designed to regularly review the decision to detain. For these to be effective, they should lead to release if an individual has not been removed. However, our experience is that they operate as tick-box exercises and seldom result in release, while case progression panels are both chaotic and under-resourced, as Stephen Shaw found in his latest report[[3]](#footnote-3), and are also frequently overruled if they recommend release.

**Separation of families**

Section 55 of the Borders, Citizenship and Immigration Act 2009 sets out the Home Office’s duty to safeguard and promote the welfare of children. This duty requires the Home Office to have regard to the best interests of any child(ren) affected by any decision it takes. Policy guidance requires the Home Office to undertake best interests’ assessments by referring such cases to Local Authority Children’s Services, and the Office of the Children’s Champion (an internal Home Office department). However, BID rarely sees evidence that this has taken place, and the Home Office continues to detain parents, often causing significant harm to the children. In the last year, BID supported 167 parents who had been separated from 328 children by immigration detention. Only 26 of these parents were removed. Worryingly, a [recent FOI](file:///\\biduksvr\S\Research%20&%20Policy\Rudy\FOI%20requests\FOI%2049562%20separated%20families%20'we%20don't%20store%20the%20data'%20-%20Sullivan.pdf) requestrevealed that Home Office doesn’t keep data on the separation of families through immigration detention despite its statutory duty. This lack of transparency enables the Home Office to evade scrutiny.

1. Whether the initial decision to detain an individual should be made independently, such as by requiring prior judicial approval

Without proper judicial oversight, the government has no incentive to demonstrate the necessity of detention. We believe a court should authorise the original decision to detain.

1. The operation of arrangements for bail

**Automatic bail**

In January 2015 the Home Office for the first time implemented an automatic bail process for detainees every four months. It is not working effectively. Between 15th January and 30th June 2018, there were [142 automatic bail hearings, in which only 15 detainees (10%) were granted bail](file:///\\biduksvr\S\Research%20&%20Policy\Rudy\FOI%20requests\FOI%2049281-%20auto%20bail%20-%20Sullivan.pdf). Detainees often do not have sufficient advance notice, are not assisted with preparation, nor do they have automatic access to legal assistance. These provisions do not extend to former “foreign national offenders” who lack access to legal advice and to the bail process, and many of whom have resided in the UK since childhood.

**Post-release accommodation:**

Since the abolition of section 4(1)c accommodation (and its replacement by Schedule 10) in January 2015, detainees have faced significant difficulties obtaining post-release accommodation. There is no application process or appeal process, and the Home Office does not provide reasons for refusals. A recent [FOI request by BID](file:///\\biduksvr\S\Research%20&%20Policy\Rudy\FOI%20requests\SCHEDULE%2010%20grants%20FOI%2048813%20-%20Sullivan.pdf) revealed the scale of the issue: only 24 people have been granted a Schedule 10 bail address between 15th January 2018 and 31st May 2018, compared to 2,824 grants of bail accommodation under section 4(1)c in 2017. Many detainees remain trapped in detention, even after a judge has granted bail in principle, simply because of the unavailability of accommodation, in breach of their Article 5 ECHR. Others are released to the streets by the Home Office, in breach of their Article 3 ECHR rights. BID’s [briefing document](http://www.biduk.org/resources/76-bid-briefing-on-post-detention-accommodation) explains the issue in greater detail.

1. Whether immigration detention should be time-limited and if so the maximum period

Immigration detention is the only form of detention within the UK that operates with no upper time limit. Compare this to arrest by the police: regardless of the seriousness of the crime, suspects can be held for a maximum period of 24 hours (extendable to 36 hours by police superintendent, to 96 hours by a magistrate). Detention is damaging, expensive and unnecessary. The Home Office itself has provided evidence to show that only 5% of people subject to immigration control abscond[[4]](#footnote-4). The real figure is likely to be even lower as the mere fact of missing a reporting event (perhaps through illness) is categorised as absconding.

1. How far current policies ensure that people are only deprived of their liberty if it is necessary, rather than for administrative convenience,

The Home Office most often relies on its power to as the justification for the use of detention. It rarely either addresses the necessity of its decision to detain, nor explains why alternatives to detention (such as reporting restrictions or electronic monitoring) are inappropriate. The result is that the burden of proof, in practice, unfailingly rests upon the detainee to demonstrate why they should be released, rather than upon the Home Office in demonstrating why they must be detained. However, under law and policy the right to liberty should only be curtailed in strictly limited circumstances with detention only used as a last resort.

