**BID’s briefing to the Human Rights Committee inquiry into immigration detention concerning post-release accommodation**

*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.*

**The repeal of section 4(1)(c)**

Under s4(1)(c) of the Immigration and Asylum Act 1999 (“s4(1)”), detainees could apply for accommodation from within detention if they had nowhere to reside when released. On 15th January the Home office replaced section 4(1)(c) with a new immigration bail and post-release accommodation system under the Immigration Act 2016.

Where the section 4(1)(c) process was designed to be quick and simple to administer, its replacement is highly complex and incompatible with the bail process. It requires detainees to follow a different system according to whether they are an asylum seeker, refused asylum seeker, or have never made an asylum claim.

**Detainees no longer have access to Home Office accommodation**

In summary, our experience has been that the Home Office no longer provides accommodation. There is no process for asylum seekers to apply for accommodation from detention. Refused asylum seekers can apply for accommodation from detention but the process is convoluted and we are yet to see a grant of this. Those who have never applied for asylum require ‘Schedule 10’ accommodation but there is no application process. The Home Office has made it clear that this will only be available in extremely rare circumstances. A [FOI request by BID](file:///%5C%5Cbiduksvr%5CS%5CResearch%20%26%20Policy%5CRudy%5CFOI%20requests%5CSCHEDULE%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. The high number of grants for section 4(1)(c) accommodation gives an indication of the level of demand there is for Home Office accommodation.

[BID’s briefing document](http://www.biduk.org/resources/76-bid-briefing-on-post-detention-accommodation) explains this complex system in detail, outlining each route and the many procedural issues which block access to Home Office accommodation.

**Lack of accommodation leaves people detained indefinitely**

BID clients who need Home Office accommodation are usually detained for periods in excess of 6 months. BID’s ‘Right to Liberty’ team provides legal representation to detainees who have been detained for long periods as well as those who have specific vulnerabilities. Although the caseload is always changing, consistently around half of these clients require Home Office accommodation.

The lack of Home Office accommodation is a barrier to release when individuals apply for bail to the First-tier Tribunal (FTT). Primarily, this is because judges are unwilling to release detainees without an address. Although the Home Office is often prepared to release individuals to the streets (discussed further below), tribunal judges are far more cautious and require assurances that the individual will have a stable address which helps address any risk of absconding (or reoffending).

Detainees can apply for “conditional” bail, which indicates that the judge believes that the individual should be released, but only once accommodation has been sourced. There are two problems with this system. Some FTT judges are ignorant of the new procedures and are simply unwilling to grant conditional bail. For instance, one judge at a bail hearing said “the best thing I can do for [the applicant] is to refuse bail, but list accommodation as the sole reason so that the applicant could judicially review the decision”. A different judge, seeing that accommodation was the only barrier to release, might have granted conditional bail. Even when conditional bail is granted it does not guarantee an individual’s release from detention.

In July, we analysed the case files of 30 BID clients who had made at least one application for bail without accommodation. 29 had received conditional grants of bail from immigration judges, of whom 19 were still in detention. Only 4 were subsequently released to Home Office accommodation, the rest were released to private, often insecure, addresses, or to the streets.

It is deeply concerning that two-thirds of the individuals in this group were considered suitable for release by FTT judges, and yet remained in detention. All would have been released had there been Home Office accommodation available which suggests that detention is being used for the purpose of accommodation. Detention for this purpose is unlawful, irrational and contrary to published Home Office policy. Article 5(1)(f) of the ECHR allows for detention for the purpose of removal or deportation; it does not allow for detention to be used for accommodation. Once there is no longer a legal justification for detention, a detainee should be released[[1]](#footnote-1).

Indeed, of 53 BID represented clients who had had difficulty sourcing accommodation, 23 (43%) had been referred for judicial reviews. By contrast, in 2017, BID only referred 21% of represented clients for judicial review in relation to lack of accommodation.

**Weakening of judicial oversight**

The changes to the bail accommodation regime have, in our view, concentrated power in the hands of the Home Office and fundamentally weakened judicial oversight of detention.

The tribunal’s grants of ‘conditional’ bail referred to earlier, are accompanied either by a suggestion that the Home Office ‘consider’, ‘use best endeavours’, ‘act diligently’ to source accommodation, or an explicit instruction for the Home Office to do this. In reality, whether the judge politely suggests or explicitly instructs is immaterial – they have no power to force the Home Office to take action. Usually these grants of conditional bail are valid for 14 or 28 days, after which they lapse and the detainee is required to make a new application.

Our observations of bail hearings show that judges are aware that grants of conditional bail are often toothless, and cede control over release to the Home Office. It was common to hear them point out the ways that their hands are tied:

 “I’ve granted conditional bail, that’s all I can do…Hopefully you will have an address”

“that’s all I can do. I cannot go any further… I have no way of releasing this man, unless you want me to release him to the streets. I wish I had the power of the high court judge but I don’t. In the good old days, habeas corpus would have come into this”

To varying degrees, judges expressed frustration at the legal and procedural limits of their oversight of detention. They can only scold the Home Office for its failure to source accommodation but they lack the power to release.

Independent judicial oversight is essential when the Home Office has unfettered power over whether to detain someone. The Home Office claims to be putting in place measures to improve oversight through the introduction of automatic bail procedures (whose problems we have documented in our earlier submission to the Committee), but the new accommodation regime is weakening the power of FTT judges to grant individuals bail.

**Release into destitution in violation of article 3**

As mentioned earlier, the Home Office is not averse to releasing individuals to the streets. Since 15 January 2018, we have supported a number of clients whose application for bail is refused after the Home Office opposed release citing lack of accommodation, only for the Home Office to release the client to the streets days later.

We have even seen the Home Office state in court documents that, in the event of bail being granted, the individual should be released ‘to the streets and would need to make an application for Home Office accommodation’.

The courts have found that in order to avoid a violation of Article 3 of the ECHR, the SSHD may be required to provide accommodation and support. The SSHD acknowledges this caselaw in its guidance but is releasing homeless detainees into destitution nonetheless. The Bail Guidance states:

“The first step in determining whether accommodation and/or support may need to be provided for human rights reasons is to note that in ordinary circumstances a decision that would result in a person sleeping rough or being without food, shelter or funds, is likely to be considered inhuman or degrading treatment contrary to Article 3 of the ECHR” (R (Limbuela) v Secretary of State [2005] UKHL 66).[[2]](#footnote-2)

Article 3 is an absolute right; the SSHD’s violation of Article 3 cannot be justified.

Case study: KD

*Issues: detention being used for accommodation, release into destitution*

KD arrived in the UK as a child, and was detained around 4 months ago. He has paranoid schizophrenia. A damaging cycle of release and re-detention (the Home Office evades accountability by failing to keep data on re-detention) has meant that he has now spent almost 3 years in immigration detention. He has no address that he can go to outside detention, and under the new bail accommodation system he has been unable to secure Home Office accommodation.

The last time KD was released by the Home Office, he had waited many months for the Home Office to comply with an order from the tribunal to provide accommodation. This never happened and he was released into destitution. He struggled with alcohol addiction and was recalled to prison after an arrest which placed him in breach of his license. A judge later found that the Home Office’s failure to provide accommodation was a material factor in his reoffending.

KD is not removable (he has a court of appeal hearing scheduled to take place in 2019). Almost 3 months ago he was granted conditional bail by a tribunal judge, who instructed the Home Office to source a bail address. This has still not happened, and he is still detained, unable to effectively challenge his detention through the judicial process. Where his release into destitution was potentially in violation of his Article 3 rights, his current situation sees him being detained for the purpose of accommodation, in breach of his Article 5 rights.