1. Whether alternatives to detention are properly explored and used

BID is opposed to the use of immigration detention. Alternatives already exist which the Home Office could use, and regular reporting is the least coercive of these. We do not believe it is necessary to deprive people faced with deportation or removal from the UK of their liberty. The use of detention creates the absconding risk it purports to prevent. For some people even a day in detention can be irreparably damaging.

Home Office statistics indicate that most detainees are released back into the community. The proportion of detainees who are removed at the end of their period of detention has declined steadily, from 63% in 2010, to 45% in the first quarter of 2018. Shaw’s latest report notes that ‘very frequently, detention is not fulfilling its stated aims’[[5]](#footnote-5), and that these figures ‘continue to call into question the extent to which the current use of detention is cost effective or necessary’[[6]](#footnote-6).

The best alternative to detention is freedom. Regular reporting can be used as a non-coercive alternative. Under the “Family Returns Process” implemented from 2010 onwards, Home Office figures show that 1,300 families complied with voluntary return in the last two years, compared with just 19 who it was deemed necessary to put through the detained process. Just 4 of those families were removed[[7]](#footnote-7).

1. Detainees’ access to legal advice and their ability to engage with the legal processes to challenge their detention

Legal aid is still available for detention matters. However, this is not provided automatically: detainees must make an appointment with the legal aid immigration practitioners who apply a means and merits test to decide whether or not to take on a case. Our regular 6-monthly surveys show that just a quarter of those questioned actually had a legal aid lawyer. Where deprivation of liberty is concerned, there is always merit in making an application for bail, and there should be legal aid available for every detainee to challenge their detention.

Cuts to legal aid which came into force in 2013 removed immigration, human rights and deportation from scope and have made it more difficult for detainees to prepare their immigration case. (<http://www.biduk.org/pages/106-bid-legal-advice-surveys>).

Lack of access to legal advice is a particular difficulty for immigration detainees held in prisons. In our most recent legal advice survey, out of 50 people who had been transferred from prison to IRC, only 3 had received legal advice from an immigration solicitor while in prison.

1. <https://www.theguardian.com/uk-news/2018/jun/28/wrongful-detention-cost-21m-as-immigration-staff-chased-bonuses> [↑](#footnote-ref-1)
2. See for example the case of *SSHD v Amin Sino [2011] EWHC 2249 (Admin),* para 198 where inducing cooperation with the removal process by use of immigration detention would put into question the first Hardial Singh principle for the SSHD to only use his power of detention for the purpose of deporting an individual; similarly the case of *SSHD v Babbage [2016] EWHC 148 (Admin),* para 74 where a person could not be held in immigration detention intended for the purpose of deportation but pending a decision on whether or not to prosecute them for non-cooperation with the documentation process. [↑](#footnote-ref-2)
3. Shaw report at 4.73 page 85 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/728376/Shaw\_report\_2018\_Final\_web\_accessible.pdf](https://emea01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F728376%2FShaw_report_2018_Final_web_accessible.pdf&data=01%7C01%7Cj.elliott%40wilsonllp.co.uk%7Ca69e740115bf41feb49b08d60cd39f41%7C14a4aa2b62fd41e5b8a28d9500b5a8b3%7C1&sdata=%2FzBu7cZc%2BqEXwYGYsHQrTEb2%2Fo1%2Bc4sLelj4KQYClw0%3D&reserved=0)) [↑](#footnote-ref-3)
4. APPG inquiry into immigration detention, page 25 <https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf> [↑](#footnote-ref-4)
5. 2.93 page 22 of Shaw report <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728376/Shaw_report_2018_Final_web_accessible.pdf> [↑](#footnote-ref-5)
6. 2.98 page 27 of Shaw report

   <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728376/Shaw_report_2018_Final_web_accessible.pdf> [↑](#footnote-ref-6)
7. Report on unannounced inspection of Tinsley House IRC, introduction, page 5 <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2015/05/Tinsley-House-web-2014.pdf>

   [↑](#footnote-ref-7)