**Lack of process**

For asylum seekers, as well as those who have not made an asylum claim, there is no process for applying for Home Office accommodation from detention. For failed asylum seekers, the process is convoluted and places such a high evidentiary burden on the detainee that we have seen several refusals but no grants (Once again, [BID’s briefing document](http://www.biduk.org/resources/76-bid-briefing-on-post-detention-accommodation) goes into greater detail than we have space for here).

This lack of process is unmanageable for unrepresented detainees who may not know how to pursue the issue, and may not know why they are detained when a judge has said that they ought to be released. For detainees without accommodation, much of the bail process is now negotiated outside the courtroom. BID’s clients have the benefit of representatives who have some grasp of this highly complex system, and are able to hasten resolution through correspondence with various parties (Home Office, tribunal, probation services); repeated bail applications; and referrals for unlawful detention. It is unrealistic to expect unrepresented detainees to be able to do the same from detention.

We are concerned that when bail does not lead to release, it will be confusing and disheartening for many unrepresented detainees and may deter future applications for bail.

**Vulnerable adults**

The Adults at Risk (AAR) policy provides for the release of individuals whose detention is seen to be inappropriate in the light of specific vulnerabilities. We are concerned that individuals who are deemed by the Home Office unfit for detention may remain locked up for an unacceptable amount of time while accommodation issues are resolved.

**Transfer of bail management.**

Another change threatens immigration bail’s purpose as an independent safeguard on Home Office decisions. In addition to eliminating section 4 accommodation, the 2016 Immigration Act also provided for ‘management’ of bail to be transferred to the Home Office after it is granted, which means a person on bail would have to request permission from the HO rather than the tribunal if they wanted to move residences or vary any other bail conditions.

**Case study: WB**

*Issues: provision for vulnerable adults; Home Office management of bail conditions, difficulty for unrepresented detainees to navigate this highly complex system*

WB has a serious heart condition, as well as diabetes and a pacemaker. A report from a doctor asserted that he was unfit for detention because he was likely to imminently suffer a fatal heart attack if not released immediately as his pacemaker’s battery needed to be changed. The Home Office agreed that he was not suitable for detention, but he remained locked up for just under a month after this report was produced while the Home Office endeavoured to source accommodation. It transpired that there was much confusion within the Home Office about how this was to be done, and caseworkers didn’t seem to be aware that there was no procedure for applying to schedule 10 accommodation. It took a month of chasing different Home Office caseworkers, as well as applying pressure through a grant of conditional bail in the FTT, before the Home Office finally sourced accommodation.

The address they found was completely unsuitable. The living conditions were horrendous; WB’s mobility issues made the steep staircase very difficult; the closest town was 2km away and the closest hospital 4km away. The Home Office imposed bail conditions which included electronic monitoring, a 12 hour daily curfew, and reporting conditions that require 9km travel on buses. Management of bail was only transferred back to the tribunal after WB’s solicitor challenged the conditions, which the judge adjudged to be ‘fierce’, and mentioned that it ‘looked like the Home Office is trying to punish this man’. We do not know what would have happened had WB been unrepresented.

**Recommendation**

BID recommends that people in detention who would otherwise be destitute on release, be provided with accommodation.  We further recommend that the Home Office revert to a system with a simple application process, as was the case in applying for Section 4(1)(c) accommodation.

1. In the recent High Court judgment of R (MS) v Secretary of State for the Home Department [2017] EWHC 2797, Mr Martin Griffiths QC stated:

“I do not think that detention could be justified simply on the basis that release would place the Claimant on the streets. If it is unacceptable to place the Claimant on the streets, he should be provided with bail accommodation. Detention is not a proper substitute for such accommodation once detention cannot otherwise be justified.”

Although caselaw relates to the superseded section 4(1) accommodation regime, the principles still stand. [↑](#footnote-ref-1)
2. Home Office Immigration Bail Guidance published for Home Office staff on 12 January, 2018, retrieved from: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/673954/immigration-bail-v1_0.pdf> [↑](#footnote-ref-2)